CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

© 1996

Technical and Bibliographic Notes / Notes technique et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming are checked below.

- [x] Coloured covers / Couverture de couleur
- [ ] Covers damaged / Couverture endommagée
- [ ] Covers restored end/or laminated / Couverture restaurée et/ou pelliculée
- [ ] Cover title missing / Le titre de couverture manque
- [ ] Coloured maps / Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- [ ] Bound with other material / Relié avec d'autres documents
- [ ] Only edition available / Seule édition disponible
- [ ] Tigiht binding may ceuse shadows or distortion along Interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.
- [ ] Blank leaves edded during restorations may appear within the text. Whenever possible, these have been omitted from filming / Il se peut que certaines pages blanches ejoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- [ ] Additional comments / Commentaires supplémentaires:

L'Institut a microfilmé le meilleur examplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modifications dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured pages / Pages de couleur
- [ ] Pages damaged / Pages endommagées
- [ ] Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- [x] Peges discoloured, stained or foxed / Pages décolorées, tachetées ou piquées
- [ ] Pages detached / Peges détachées
- [x] Showthrough / Transparence
- [ ] Quality of print varies / Qualité inégale de l'impression
- [ ] Includes supplementary material / Comprend du matériel supplémentaire
- [ ] Pages wholly or partially obscured by errata slips, tissues, etc., heve been refilmed to ensure the best possible image / Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.
- [ ] Opposing peges with varying colouration or discolourations are filmed twice to ensure the best possible imege / Les pages s'opposant ayant des colorations variables ou des décolorations sont filmées deux fois efin d'obtenir le meilleur image possible.

This item is filmed et the reduction ratio checked below/
Ce document est filmé eu taux de réduction indiqué ci-dessous.

10X 12X 14X 16X 18X 20X 22X 24X 26X 28X 30X 32X

The copy filmed here has been reproduced thanks to the generosity of:

National Library of Canada

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol ⟶ (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

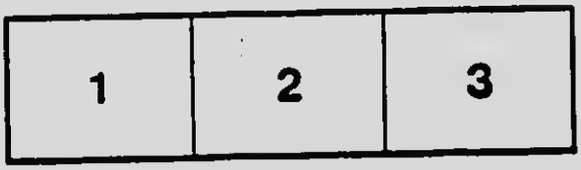
Bibliothèque nationale du Canada

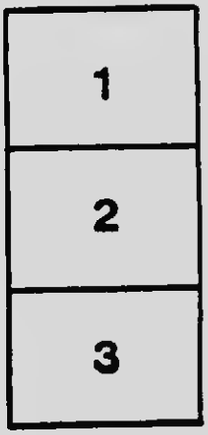
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

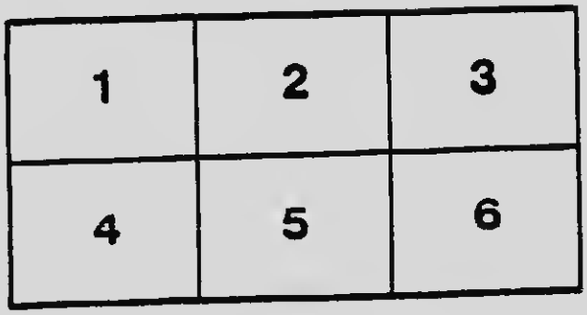
Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole ⟶ signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

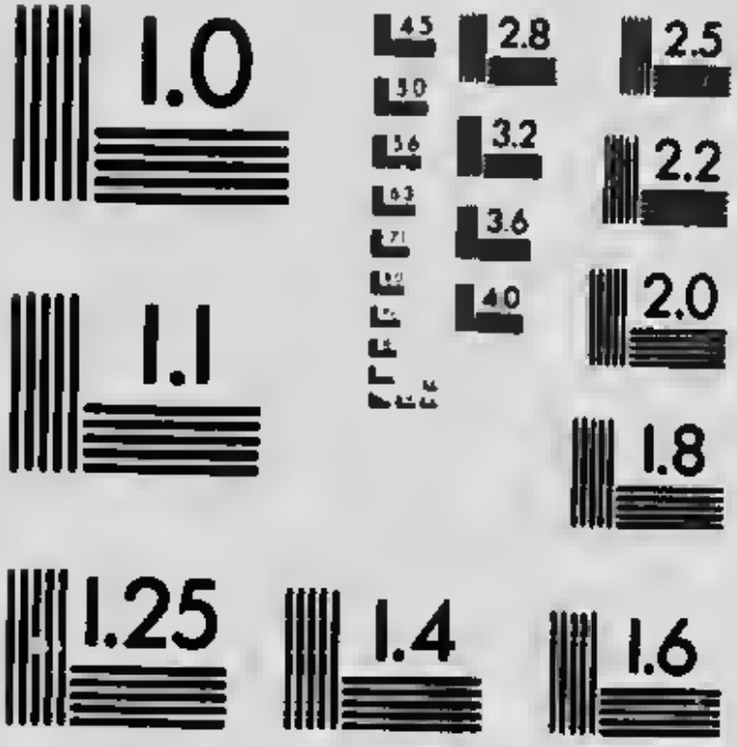






MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

THE ADMINISTRATION OF JUSTICE

ADDRESS BY

WILLIAM RENWICK RIDDELL

TORONTO, CANADA. THE ILLINOIS STATE BAR ASSOCIATION. CHICAGO.

JAN. 23, 1917

THE ADMINISTRATION OF JUSTICE.

WILLIAM RENWICK RIDDELL, OF TORONTO, CANADA.

The officers of your Association have paid me the very high compliment of asking me to address you at this your annual meeting; and I can think of no subject of more interest than that in which we are all concerned, The Administration of Justice. And, believe me, I am fully conscious of the great honor you have thus conferred upon me, however unworthy may be its recipient.

I have no intention in what may be said to hold up our methods, our Courts, as an example to be followed, much less to criticise your methods, your Courts or the results you may attain. My remarks will be mostly of a general character; but if there be found anywhere in them aught which will be helpful toward the ends we all have in common, I shall be glad.

It would seem that very shortly before historic times, man lived in anarchy, vindicating his rights and avenging his wrongs by his own strong right hand; when "wild in woods the noble savage ran," he knew no law but his own desires, no master but him who held him by force; everything was to him right that he liked, wrong was what he disliked. The unutterable cruelty and misery of those times may escape the poet, but never the sociologist or statesman.

When man began to be gregarious and formed clans and septs, it was soon recognized that no community could prosper whose only rule was the rule of might, where each was judge of what he was entitled to and was permitted to acquire and keep all he could. The desires of one crossing the desires of another, one must give way or be made to give way—the weaker slain or disabled by the stronger, by so much weakened the community and laid it the more open to conquest and destruction by other communities—while even if matters were not pushed to that extremity, the rankling sense of injustice which corroded the heart of him who had been forced to submit, was itself a deleterious element.

Accordingly it must early have been determined that conflicting interests of two members of the same community must be determined by an independent tribunal. At first, no doubt, the King or Priest—the words were long synonymous—the wise or kenning Elder—was the Judge. For long the Judge received inspiration from the god, not uncommonly the eponymous hero, in each particular case, "every case was treated on its own merits," and the decision of the god was sought on the particular case without regard to general rule. The litigants receiving the judgment of the god, The Great Master, must needs be satisfied that what was said to them was as the Great Superior wished—He could always say *sic volo, sic jubeo, stat pro ratione voluntas.* Even when the doctrine of special inspiration grew shaky, the judge continued to adjudicate on the particular case before him almost if not quite irrespective of what he had decided in a previous case and with little or no thought of how he might decide in a subsequent, principle being far in the future.

Nor did this wholly cease to be the case when record or tradition gathered the "themistes" which had been pronounced, and a family or order of functionaries, priests—call them what you will—were the guardians of past judgments and considered as entrusted with knowledge of the will of the gods. Something like principle did indeed creep in—something approaching a general rule was gradually appreciated, but still there was not law in our modern sense.

That was practically the condition of the Indian when America was discovered; (it is said "the Indians had few laws but they were well violated"); and it is the condition of many tribes of so-called savages today. It is a great mistake to suppose that there is more litigation in Chicago or in Toronto in proportion to population than there was among the Iroquois or is among tha wandering tribes of the desert. The difference is that in these, every law suit is a thing by itself, in those every law suit is connected with thousands of others which have preceded it. There is no satisfactory evidence of the advantage of one method over the other in doing substantial justice.

In ancient Athens principle did not quite make its way, did

not do its perfect work. Much written law there was but more unwritten; and every citizen, every diesst, had his own view of what in reality was the law—in great measure what he wished to be l w was law, and he decided accordingly.

It is the glory of the Roman civilization that thence arose the full theory of law as a principle, as a collection of binding precepts. The influence of Roman or Civil Law upon the whole judicial, legal concept of the modern world, it would not be easy to exaggerate.

Our Teutonic ancestors had their own law, cruel, illogical, tyrannical in many respects; but they were inordinately proud of it, and we, their descendants, are by instinct and education prone to look upon it with not much less pride than they.

The history of English civil law for over eight centuries has been in great measure a history of conflict between the crude law of the Teuton and the polished law of the Roman; the more civilized law, with but few set-backs, has been all the while acquiring a greater and greater ascendancy. Now in England and in Ontario, where the rules of Equity and of Common Law conflict, the rules of Equity prevail; the rules of Equity which are practically all derived from the law of Rome.

From the earliest times, the tribunal to decide rights might be of a temporary character and *pro hac vice*, or it might be of a permanent or quasi-permanent nature. In the former case, however disguised, it was in substance a board of arbitration; in the latter, by whatever name it might be known, it was a court. The Court has grown upon the Board as a means of settling disputes, and is now triumphant; and whenever an arbitration is preferred to a Court decision it is a disgrace either to the substantive law, and therefore to the legislature, or to the practice, and therefore in most instances to the Courts—in every such instance the law has proved a failure and the Courts incompetent.

In international disputes indeed the progress just spoken of does not appear. When two nations do not determine their rights by the cannon and bayonet, by wounds and blood and death, by the elimination of their bravest and strongest, "wet eyes of widows, broken old mothers and the whole dark butchery without a soul,"

they have heretofore in most cases formed a temporary Board and left it to the Board to decide without any principle but "Get all you can, give up what you must." Too often it is found that the ape and tiger still survive in that jungle.

Within the nation, we of modern times have decided that our rights must be determined on principle—on principles that can be certainly known, for they can be expressed in writing.

In what I am now about to say, I speak in the main of civil litigation. I shall later on speak of criminal justice specially.

The function of the Court is to determine rights according to principle, that is, according to law; and from one point of view, in so far as it does that, in so far is it a success and no further.

It is not enough that the Court shall give litigants their rights according to law. The Court was invented to prevent strife by determination of right by and through a just and impartial referee; and unless it is believed that the Court is just and impartial, it fails in a most important part of its object and loses much of its value.

Moreover such a course should be pursued that those who have disputes shall be desirous of having them decided on principle; that is, the superiority of the professional agent of justice, the Court, should be manifest over the non-professional, the Board of Arbitration. The medical profession should feel no more regret at the prevalence of resort to the quack than the legal profession at prevalence of resort to arbitration.

The relative importance of two great ends of the administration of justice, that is, determination of right according to principle, and satisfying the public that justice is properly administered, may depend upon circumstances. In a judgment of my own it was said: "all magistrates should remember that while the most important thing for them is to be impartial and right, it is not much less important that litigants and the public generally should believe in their impartiality and rectitude," Rex v. McArthur (1906), 8 O. W. R. 694. Nay, I am not at all sure that it is not sometimes more important that the litigants and the community shall think justice is being done than that the decision shall be strictly in accord with precedent. Not many years

ago, in conversation with a retired Justice of the Supreme Court of the United States, I ventured to express the opinion that no harm would have accrued if two-thirds of the cases in that court had been decided the other way; he answered, "If you leave out the constitutional cases I should agree, and indeed I think you might increase the percentage considerably." The modesty of one not thoroughly acquainted with the Constitutions of the United States and of the States of the Union, one who lives in a country without a Constitution (and likes it), prevented me then speaking to an authority on these, from questioning my friend's exception. I venture, however, here to submit to you the consideration —what harm would have been done if Daniel Webster had failed in the Dartmouth College case? Your law would have been different, but would it have been worse? Is your law better for the people at large—and it is the people it must always have in its care—than if it were as in England and Ontario? Are even your corporations during the sittings of Congress and Legislature any more comfortable than ours or those in England? And after all, has the effect been much more than to oblige legislatures to introduce into private charters a clause reserving the power to repeal or alter them—just as it is said that practically the whole effect of the Statute of Uses was to introduce five words into conveyances?

Did the decisions, or either of them, on the constitutionality of taxation of incomes do any good? and would any harm have been done if they had been the other way? No constitutional amendment would have been necessary, but what of it? Would any one have been injured if he were validly taxed under the constitution as it stood, rather than under an amendment? And does it feel any more pleasant or hurt any less to pay an income tax than if it had been levied under the document of the Fathers?

Did the "Dred Scott" decision settle anything? Perhaps it hastened an inevitable conflict, but did it do more? Was the conflict not inevitable under any decision, and was it rendered less intense, costly, bloody, terrible by the decision actually given?

Most hesitatingly and meekly (as becomes an outsider) I venture to suggest to you that all the decisions of the Supreme

Court are overborne in importance by the one decision of the Senate of the United States when that body refused to dismiss Andrew Johnson; for in all human probability there will never be another impeachment of a President of the United States for the reason that he does not agree with the majority of the people or of Congress; the President is as firmly seated on his throne and is as truly a monarch for the term for which he is elected as any king or emperor in Christendom. Benjamin Robbins Curtis' success before that tribunal was of vastly more significance and of vastly greater importance to the United States and its people than would have been success in the Supreme Court when he delivered the superb dissenting judgment which will continue to be the greatest glory of his name so long as Courts endure and lawyers reason.

Does not the decision of the New York Court of Impeachment that a Governor of that State, their two year King, must behave himself according to their views of honesty and propriety before as well as after his inauguration, overtop in importance the decision of the unconstitutionality of employers' liability legislation? Did this do more than call for an amendment, inevitable if the people wanted it? And what possible harm could have been done had the decision been the other way?

It is the regular and conventional thing to speak of the great principles of the common law as something sacrosanct; to say that the common law is the perfection of human reason. So far as these principles are identical with enlightened reason, with the teachings of the moral law, there can be no complaint. But how do they differ from Justinian's triad? *Praecepta juris sunt haec. Honeste vivere, alterum non laedere, suum cuique tribuere.* The maxims of law are these, to live honorably, to injure no one, to give every one his due. Any principles outside of these, of what avail are they? And what harm if the rules laid down by the Courts had been different? The laws of real estate at the common law no civilized nation would now endure; in your country and in mine, the Legislature had to intervene so to change them as to make them consistent with common sense. What advantage is it that (or if) the laws of distress by landlord for rent be retained? Who would now lay down the "Rule in Shelley's Case?"

All that has been saved the common law is Legal Fiction, Equity and Legislation; and all our pity for those who did not inherit or adopt the eommon law of England, your fellow Americans in Louisiana, my fellow Canadians in Quebec would laugh at. Outside of the fundamental prineiples of honesty, there's nothing either good or bad in law but thinking makes it so; most of our admiration for the sages of the law, Bracton, Littleton, Coke, is as well founded as admiration of the middle age schoolmen and no more so. Extraordinary ability, profound learning, consummate subtlety, eharacterize both classes; but no one would be much the worse if they had devoted their attention to heraldry or the tracing of pedigrees; or if in eight out of ten eases they found the law diametrically opposite to what they did find.

Howbeit, for good or for ill, the law is in most instances settled; the rights of the people are to be determined aeeording to fixed rules laid down either by binding deeision or by legislative authority. The Court must neeessarily be conservative; the Court has no more power to change the law as it finds it than to eliminate the word "not" from the eommandments; the people are entitled to their law as it stands and must submit to it whether they like it or not. We probably all agree that (speaking generally) the very first consideration underlying, surrounding and going beyond all others, is that justiee shall be done aecording to the existing law. If the people do not like the law let them ehange it, the Court eannot ehange it for them.

God forbid that any Court should be influenced in its judgment by the opinions of litigants or of any other person whomsoever. Circumstances may and often will be sueh that judgments will not only be unpopular, but they may even be repugnant to the sense of justice of the community; and yet the Court must give precisely these judgments.

But that does not imply that the Court should so act as to give rise to the impression amoug the people that it is wholly indifferent to a just public sentiment. Lord Mansfield could say: "I wish popularity," and he showed himself a good public servant when he said so, if a better when he added, "but it is that popularity which follows, not that which is run after, it is that

popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. * * * *'Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam putarem.'"* (I have always been of this opinion—that unpopularity gained by doing one's duty is a glory not a disgrace.)

Now justice is not administered in the abstract, it is justice to the litigant in the particular case that must be sought; and the one essential of a Court is that the law is administered in the particular cases brought before it.

A story is told of an importer who had been required to pay $800 as duty upon goods which he had brought in. He claimed that no duty was payable, and paid under protest. He brought his action which made its way by slow degrees to the Supreme Court. In that Court all the Judges gave learned opinions, but none said whether the unfortunate merchant was to have his money returned, and the Court was shocked to hear a troubled voice, "Do I get my $800?" *Se non è vero, è ben trovato.*

The Court is not (at least in my country) the master of the people, but their servant, supported by them for their own use and in their service; the judge is paid by the people to do their work, and just as soon as the Court is not worth, directly or indirectly, what it costs, it should be abolished—directly in adjudicating upon the rights of litigants, indirectly in preventing civil wrongs, turmoil, assaults, thefts, trespasses, in the time-honored phrase "maintaining the King's peace."

A Court does not exist for itself; it is not an end in itself. A Court is an evil and the less it is called into play the better for the community unless the evils arising from this course will be greater than those arising from the more frequent exercise of its functions.

When Congress was proposing to give American coasting vessels a privilege in the Panama Canal not granted to other ships, and Britain made a protest, basing her claims upon treaty (I am not going to discuss the rights and the wrongs of the matter, the American people are guardians of their own honor and need no advice or opinion from me or any other non-Amer-

ican), my friend of the United States Supreme Court said to me: "I hope that question will go to The Hague." I answered, "I hope not;" and when he wonderingly asked why, I said, "I hope there will be no necessity, I hope that the nations will settle the matter without litigation, there is no saying what heart-burnings and discontents may arise over the decision; we in Canada still remember the Alaska Boundary Award, and no one has a right to expect a repetition of the extraordinary good fortune which followed the Fishery Award at The Hague the other day when each party claimed substantial victory. A settlement between the parties themselves is infinitely to be preferred to a reference or litigation of any kind." My friend was not wholly convinced; he was an American and consequently thought that "there is nothing like a court."

The court was made for man, not man for the court. No considerations of dignity, tradition, *esprit du corps* should ever induce a judge to forget that he is a servant of the people, paid by the people to do the people's work—if he fail to appreciate this elementary truth and to act upon it, he is apt to be an unfaithful servant, a dishonest recipient of wages paid for work which he fails to do. Fortunately this class of judge is rare; there is no "I Won't Work" associations for them.

The Court does not exist for the exhibition of the personal dignity of the judge. Personal dignity in a judge may be a valuable asset to the community which he serves, it may help to preserve decorum and thereby advance public business; but it may be a detriment if of a certain kind. If the back be so stiff that it cannot bend itself to work, and if the business of the Court must be delayed because the judicial dignity craves twenty-three hours rest of the twenty-four, the public can very well manage to get along without it. And the dignity which is so concerned with looking for slights and "contempts of Court" that it has little time for anything else, is better placed elsewhere than on the bench. Let a judge do his work faithfully, promptly and courteously, and his dignity may generally be left to look after itself.

Tradition is sometimes of much value; but it is tradition of what is good and useful; a traditional method of doing busi-

ness is convenient and not infrequently is the best available method; but a tradition, if there be one, of dilatoriness or inefficiency were better forgotten. What is old is not necessarily good, nor what is new, necessarily wrong.

Perhaps the most frequent complaint made anywhere of the administration of the law, is its delay—the law's delay. One of the promises wrung seven centuries ago from a reluctant king by a resolute aristocracy, was *Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam;* to none will we sell, to none will we deny or delay right or justice. He who delays justice, denies it—a truth profound though it lies on the very surface, patent and obvious, so patent and obvious indeed that it is often overlooked.

A very short time ago I read an able article by an eminent judge of one of the United States, in which he said that delay if not too long is a good thing in litigation. I then absolutely repudiated that doctrine, as I do now; I assert most confidently that every unnecessary delay is wrong if not asked for by the parties concerned. The ideal method of determining rights would be for the parties when difficulties arose, at once to lay the facts before a judge and have an immediate decision. We in Ontario have that method in substance where there are no facts in dispute but the only question is the interpretation of a written document whether will or contract. This cannot always be done, there are generally in dispute facts upon which the rights depend; and these facts must be determined in some way. The very speediest method of bringing them to a determination consistent with thorough investigation is the best; and a litigant has a legitimate ground of complaint if there is a day's delay beyond the time really necessary.

Delay in bringing a case to trial may be due to the people themselves; their representatives may not have constituted a sufficient number of courts, elected or appointed a sufficient number of judges; or they may have clogged the courts by an intricate and dilatory practice. In that case the people cannot complain; they have the courts and the practice they deserve. If they want something better, let them do something better. It is idle

whining about an evil which is due to one's self and one's own negligence or indifference; "whatsoever a man soweth, that shall he also reap."

The delay may be due to a vicious practice which the courts have the power to change for the better; in that case the courts are derelict in their duty if a change is not made. Not rashly—changes in well understood and well established practice are not lightly to be made. I have no high opinion of the "wisdom of our forefathers"—they were probably much the same manner of men as those of the present time, and "there is a great deal of human nature in man;" but any institution that has stood the test of time and fairly well fulfilled the object of its being, deserves to be treated with respect even by our non-reverent generation. Still everything must give way to the public good, reverence for antiquity included.

Speaking generally, if either litigant cannot compel the trial of his case in six months from the institution of proceedings, there is something wrong, and he has a right to complain. There may, of course, be trouble in locating witnesses and procuring their attendance, there may be intricate and protracted experiments to be made, or other causes for delay, but in the general case no want of a sufficient number of judges, no intricacy of practice, no skirmishing of lawyers, should prevent the trial of a case within the time I have mentioned.

It is a matter of the most profound astonishment to those of my Province to see the great delay to which some of the States of the Union submit; our people would not stand it for a year, there would be such an outcry in the press and [illegible] where that no government would refuse to bring in, no legis[illegible]ure refuse to pass, amending and corrective legislation.

How is a case to be tried?

There may be constitutional provisions which must be obeyed or the legislature may prescribe. In Ontario there are very few cases in which a jury is of right; in most instances the presiding judge is master of the situation, he may try a case with or without a jury as seems best. At Toronto in 1913, in the lowest court, the Division Court, not one per cent were tried

with a jury,* in the next higher, the County Court, 18% were tried with a jury, and in the Supreme Court, 26%. In most of these cases the jury were not allowed to find a general verdict but were confined to answering certain questions of fact submitted to them by the judge, he reserving everything else to himself. In more than thirty years' experience I have known of only two appeals against the action of a trial judge in striking out a jury notice—both unsuccessful.

The saving of time—and wind—is enormous. The opening and closing speeches of counsel to the jury and the charge of the judge are done away; in argument there are very few judges who care to be addressed like a public meeting and quite as few who are influenced by mere oratory—all indeed must *ex officio* be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks on witnesses or parties, invective, appeal to the lower part of our nature, are all at a discount; and in most cases justice is better attained, rights according to law are better ensured. Moreover during the course of a trial a very great deal of time is not uncommonly wasted in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimised before a judge.

But it is never to be forgotten that the courts belong to the people, and the wishes—even the prejudices—of the people must be borne in mind. If for any reason the body of the people were to come to the opinion that a judge trial was not a just trial, justice would not be satisfactorily administered if that form of trial were adopted. There I leave the matter.

Very often during the course of a trial, facts will come to light which give a new turn to the case; some courts are so hampered, or so hamper themselves, that they cannot go outside of

*The official report of the Inspector of Division Courts for 1913, just to hand, shows that in 1913 the total number of suits entered in these Courts in the whole Province was 62,675, and the number of juries called for 117, a little less than one-fifth of one per cent. The whole amount claimed in the suits brought was about two and a half millions; the cost of the juries averaged a few cents over $10.

what the lawyers have already put on paper; they cannot "amend the pleadings," and great injustice may result. Whenever by any hide-bound practice a court cannot do justice on the facts because a lawyer has made a mistake, there is a failure in the elementary duty of the court. In the ideal state, every liberty will be given to both parties to bring out all the relevant facts, and judgment will be given on those facts according to the very right and justice of the case even if lawyers make fifty mistakes and a hundred omissions.

Law is not a game where the smartest man wins, it is a serious attempt to determine rights no matter by whose mouth or with what ingenuity—or want of it—they are asked.

The courts are sometimes said to have as their function the making of good lawyers. Perhaps so, but just as one function of a hospital is to make good doctors—a mere by-product of an institution whose primary and fundamental object is to heal the sick—so while that of the court is to give a litigant his rights, there can be no harm in the by-product of good lawyers. There can be no harm in a doctor learning while he is practising in the hospital, but the doctor who puts in the forefront anything but the cure of the particular patient entrusted to his care is derelict in his duty, recreant to his profession. Comparison with this of the duty of a lawyer is obvious; the place to learn law is the law school and the library, the court is a place to do business in, to determine "Do I get my $800?"

I almost tremble when I suggest that the "good lawyer" of popular conception is no great acquisition to the community any way. Let me not be misunderstood. I pity the lawyer who knows nothing else than the daily routine of a law office or a court, who has become a mere tradesman, handicraftsman; but just as I pity the student at the university who reads only enough to pass on. Law is a liberal and a learned profession, and there are very few fields of knowledge which may not be of advantage in enlarging the mind and understanding. Even deep reading in the older authors will do no great harm if care be taken not to fill the mind with antique views to the detriment of common sense, what I have frequently described as "cluttering up the mind with law." The fact that law is a learned profession does not

diminish the significance of the fact that the lawyer is a business man, hired to do his client's business.

A well educated Bar is a great desideratum; a self-respecting Bar is of great value—a Bar, which never forgetting the rights of the client, does not think it inconsistent with duty to assist justice by courtesy to opponents, by civility to witnesses and others, by respect to the court, by a due regard to the exigencies of public business. The noisy showy barrister, who plays to the gallery, seeks to impress his client or the populace with his ability and importance by discourtesy to others, insolence (more or less veiled) to the court, interminable oratory to the jury, is an evil, a public nuisance. That class will always be met with where the people want it. No one can expect total self-abnegation and disregard of his own interests even in a counsel; and "for people who like that sort of thing, that is the sort of thing they like."

What about appeals?

The ideal method would be for the losing party to take all the evidence, papers, etc., in the case, at once before the appellate tribunal, and, both parties being heard, the case to be disposed of without delay. The nearer the practice is assimilated to that ideal system the better, other things being equal. The Appellate Court should, if required by the amount of business, be continuously in session with only such intervals as are necessary to consider the cases presented. The material before the Appellate Court should be all the material in the trial court; this should be got before the Appellate Court at the earliest possible moment and with the least possible expense; the proceedings should be as little technical and complicated as possible, and in this court as elsewhere justice delayed is justice denied. Of course there will often be circumstances causing delay, there may be facts alleged or statements made at or after the trial which must be investigated; people will die and even the counter-irritant of a law suit will not always keep them alive. Leaving aside special circumstances and speaking generally, if a losing litigant cannot have his appeal heard and disposed of in three months from trial there is something wrong. In a certain country, a Chief

Justice declined to sit in an appeal because judgment might not be given before the expiration of his term, more than three months distant; that fact and the circumstance that it excited no astonishment will furnish their own commentary.

Moreover there are often trifling errors (generally against technical rules) at the trial; even judges are not exempt from the imperfections of humanity. An Appellate Court should pay no attention to such defects unless some injustice results. There may be some fact left unproved or later discovered. Why should not the Appellate Court allow the fact to be proved before itself? What is the sense in sending a case down for a new trial with all its risks, expense and trouble?

There is one failing with which courts of appeal are very frequently afflicted: they are apt to forget that the main object of litigation is the determination of the rights of the litigants before them, and to imagine that what they are for is to write dissertations on the law. To a lawyer, there is no stronger temptation than to follow up a point suggested in a case and to exhaust the law on such point, although it is not really material in the case under consideration. There can be no objection to that course, but it should not be followed so as to delay a decision unduly and thereby deprive the litigant of his right to speedy justice.† What is important is, "Do I get my $800?"

†I produce to you the list of our Appellate Division, the Court of Appeals in Ontario, for the May, 1914, sittings.

There are eighty-one cases on the list. The judgments from which these appeals are taken were delivered as follows:

Before January 1, 1914	7
In January, 1914	5
In February, 1914	14
In March, 1914	44
In April, 1914	11
In all	81

Of those before January 1, 1914, two are cases of a Municipal Street Railway which is being reorganized, and all parties desire time to complete the financial arrangements. The parties have

had several opportunities to argue the appeals if they so desire, and the cases are kept on the list *ex abundanti cautela* for fear the arrangement may fall through. Three others have stood by arrangement of counsel; and one to enable the appellant to procure a preliminary order from a county court judge, *persona designata* under the statute. All of these have had at least one chance to be argued. The seventh is a case *sui generis*. A wife is suing her husband and conducting her own case. Two motions have been made by the defendant to dismiss the appeal for want of prosecution, but the court has extended the time. Much of the evidence at the trial is said to be irrelevant, and the plaintiff is finding difficulty in extracting what is material. She scorns professional help and is perhaps looking for a grievance. At all events we thought we should not cut her out of an appeal.

Of the five decided in January, 1914, two were delayed by illness of counsel, and counsel on the other side agreed to let the cases stand; two by reason of omission of stenographers to get out evidence in time; and in the fifth, counsel mislaid his papers and the other side consented to delay. All these have had at least one chance.

We do not allow cases to stand from month to month without inquiry. From time to time all cases looking stale are called on to be spoken to; and if the reporters are found derelict they are brought to time. If the parties are not really intending to go on with the appeal promptly, it is dismissed.

During the May sittings all the appeals from judgments delivered in January, 1914, have been disposed of; of those before January, the two about the Street Railway still stand; one other will be disposed of June 1, another June 5; all others have been heard.

There have been added to the May list 3 cases in which judgment was given in March.

We have heard

Of those in February, 11 leaving 3

Of those in March, 35 leaving 12

Of those in April, 9 leaving 2

In addition to those fully heard, two involving disputes

between the Municipality and private individuals have been heard in part and stand for a proposed settlement.

And what law should be administered?

Most of the English-speaking peoples have the tradition of the fundamental distinction of Law and Equity. This distinction is historical and arose from our ancestors having a law of their own of which they were inordinately and stubbornly proud and tenacious, *"Nolumus leges Angliae mutare"* said the barons on a memorable occasion; and *nolumus leges Angliae mutare* they continued to think (some indeed consider that the barons have not ceased to be intensely conservative even at the present day). The gross and palpable injustice done by these venerated *leges Angliae* became intolerable, and after legal fiction had failed to permit justice to be done in the law courts, Equity was invented. "Equity mitigated the rigor of the common law" is the conventional and euphemistic way of putting it; but this cloaks the infamies which the common law enjoined or permitted. The lawyer was not till comparatively late entrusted with this new weapon; the churchman was the early chancellor. But it got at length into the hands of lawyers and became as technical and as formal as the common law whose rigor it was to alleviate. These two systems of law ran along side by side, administered by different courts for centuries, and the English lawyer came to think that this division subsisted in the very nature of things.

It is hard to dislodge inveterate and traditional opinions even when they are wholly without solid foundation. The colonial lawyers raised on English precedents as pabulum, absorbed the English idea and it stuck. I have before me as I write a letter on the subject of the Courts of Law of Upper Canada addressed to the Attorney General and Solicitor General in 1847. This was written by a member of our bar of the highest standing, one who was afterwards Chancellor and then Chief Justice of Ontario. Addressing the "Chief law officers of the Crown for Upper Canada upon a subject interesting alike to the profession and to the country—the due administration of justice," and at a "time when changes appear to be contemplated in some of our Courts of Justice," he argues that "law and equity ought to be

considered as distinct systems, and that they are so considered and kept apart in England, is, perhaps, one of the best provisions of our Constitution." He approves the statement of Lord Eldon as to "the necessity of that separation of Courts of Law and Equity which so mainly contributes to the complete and effectual administration of justice to an extent and in a degree such as are unknown and must be ever unknown where that separation is not effectually made and observed." In Upper Canada we had got along without a Court of Equity till 1837, and there was in 1847 talk of getting rid of it. Mr. Spragge (the writer spoken of) deprecates such a course, disputes the statement of those who say "we did very well without it before the Court of Chancery was established," for, he says, "the common law was never meant nor is it calculated by itself to form the jurisprudence of a country. Without being tempered by equity law, it would often work injustice, and in its actual operation in this country the application of its rules did work injustice until a language began to be used in our Court of King's Bench which would have sounded strangely in the ear of a common lawyer in England." He thinks that without separate courts "the law * * * would degenerate into an uncertain hybrid system neither common law nor equity, but an incongruous compound of both, so that no man could tell what his rights are." "We must * * * have English law, a combined system of law and equity, or we must abrogate the English law, throw our whole system of law to the winds and adopt the civil law. But were so mad a scheme proposed methinks Upper Canada would answer as with one voice *nolumus leges Angliae mutare.*" This reasoning was adopted, and as at the Parliament of Merton so at our Canadian Parliament *"Omnes comites et barones una voce responderunt quod nolunt leges Angliae mutare quas hucusque usitatae sunt et approbatae.*

If any lawyer were asked to lay down a code of laws for a new community he would be thought insane if he laid down two codes, one of laws to govern the people and another, to modify and to that extent to nullify the first; and yet because from historical reasons that system grew up in England, many lawyers thought it a necessary system. Even in 1847, some could not

conceive of the legislature combining the two systems into one, and directing the fused system to be applied in all courts. And so we had law and equity for over thirty years longer. In 1881 when a simple provision was made that where the rules of law differ from the rules of equity, the rules of equity shall prevail, and this was applied to all courts, many were the mournful lamentations for the departed glory of our jurisprudence. Rachel weeping for her children could be as easily comforted as the "equity lawyer" when he found that a proceeding to foreclose a mortgage could be taken by writ in the Queen's Bench Division, or the purely common lawyer when he found that the beloved principles of the common law were ruthlessly subdued to the alien rules of equity. I have myself heard a practitioner, still living, curse what he called the "confusion" of law and equity; but time is the great assuager of grief and the change has vindicated itself. No one now would think of going back to the old system.

This fusion of law and equity has had something to do with the gradual decay of the jury system.

A word or two as to the administration of criminal justice.

The abominable cruelty of the English law, whether the common law as interpreted in early times by the high placed judge or made in later times by the high placed member of parliament for the governance of the lower classes—in either case a mandate in the vast majority of instances of the superior to the inferior—revolted the humane. Rules were extended or invented to save the shedding of blood for petty or even serious offenses. The law was brutal, and its brutality was mitigated or evaded by the ingenuity of less blood-thirsty judges. Trifling defects, errors of form, omissions to prove immaterial allegations, matters of no importance whatever were laid hold of to prevent a judicial murder. Consequently the result of a prosecution became very much a matter of chance; criminals looked upon a verdict of guilty as a bit of bad luck. A chaplain of Newgate of the time has left an awful account of the view taken by prisoners of trials, an account which haunts the reader as a horror for years.

Accordingly, the prosecution of an alleged offender became

a kind of sport. The prisoner had so much of a start, so many proceedings were forbidden to his pursuers, he might double and dodge, and in the end, in spite of facts wholly proved, might escape. It was a kind of glorified fox hunt, the quarry having a much greater chance than a fox.

This was about the condition of the law in England when the United States branched off and when Upper Canada was given legislative independence. Both took the law with them. The rights of the accused, the protection of the accused, gave the watchword; and some courts have not forgotten it yet. In not a few courts the prisoner has so many and so sacred rights that no one else has any, the State included. Instead of a criminal trial being a solemn inquiry by the State into a crime alleged to have been committed against it, a criminal trial is apt to degenerate into a game, a play, a spectacle for the curious and a subject for lurid newspaper writing. That provision made by the State for its own protection that no one shall be punished unless and until convicted by a competent court is made a cloak to shelter those who have undoubtedly committed crime; the pettiest of all petty technicalities are invoked as though they were the most profound of principles, on the violation of which the heavens should fall. Time seems not to be considered of importance in many jurisdictions; and in one the members of the bar say openly that a conviction for murder is but the beginning of the criminal trial.

Solemnity and formality in a criminal trial have great influence upon the criminal classes. Severe punishment has not at all the same deterrent effect as certain and speedy punishment. Many a degenerate or wilfully wicked person would be willing to be made the central feature of an eight days' or eight weeks' show with a good chance of evading punishment.

Is all this good for the State?

Once again, if the people really want that sort of thing they must have it; but do the people really want it? Of course the criminal classes, the potential criminal, the lawyer who is paid by the length of time he can make a case last or who seeks glory from technical ingenuity or florid rhetoric, the yellow and near

yellow paper and its readers, all are in favor of it. But the man who has to pay for it, the sober-minded citizen who takes an interest and a pride in his country, who is jealous of her honor and reputation—what of him? and is he not to be considered?

If a criminal trial is a game, well and good. The fox hunter who was expostulated with on the cruelty of his sport said, "The men like it, the horses like it, and nobody can be certain that the fox does not like it." But even fox-hunters pay for their game out of their own pocket, and if a fox does get away now and then, there is no great harm. We in Canada are too poor to be willing to pay for such a sport and too busy to be willing to waste weeks on an investigation for which days or even hours are ample. We think that except in very grave offenses, such as murder and the like, an accused should have the option to be tried by a judge and without delay, iustead of waiting for a jury sittings. If one charged with crime be desirous of trial by jury we allow him a copy of the jury panel in sufficient time to make inquiries as to any objection to the jurymen, and when a trial is set we insist on it being proceeded with, with due diligence and reasonable speed. The first time I met your ex-president, Mr. Taft, he spoke of the intolerable delay in criminal trials in the United States. I told him that a short time before, I had gone to a Canadian city to hold the Assizes on the same day that a few hours further along the same line of rail but across the international boundary, a judge began to get his jury in a murder case; that I had tried four criminal cases and seven civil cases, and was home in Toronto before my American brother had half his jury. I told the New York Bar Association that in my thirty years experience I never saw it take more than half an hour to get a jury. Let me add that I have never but once heard a proposed juryman asked a question about reading newspapers, forming an opinion, or anything else. I have uever known even a murder case (except one) take four days; very few indeed take more than two; none tried before me has taken as much as two full days; and medical or other experts are not allowed to drag out proceedings. We think four on each side enough except in special circumstances and we keep these well in hand.

Is fair play not the only natural right of one accused of crime? It may be that in some courts the proceedings are protracted by the gladiatorial spirit. The prosecuting counsel feels that he has a brief for conviction and that he is vanquished and disgraced if he fails in procuring it. He strains every nerve to that end, stretches the law and colors the facts; and if, *per fas aut per nefas* he hears the jury say "Guilty" he is triumphant. I venture to think that that theory and the practice based upon it are wholly vicious and debasing. In an investigation by the State into an alleged offense against itself, the counsel representing the State has the plain duty to investigate; and the State not desiring that an accused be pronounced guilty if in fact or in law he is not, it is the plain duty of the prosecuting counsel to bring before the court and jury all the facts and all the law—what helps as well as what incriminates the accused.

The wholly brutal system of the judge being the most determined and effective prosecutor has long gone out; the only excuse for it was that not seldom the judge had been the investigator and had become certain of the guilt of the accused. Howell's State Trials are appalling reading at the best; and a judge who would act now as the most venerated of the sages of the law acted in the past would be cursed and despised of all men.

Has not the spirit of these judges descended to some prosecuting counsel?

In Canada, the theory is that the Crown Counsel represents the State. He has no concern with whether the accused is found guilty or not. His whole duty is performed when he has brought out all the facts by direct evidence or by cross-examination of witnesses for the defence and has summed up to the trial tribunal fairly all the facts. If the judge or, in case of a jury trial, the jury think no case has been made out, that is no concern of his; he is not to blame. Of course, human nature is human nature. Counsel will instinctively want to fight the counsel on the other side. It is difficult to be impartial, particularly when one has a strong conviction of the guilt of the accused; but if counsel wilfully concealed or failed to bring out facts favorable to the prisoner's innocence, if he unduly pressed for a conviction, if he were to urge

unfair arguments to the jury, he would lay himself open to unfavorable comment of his professional brethren and the public, as well as to stern rebuke by the trial judge. The method of candor and fair play brings more convictions than the opposite course. A jury like fair play, and if they see a prisoner is not getting it, they are not at all unlikely to feel resentment and to "help the under dog." I am an old Crown Counsel, and I speak whereof I know.

Speed is called for in an appeal in criminal matters. The deterrent effect of punishment varies inversely with the delay in punishing; while if there is to be a new trial, it should be as soon as possible, witnesses disappear or "forget" more quickly and effectively in criminal than in civil matters.

Punishment should follow swiftly; we think, in the Dominion if a Canadian murderer is not hanged within a year of his crime he is justified in complaining of being deprived of his just rights given him by Magna Charta.

There is abroad in some quarters a feeling of unrest and dissatisfaction with the administration of justice, civil as well as criminal. It will not do to say that this is due to machinations of demagogues, to the ambition of politicians out of office. No demagogue or dissatisfied politician can long make any considerable number of the community believe in what has no foundation in fact. The causes of dissatisfaction should be sought out and if possible removed.

Some part of this may be due to a misunderstanding of the true function of the court. It seems impossible for some, and those not the most ignorant or least American, to understand that the court does not make the law. Just as it is said we have in our bodies remains now dormant and useless, even harmful, of organs which were alive and active in the reptile stage through which we are told our race has come, so there is away down in many minds the relics of what was real when the early judges laid down the law to suit themselves. As the nightmare which frights the bravest before a danger which does not exist is said to be a reminiscence of the terror of the ancestor, the naked savage running through the dark forest of old, fleeing a very real

danger, so the present nightmare—if it is right to call it a nightmare—may be, at least in part, an atavistic reminiscence of what was once a grim reality. It may be that means can be found and used by the Bar or others to correct such misapprehension.

But is that the only reason? Of course substantive law is for the legislature, but there are many ways in which the Court can do much to make the administration of laws accord with the requirements of the people.

Conservative, Courts must needs be from their very constitution, but that does not imply that they must be unsympathetic to any suggestion of improvement or grudging in giving full effect to amendatory measures, permissive or imperative. Dignified they should be, but that does not imply *otium cum dignitate* with *otium* ninety-five per cent of the prescription. Deliberate, too, but that does not mean so slow that before judgment is given the litigant is dead or hope deferred has made the heart sick. Independent of public opinion every judge must be, but that is not synonymous with indifference to the manner in which the public receive his judgments and the opinion the people have of his honesty. Like Lord Mansfield, while he should despise the popularity that is run after, he may well prize that which follows. He is called upon for imperative public reasons to avoid the very appearance of evil and see to it that nothing in the manner of his judgments is unnecessarily offensive to his fellow-countrymen, however unpalatable the matter may be. That judge received no commendation who, while he feared not God, neither regarded he man; and no judge may use the objurgation, so well known as attributed to a multi-millionaire, "the public be damned."

The position of a judge is one of the very highest to which a man can be called in a free country; the influence for good of an upright and conscientious judge is incalculable; and when he exhibits defects of manner, lack of prudence and decorum, contempt of the commonalty, he grieves the judicious and does as much or nearly as much harm as if he were ignorant of law, indifferent to the soundness of his decision, partial in his treatment of the Bar or litigant and subservient to sinister interests.

It is a matter of frequent comment and almost unbounded

wonder to those under another system that in these United States, judges who achieve the Bench through a method wholly repugnant to the sentiment of the British peoples are so almost universally found to be of high legal attainment, sound judgment and independent mind. It is a matter of pride to all English speaking lawyers that the method of election or appointment has been found to be wholly immaterial; the honest lawyer, who the satirists says is the noblest work of God and about the scarcest, is not scarce on the Bench of the Union or any of its component States.

It is a matter of congratulation that it is almost unknown that even the bitterest critic charges want of learning, ability or honesty in the occupants of the Bench. It is, however, alleged that dissatisfaction has been felt with an apparent indifference to the demands of an advancing society, an unsympathetic attitude towards the masses. So far as that means that the courts should change the law laid down for them by decision or statute, the criticism is unjust and cannot be accepted. If it means that rules are allowed to crystallize into technical language so rigid that the letter can defeat the underlying spirit and purpose, "the case is different." The application of rules "must correspond with the practical necessities of the times." At least that is so in my democratic country; and I gladly adopt the language of the great lawyer whom many of you heard last summer in Montreal, the Lord Chancellor, Viscount Haldane, delivering judgment in the House of Lords, (1914) A. C. at pp. 37-38.

How far those in a land in which a system different from ours prevails can go in making the rules "correspond with the practical necessities of the times," I cannot say; but is not some of the real foundation (as distinguished from the political pretext) of this agitation, based upon the conviction that the practical necessities of the times have not been considered?

Be that as it may, it is perfectly certain that in every free country the people will and must have their way in the long run—with courts as with all else. It is the part of the patriot and the statesman to see to it that that way is the right way, and that the right way is found with the least possible delay. The

right way in litigation implies justice cheap, speedy, full and certain; and anything in the constitution and practice of the courts which is not conducive to that end is wrong and must be amended; if by the courts themselves, so much the better, and the sooner the better, but in any case it must be amended.

We live in an age of unrest; the principles underlying institutions are being investigated as never before; nothing is taken for granted; the motto is "you have got to show me;" the ever iterated and re-iterated question is "Why?" "Why?" "Why?" The courts should not and cannot hope to be an exception. "If our virtues did not go forth of us, 'twere all alike as if we had them not." The administration of justice is on its trial. What will be the verdict?

So long as there is a moral law governing the universe, so long as its affairs are governed by the Divine Law, the verdict must be certain. With a Bar alive with a keen sense of public duty, with a Bench whose members can say with truth and pride, "I have judged the people with righteousness and the poor with judgment —judgment have I laid to the line and righteousness to the plummet—I have executed the judgment of truth and peace in the gates—touching the righteousness which is in the law I am blameless—I have done no unrighteousness in judgment—I did not respect the person of the poor nor honor the person of the mighty, but in righteousness did I judge my neighbor—for I did not respect persons in judgment but heard the small as well as the great and was not afraid of the face of man—I did not wrest judgment nor take a gift, nor did I ask for a reward—I did not take bribes and pervert judgment—but I judged righteous judgment, the judgment which cometh from the Lord"—the verdict must be "Well done, good and faithful servants."