

“ The Pioneers and the Common Law ”

By

Roscoe Pound

During his years as Dean of the Harvard Law School, Roscoe Pound was frequently invited to speak to state bar associations. In July 1920, he addressed the North Carolina Bar Association on “The Pioneers and the Common Law.” It was published a few months later in the *West Virginia Law Quarterly and the Bar*.

He begins by sketching the pervasive influence of the common law — “it is the spirit of our law that has made it a law of the



world.” Of the “factors” that made it — feudalism, Puritanism, seventeenth-century contests between courts and the monarchy, the “idealistic philosophy of the nineteenth century” — one “operated in the new world, namely, the ideas and ideals of the pioneer.” But pioneers’ views of law became, in his vivid phrase, “an abattis” to reforms necessary to administer justice to urban communities in the twentieth century. (An abattis is a fortification or barricade of fallen trees with

their sharpened tops facing the enemy.) Here is an excerpt:

[T]he spirit of our American common-law polity . . . presupposes a homogeneous population, which is jealous of its rights and in sympathy with the institutions of government. It presupposes a public which is intrinsically law abiding, even if inclined under provocation to vindicate public justice by rough and ready methods. It presupposes a people which for the most part will conform to rules of law when they are ascertained and known, so that the chief concern of courts and of the state is to settle what is the law. It presupposes a public which, in the jury box, may be relied upon to enforce law and vindicate justice between man and man intelligently

and steadfastly. In other words, our common-law polity presupposes an American farming community of the first half of the nineteenth century; a situation as far apart as the poles from what our legal system has had to meet in the endeavor to administer justice to great urban communities at the end of the nineteenth and in the twentieth century.

American procedure, as it had developed through judicial decision, professional usage and legislation in the last century, shows the hand of the pioneer even more plainly. It requires no great study of our procedure to enable us to perceive that many of its features, taking the country as a whole, were determined by the conditions of rural communities of one hundred years ago. Many of its features are more appropriate to rural agricultural communities, where in intervals of work, the farmer, remote from the distractions of city life, found his theatre in the court house and looked to politics and litigation for amusement, than to modern urban communities.

In the near century that has passed since Pound delivered this critique, the frontier's influence has waned as countless procedural reforms have been implemented, re-examined and refined. While Pound helps us understand why the nineteenth century pioneer mentality impeded reform, he also makes an occasional reference that addresses twenty-first century controversies. For instance, today there is a debate among some members of the federal judiciary and within the academy over the question of whether judges should cite "foreign law" or "foreign authorities" when interpreting the constitution. Pound reminds us of a similar episode following the Revolutionary War, when there was such hostility toward England that some states enacted laws prohibiting judges from citing English authorities. It is not hard to imagine what Pound, whose writings are spiced by references to Roman law, continental theorists and Latin phrases, would think of today's intellectual isolationists.

Pound's address has been reformatted and page breaks added. His photograph is taken from concurringopinions.com. Other articles by him can be found in the "Theory" category in the archives of the Minnesota Legal History Project. △



THE PIONEERS AND THE COMMON LAW. *

By Roscoe Pound **

Few institutions of the modern world show such persistence and vitality as the common law. Indeed, persistence and vitality have marked its history from the beginning. In the twelfth century it came into conflict with the Church, the most powerful antagonist of that time, and succeeded in establishing itself as the law of the land. It is true a like struggle between state-law and church-law went on all over Europe. But the canon law left much less mark upon the law of England than upon the law of Continental Europe, and today there is nothing beyond a separate probate court in most of our jurisdictions and a few peculiarities of probate practice to remind us of the conflict. In the sixteenth century the common law was again threatened by the onward march of the Roman law in western Europe. Renaissance, Reformation and Reception of Roman Law seemed, as Maitland has shown us, an irresistible conjunction. Elsewhere the local law gave way before it. The common law of England was the only body of Germanic law that withstood the movement and survived as a whole. Again, in the seventeenth century, with the rise of absolute governments, the common law came into conflict with the most powerful movement of the time and emerged victorious. The contests between courts and crown in Stuart England insured the survival in English public law and further development in American public law of the [2] most characteristic of common-law institutions. In the new world, at the end of the eighteenth century and at the beginning of the nineteenth century came another conflict to be spoken of presently, which had for its result to make the common law of

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** Dean of the Law School, Harvard University.

England a law of the world. Still later in the nineteenth century, in the legislative reform movement, the common law was threatened by legislative activity, the capital fact, it has been said, in modern politics. Yet as we look back over a century and a quarter of American state legislation, we are bound to admit that it has wrought no essential change in what truly goes to make up the common law.

Today, the common law imposes itself on the huge mass of legislation poured out by our law-making bodies and gives it form and consistency. It has swallowed up and assimilated equity, admiralty and the law merchant. It has made the criminal equity of the Star Chamber into a system of legal doctrine as to misdemeanors. It gives unity to our rapidly growing body of judicial decision, despite the independent authority of the supreme courts of forty-eight states.

Nor is the common law less successful upon foreign ground or in competition with foreign law. Wherever it has come in contact with the rival law of the modern world, the outcome has been the same. In Louisiana, the criminal law, the public law, the law of torts, the law of corporations, the law merchant are thoroughly Anglo-American; the common-law doctrine of precedents has been received, and more and more the law is becoming Anglo-American in substance, if Roman-French in its terminology. In Texas only a few anomalies of procedure remind us that that domain was once ruled by Roman-Spanish law. Only historians know that Michigan and Wisconsin were once subject to the Custom of Paris. In Scotland the law has all but ceased to be Roman in more than its vocabulary. In South Africa, as judges reason and decide after the manner of common law lawyers in the mere phrases of Roman-Dutch law, like movement is visibly in progress. In Porto Rico and in the Philippines the growing element and the aggressive element is Anglo-American.

Moreover the characteristic common-law institution, the supremacy of law, in the form in which it has reached its highest development in America, is commending itself to the most diverse peoples, when they find themselves living under written constitutions. Thus we find courts in South America deciding constitutional questions on the basis of Cooley's *Constitutional Limitations*; we [3] find Dutch judges in South Africa, trained in Roman-Dutch law, holding legislation void for infringing the fundamental law and citing *Marbury v. Madison*

on the same page with commentators on the Pandects; we find continental publicists lamenting that their polity does not provide for judicial interpretation of their constitutions.

There is the same unity of law in the common-law world that there is in the Roman-law world; the unity of our law from Coke to the present is as real as the unity of Roman law from Papinian to the latest continental code. But this unity is in its spirit, in its characteristic institutions, rather than in any fixed dogmas or settled doctrines. It is the spirit of our law that has made it a law of the world; it is the spirit of our law that will endure. And this spirit of English law, like the English people itself, is composite. One factor in making it was feudalism, whence we took the idea of relation—from the analogy of the relation of lord and man—and made it the most fruitful of our legal institutions, as the double titles in our treatises and digests bear abundant witness. A second factor was Puritanism, with its idea of consociation rather than subordination and its rooted distrust of magisterial discretion. A third factor was the body of politico-legal ideas developed in the seventeenth-century contests between courts and crown, giving us our American bills of rights and identification of the common-law rights of Englishmen with the natural rights of man. A fourth factor was the idealistic philosophy of the nineteenth century, the formative period in which the common law of England became the law of the new world; a philosophy which put the individual human will at the very center of law and politics and confirmed and intrenched the individualism inherent in Germanic law, already fortified by Puritanism and given dogmatic form in the contest between courts and crown. Finally a fifth factor operated in the new world, namely, the ideas and ideals of the pioneer. It is of this factor and its effects upon our law that I would speak to you this morning.

“There are features of American democracy,” says Professor Sumner, “which are inexplicable unless one understands . . . frontier society. Some of our greatest political abuses have come from transferring to our now large and crowded cities maxims and usages which were convenient and harmless in backwoods country towns.” This is no less true of many of our more serious legal abuses. In particular many crudities in judicial organization and [4] procedure are demonstrably legacies of the frontier. Moreover the spirit of American law of the nineteenth century was sensibly affected by the spirit of the pioneer.

For most practical purposes American judicial history begins after the Revolution. Administration of Justice in Colonial America was at first executive and legislative, and these types of non-judicial justice persisted well into the last century. Again, with a few conspicuous exceptions, the courts, before and for some time after the Revolution were made up largely of untrained magistrates, who administered justice according to their common sense and the light of nature, with some guidance from legislation. Until the Revolution, in most of the Colonies it was not considered necessary or even expedient to have judges learned in the law. Of the three justices of the Superior Court in New Hampshire after independence, one was a clergyman and another a physician. A judge of the highest court of Rhode Island from 1814 to 1818, was a blacksmith, and the chief justice of that state from 1819 to 1826 was a farmer. When James Kent went upon the bench in New York in 1791, he could say with entire truth: "There were no reports or state precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own and nobody knew what [the law] was."

Our judicial organization, then, and the great body of our American common law are the work of the last quarter of the eighteenth century and the first half of the nineteenth century. On the other hand our great cities and the social and legal problems to which they give rise are of the last half of the nineteenth century, and indeed, the pressing problems do not become acute until the last quarter of that century. Our largest city now contains in three hundred and twenty-six square miles a larger and infinitely more varied population than the whole thirteen states contained when the federal constitution was adopted. But New York City did not attain a population of one million till about 1880; and questions of sanitation and housing were first urged after the Civil War. Such commonwealths as the states west of the Missouri, each of which, with a population not much exceeding a million, occupies an area considerably greater than England and Wales, represent more nearly the conditions for which the American judicial organization was developed and for which the common law of England was made over into a law for America.

To understand the administration of justice in American cities [5] at the end of the nineteenth century, we must perceive the problems of the administration of justice in a homogeneous pioneer or rural community of the first half of the nineteenth

century and the difficulties with which lawyers and jurists had to contend in meeting those problems; we must perceive the attitude of such a community toward legal procedure and its conception of the nature and function of a trial; we must perceive its attitude toward government and administration and its rooted objection to supervision and restraint.

In the homogeneous pioneer or rural community of the first half of the nineteenth century, the administration of justice involved three problems: (1) To receive the English common law, or to find somewhere else a basis for legal development, and to work out upon the basis adopted a system of principles and rules adapted to America; (2) to decentralize the administration of justice so as to bring justice to every man's door; and (3) to devise a criminal law and criminal procedure sufficient to deal with the occasional criminal and the criminal of passion in a homogeneous community of vigorous pioneer race, restrained already for the most part by deep religious conviction and strict moral training.

Chief of these problems was the one first named, the problem of working out a system of rules and principles applicable to America. It has long been the orthodox view that the colonies brought the common law with them and that the English law has obtained in this country from the beginning. But this is only a legal theory. In fact the colonies began with all manner of experiments in administering justice without law and it was not till the middle of the eighteenth century that the setting up of a system of courts and the rise of a custom of studying law in England began to make for a general administration of justice according to English law. Just prior to the Revolution the widespread study of Blackstone, whose first edition appeared in 1765, gave great impetus to the reception of the common law. But as late as 1791 the law was so completely at large in New York that the genius of a Kent was needed to make the common law the law of that state.

After the Revolution the public was extremely hostile to England and to all that was English and it was impossible for the common law to escape the odium of its English origin. Judges and legislators were largely influenced by this popular feeling, and there was no well-trained bar to resist it. In Philadelphia there were a number of great lawyers, and there were good lawyers here and [6] there throughout the country. But the bulk of the profession was made up of men who had

come from the Revolutionary armies or from the halls of the Continental Congress and had brought with them many bitter feelings and often but scanty knowledge of the law. It was natural that they should resent any serious investigation of the English authorities and perhaps endeavor to palliate their lack of information by a show of patriotism. Moreover a large and influential party were enthusiastically attached to France and not only denounced English law because it was English but were inclined to call for a reception of French law. "The citation of English decisions in the opinions of the courts," says Loyd, "greatly exasperated the radical element. What were these precedents but the rags of despotism, who were the judges that rendered them but tyrants, sycophants, oppressors of the people and enemies of liberty." The legal muckraker of today wields but a feeble pen in comparison with his predecessor of the first half of the last century. Under the influence of such ideas, New Jersey, Pennsylvania and Kentucky legislated against citation of English decisions in the courts. There was a rule against such citations in New Hampshire, and more than one judge elsewhere had his fling at the English authorities cited before him.

In part this opposition to the reception of the common law was political. In large part, however, it was but a phase of the opposition of the frontiersman to scientific law. "The unthinking sons of the sagebrush," says Owen Wister, "ill tolerate anything which stands for discipline, good order and obedience; and the man who lets another command him they despise." In this they but represent the feelings of the outposts of civilization everywhere. As numbers increase there is a greater interest in general security. But even then in the rude pioneer community the main point is to keep the peace. Tribunals with power to enforce their judgments are the most pressing need. There the refined, scientific law that weighs and balances and deliberates and admits of argument is out of place. A few simple rules, which everyone understands and a swift and decisive tribunal best serve such a community. The customary law of the mining country from 1849 to 1866 largely repeated in this respect the experience of the Atlantic coast down to the Revolution. In the next stage, as wealth increases, commerce develops and society becomes more complex, the social interests in the security of acquisitions and in the security of transactions call imperatively for certainty and uniformity in the administration of [7] justice and hence demand rules. But as we have seen, at the beginning of the nineteenth century American law was

undeveloped and uncertain. Administration of justice by lay judges, by executive officers and by legislatures was crude, unequal, and often partisan, if not corrupt. The prime requirement was rule and system, whereby to guarantee uniformity, equality and certainty. And, since in the nature of things rules may not be laid down in advance for every case, this meant that a scientific development of law was inevitable.

Scientific development of American law was retarded and even warped by the frontier spirit surviving the frontier. The effects of the opposition to an educated well-trained bar and to an independent experienced, permanent judiciary, which are legacies of the Jefferson Brick era of American politics have been spoken of on a former occasion. It will suffice here to recall the lack of interest in universality and fostering of local peculiarities which are so characteristic of our legal system. In part Puritanism must share the responsibility. But in large part this spirit in American law is a remnant of the frontier repugnance to scientific law and the insistence of the pioneer that his judges decide offhand without study of what other judges may have done in European monarchies or in effete communities to the eastward.

Again, the insistence upon the exact working out of rules and the devotion to that end of the whole machinery of justice, which is so characteristic of nineteenth-century America, is due in great part to pioneer jealousy of governmental action. A pioneer or a sparsely settled rural community is content with and prefers the necessary minimum of government. The social interest in general security requires a certain amount of governmental machinery. It requires civil and criminal tribunals and rules and standards of decision to be applied therein. But when every farm was for the most part sufficient unto itself the chief concern was that the governmental agencies set up to secure this social interest might interfere unduly with individual interests. This pioneer jealousy of governmental action cooperated with the Puritan idea of consociation and the eighteenth-century idea of the rights of man to exalt individual interests and put all possible checks upon organized social control. There must be no magisterial, or administrative or judicial discretion. If men had to be governed, it must be by known rules of the law.

Thus the chief problem of the formative period of our American legal system was to discover and lay down rules; to

develop a system of certain and detailed rules which on the one hand would meet the requirements of American life, and, on the other hand, would tie down the magistrate by leaving as little to his personal judgment and discretion as possible, would leave as much as possible to the initiative of the individual and would keep down all government and official action to the minimum required for the harmonious co-existence of the individual and of the whole. This problem determined the whole course of our legal development until the last quarter of the nineteenth century. Moreover, it determined our system of courts and our judicial organization. Above all else we sought to insure an efficient machine for the development of law by judicial decision. For a time this was the chief function of our highest courts. For a time it was meet that John Doe suffer for the commonwealth's sake. Often it was less important to decide the particular cause justly than to work out a sound and just rule for the future. Hence for a century the chief energies of our courts were turned toward the development of our case law and the judicial hierarchy was set up with this purpose in view. It could not be expected that a system of courts constructed chiefly for such purposes would be able to deal effectively with the litigation of an urban community of today in which men look to legislatures to make rules and to courts to dispose of controversies.

A second problem in the formative period of American law was to decentralize the administration of justice so as to bring justice to every man in a sparsely settled community. The system of English courts at the Revolution was too arbitrary and involved to serve as a model to be followed in detail in this country. But overlooking concurrent jurisdiction and some historical anomalies, a general outline might be perceived which was the model of American judicial systems. To begin at the bottom, this was: (1) Local peace magistrates and local inferior courts for petty causes; (2) a central court of general jurisdiction at law and over crimes, with provision for local trial of causes at circuit and review of civil trials in bank in the central court; (3) a central court of equity in which causes were heard in one place, though testimony was taken in the locality; and (4) a supreme court of review. In the United States all but five or six jurisdictions merged the second and third. But with that salutary act of unification most of our jurisdictions stopped. Indeed for a season there was no need for unification. The defects in the foregoing scheme that appealed to the formative [9] period of American judicial organization lay in the

second and third of the tribunals above described, namely the central court of law and the central court of equity. In a country of long distances in a period of slow communication and expensive travel, these central courts entailed intolerable hardship upon litigants. It was a prime necessity to bring justice to every man's back door. Accordingly in most states we set up a number of local courts of general jurisdiction at law and in equity and our policy has been one of multiplication of courts ever since. Nowhere is radical change so much needed as in the organization of our courts. In almost all of our states the whole plan of judicial organization, adapted to a pioneer, rural, agricultural community of the first half of the nineteenth century, is in the way of efficient disposition of the litigation of the industrial and urban community of today.

A hundred years ago the problem seemed to be how to hold down the administration of punitive justice and protect the individual from oppression under the guise thereof, rather than how to make the criminal law an effective agency for securing social interests. English criminal law had been developed by judicial experience to meet violent crimes in an age of force and violence. Later the necessities of more civilized times had led to the development in the court of Star Chamber of what is now the common law as to misdemeanors. Thus one part of the English law of crimes, as our fathers found it, was harsh and brutal, as befitted a law made to put down murder by violence, robbery, rape and cattle stealing in a rough and ready community. Another part seemed to involve dangerous magisterial discretion, as might have been expected of a body of law made in the council of Tudor and Stuart kings in an age of extreme theories of royal prerogative. The colonists had had experience of the close connection of criminal law with politics. The pioneers who had preserved the memory of this experience were not concerned solely to do away with the brutality of the old law as to felonies. Even more their constant fear of political oppression through the criminal law led them and the generation following, which had imbibed their ideas, to exaggerate the complicated, expensive and dilatory machinery of a common law prosecution, lest some safeguard of individual liberty be overlooked, to give excessive power to juries and to limit or even cut off the power of the trial judge to control the trial and hold the jury to its province. Nor did these enfeeblings of punitive justice work much evil in a time and in places where crime except [10] possibly the feud and the duel, on which the community looked indulgently, was rare and abnormal, where,

therefore the community did not require the swift-moving punitive justice, adjusted to the task of enforcing a voluminous criminal code against a multitude of offenders, which we demand today.

In Fennimore Cooper's *Pioneers*, the story opens with a striking picture of central New York in 1823, a region which, as we are told, had been a wilderness forty years before. Above all the author attributes its prosperity to mild laws and to the spirit of the pioneer. "The whole district," he says, "is hourly exhibiting how much can be done, in even a rugged country, and with a severe climate, under the dominion of mild laws, and where every man feels a direct interest in the prosperity of a commonwealth of which he knows himself a part." This is the spirit of our American common-law polity. It presupposes a homogeneous population, which is jealous of its rights and in sympathy with the institutions of government. It presupposes a public which is intrinsically law abiding, even if inclined under provocation to vindicate public justice by rough and ready methods. It presupposes a people which for the most part will conform to rules of law when they are ascertained and known, so that the chief concern of courts and of the state is to settle what is the law. It presupposes a public which, in the jury box, may be relied upon to enforce law and vindicate justice between man and man intelligently and steadfastly. In other words, our common-law polity presupposes an American farming community of the first half of the nineteenth century; a situation as far apart as the poles from what our legal system has had to meet in the endeavor to administer justice to great urban communities at the end of the nineteenth and in the twentieth century.

American procedure, as it had developed through judicial decision, professional usage and legislation in the last century, shows the hand of the pioneer even more plainly. It requires no great study of our procedure to enable us to perceive that many of its features, taking the country as a whole, were determined by the conditions of rural communities of one hundred years ago. Many of its features are more appropriate to rural agricultural communities, where in intervals of work, the farmer, remote from the distractions of city life, found his theatre in the court house and looked to politics and litigation for amusement, [11] than to modern urban communities. For instance, if I have read American judicial biography aright, no small part of the exaggerated importance of the advocate in an American court

of justice, of the free rein, one might almost say the license, afforded him, while the judge must sit by and administer the rules of the combat, may be traced to frontier conditions and frontier modes of thought. When the farmers of the county have gathered to hear a great forensic display they resent the direction of a verdict on a point of law which cuts off the anticipated flow of eloquence. They resent judicial limitation of the time for argument, since the audience is to be considered as well as the court and the litigants. Hence legislation tying down the trial judge in the interests of untrammelled advocacy has its origin on the frontier. In particular it may be shown that legislation restricting the charge of the court has grown out of the desire of eloquent counsel, of a type so dear to the pioneer community, to deprive not merely the trial judge but the law of all influence upon trials and to leave everything to be disposed of on the arguments. Moreover the frontier spectator in the forensic arena is not unlike his urban brother who looks on at a game of base ball. He soon learns the points of the game and knows and appreciates those who can play it.

In a book of reminiscences of an eminent lawyer there is a chapter entitled "Country Practice of the Law" which describes the writer's experience in the western part of Massachusetts in 1861. He tells of a case where, in a prosecution for malicious injury to real estate, the case was that a wooden pump had been taken out of a well in mere wanton mischief. Counsel contended that there was no malicious injury to real estate since the land was not injured and the pump itself was personalty so that the complaint should have been for malicious injury to personal property. To show this he argued that if a pump were realty there would have to be a conveyance by deed of sale every time one was sold. The magistrate was duly impressed and discharged the accused, but, being a conscientious man, proceeded to draw up a new complaint for malicious injury to personal property, upon which the accused were re-arrested and put upon trial. Thereupon the same counsel cited authorities, which were unanimous and conclusive, that the pump in the well and annexed thereto for permanent use was a fixture and so not personal property. The justice could not deny the force of these decisions and was obliged to discharge the accused upon this charge else, so that they escaped. But, we [12] are told, "the magistrate enjoyed the joke upon himself as much as the rest of us." "In fact," the author continues, "many of these legal trials at the time were looked upon as huge jokes." Elsewhere he says "The whole contest was looked upon

as a contest of wits, and if a person prevailed on account of knowing more than the other party, it was not considered at all derogatory to his character that he should use that knowledge in any way that was best suited to the interest of his client." The ethics of such a contest were the ethics of the professional baseball games. I need not say that we have got well beyond this in professional ethics today. But our procedure is still too much in the spirit of which such advocacy is only an extreme manifestation.

The pioneer has influenced American judicial procedure in another way. On the frontier "everyone that was in distress and everyone that was in debt and everyone that was discontented gathered themselves" to begin life anew. Hence the attitude of the pioneer was not favorable to the creditor seeking to enforce his claim and the legislation of our pioneer jurisdictions was often what might have been expected of the cave of Adullam. Extravagant powers in juries, curtailment of the powers of trial judges, an abatis of procedural obstacles in the way of plaintiffs and a vested right in errors of procedure on the part of defendants, all these institutions of American procedure grow out of the desire of the frontier community to shield those who had fled thereto from the exactions of their creditors. Later, when these communities had borrowed heavily from their older neighbors in developing their natural resources there was a strong local interest in preserving these institutions. The very spirit of procedure in some parts of the United States is so tinctured by frontier favor to debtors that improvements in the direction of increased effectiveness in the judicial machinery can come but slowly. All this is quite alien to common-law modes of thought. But it has affected common-law procedure in America not a little.

What Professor Wigmore has called the sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end, no doubt has its roots in Anglo-American character and is closely connected with the individualism of the common law. Yet it was fostered by the frontier attitude toward litigation and it has flourished chiefly in recent times in tribunals such as the Texas Court of Criminal Appeals where the memory of the frontier is still green. Moreover the rise of a class of habitu-[13]-al defendants, who are compelled to fall back upon procedural niceties through the unwillingness of juries to judge them according to law or even to do them justice, and the rise of a class of habitual plaintiff's

lawyers who rely on sympathy and prejudice rather than law, and resent judicial interference to enforce law or preserve justice, have served to keep the spirit of frontier procedure alive in a wholly different environment. Technical procedure is neither a necessary check on the magistrate in the interest of liberty nor a device to advance justice. It is a remnant of the mechanical modes of trial in the beginnings of our law, developed in the eighteenth-century in an age of formal over refinement, fostered and even further developed in the pioneer or rural American communities of the last century, and turned to new uses in the standing warfare between professional plaintiffs' lawyers and habitual defendants produced more recently by the conditions of tort-litigation in industrial and urban communities.

The nineteenth century aggravation of the common-law attitude toward administration has been spoken of in other connections. The political ideas of the seventeenth century growing out of the contests between the courts and the crown, Puritanism, and the political ideas of the eighteenth century all contributed to this attitude. But the exaggeration of it in the last century was in no small degree the result of the pioneer's jealousy of government and administration and his rooted objection to supervision and restraint. So also the jealousy of social legislation that developed in the last quarter of the nineteenth century, the insistence upon liberty of contract and the right to pursue a lawful calling as guaranteed to the individual and beyond the reach of legislation, result in part from the feeling on the part of the pioneer that he should be let alone and that he was ruled best when he was ruled least. In both these instances, Puritan and pioneer, working with materials fashioned in the contests between courts and crown in the seventeenth century, were able to put checks upon the enactment and enforcement of social legislation in this country for forty years after English law making had definitely changed front and become collectivist.

How great a strain is put upon our legal and judicial institutions by the stamp of the pioneer, which they acquired in the formative period, may be seen by taking up the chief problems of administration of justice in the American city of today and perceiving how little our institutions are adjusted to them. [14]

Demand for socialization of law, in the United States, has come almost wholly, if not entirely, from the city. We have no class of

agricultural laborers, demanding protection. The call to protect men from themselves, to regulate housing, to enforce sanitation, to inspect the supply of milk, to prevent imposition upon ignorant and credulous immigrants, to regulate conditions and hours of labor and provide a minimum wage, and the conditions. That require us to heed this call, have come from the cities. But our legal system has had to meet this demand upon the basis of rules and principles developed for rural communities or small towns — from men who needed no protection other than against aggression and overreaching between equals dealing in matters which each understood. Less than a generation ago we were echoing the outcry of our fathers against governmental paternalism. Today, not only have we swung over to this condition in large measure, as our increasing apparatus of commissions and boards and inspectors testifies every day, but we are beginning to call for what has been styled governmental maternalism to meet the conditions of our great urban communities. Although much has been done and comparatively rapid progress is now making, it is perhaps still a chief problem to work out a system of legal administration of justice which will secure the social interest in the moral and social life of every individual under the circumstances of the modern city, upon the basis of rules and principles devised primarily to protect the interest in general security in a rural community of seventy-five years ago.

Again, the demand for organization of justice and improvement of legal procedure comes from our cities. It is a significant circumstance that in the debates upon this subject in the past fifteen years in our bar associations national and state, the city lawyer has asserted that reform was imperative, while the country lawyer has contended that the evils were greatly exaggerated and that grave changes were wholly unnecessary; the city lawyer has been urging ambitious programs of reform and the country lawyer has been defeating them. A modern judicial organization and a modern procedure would, indeed, be a real service to country as well as to city. But the pressure comes from the city, to which we are vainly endeavoring to adjust the old machinery. Courts in our great cities as they are now organized are subjected to almost overwhelming pressure by an accumulated mass of litigation. Usually they sit almost the year round, and yet they tire [15] out parties and witnesses with long delays, and in some jurisdictions dispose of much of their business so hastily and imperfectly that reversals and retrials are continually required. Such a condition may be found

in the courts of general jurisdiction in practically all of our cities. To deal adequately with the civil litigation of a city, to enforce the mass of police regulations required by conditions of urban life, and to make the criminal law effective to secure social interests, we must obviate waste of judicial power, save time and conserve effort. There was no need of this when our judicial system was framed. There is often little need of it in the country today. In the city the waste of time and money in doing things that are wholly unnecessary results in denial of justice.

A third problem of the administration of justice in the modern city is to make adequate provision for petty litigation, to provide for disposing quickly, inexpensively and justly of the litigation of the poor, for the collection of debts in a shifting population, and for the great volume of small controversies which a busy crowded population, diversified in race and language necessarily engenders. It is here that the administration of justice touches immediately the greatest number of people. It is here that the great mass of an urban population, whose experience of law in the past has been too often experience only of the arbitrary discretion of police officers, might be made to feel that the law is a living force for securing their individual as well as their collective interests. For there is a strong social interest in the moral and social life of the individual. If the will of the individual is subjected arbitrarily to the will of others because the means of protection are too cumbersome and expensive to be available for one of his means against an aggressive opponent who has the means or the inclination to resist, there is an injury to society at large. The most real grievance of the mass of the people against American law has not been with respect to the rules of substantive law, but rather with respect to the enforcing machinery, which too often makes the best of rules nugatory in action. Municipal courts in a few of our larger cities are beginning to relieve this situation. But taking the country as a whole, it is so obvious that we have almost ceased to remark it, that in petty causes, that is with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured, practically defeats rights by making it impracticable to assert them when they are infringed.

Many causes have contributed to this neglect of provision for [16] petty litigation which disgraces American justice. Two of them at least are attributable to the conditions of pioneer justice. One has been noticed in another connection, namely,

that we have had to work out a body of substantive law for large causes and small alike in an age of rapid growth and rapid change. Hence we have studied the making of law sedulously. For more than a century in this country we have been engaged in developing in judicial experience a body of principles and a body of rules as deductions therefrom to accord as nearly as may be with the requirements of justice. This is true especially of that most important part of our law which is to be found in the reports of adjudicated cases. Almost the whole energy of our judicial system has been employed in working out a consistent, logical, minutely precise body of precedents. But while our eyes have been fixed upon the abstract rules, which are but the means of achieving justice, the results which we obtain every day in actual causes have escaped our attention. If the dilatory machinery of enforcement succeeds finally in applying the principle to the cause, we may be assured that in the very great majority of causes the result will be what it should be. But our failure to devote equal attention to application and enforcement of law has too often allowed the machinery designed to give effect to legal rules to defeat the end of law in its actual operation.

The other cause referred to is that our procedure, as has been seen, was largely determined by the conditions of rural communities of seventy-five or one hundred years ago. Hence when better provision for petty causes is urged, many repeat the stock saying that litigation ought to be discouraged. It will not do to say to the population of modern cities that the practical cutting off of all petty litigation, by which theoretically the rights of the average man are to be maintained, is a good thing because litigation ought to be discouraged. Litigation for the sake of litigation ought to be discouraged. But this is the only form of petty litigation which survives the discouragements involved in American judicial organization and procedure. In truth, the idea that litigation is to be discouraged, proper enough, in so far as it refers to amicable adjustment of what ought to be so adjusted, has its roots chiefly in the obvious futility of litigation under the conditions of procedure which have obtained in the immediate past. It is much more appropriate to frontier and rural communities where a law suit was a game and a trial a spectacle than to modern urban communities. Moreover, there is danger that in discouraging litigation we encourage wrongdoing, and it requires very little experience in the legal aid societies in any of our cities to teach us that we have been doing that very thing. Of all peoples

in the world, we ought to have been the most solicitous for the rights of the poor, no matter how petty the causes in which they are to be vindicated. Unhappily, except as the organization of municipal courts in recent years has been bringing about a change, we have been callous to the just claims of this class of controversies.

Application and enforcement of law are regarded as the central questions in modern legal science. These questions are especially acute in the United States because our polity has committed so much to courts that elsewhere is left to the executive and legislative departments. They are especially acute in American cities because in these cities the demands made of the courts increase continually. In these communities, the Puritan conception of law as a guide to the conscience and the pioneer conception that the courts exist chiefly to work out rules for a new country are wholly inadequate. The pioneer conception of enforcement through individual initiative is even more inadequate. Both the law and the agencies that administer the law, shaped by such conceptions, are unequal to the burden put upon them by the circumstances of city life and the modern feeling in a busy community that law is a product of conscious and determinate human will. This is the more apparent in application and enforcement of law in a heterogeneous community. Under the influence of the theory of natural rights and of the actual equality in pioneer society, American common law assumed that there were no classes and that normally men dealt with one another on equal terms and at arm's length; so that courts at the end of the nineteenth century were loath to admit, if they would admit at all, the validity of legislation which recognized the classes that do in fact exist in our industrial society and the inequality in point of fact that may exist in bargaining between them. It assumed also that every normal part of the community was zealous to maintain its rights and would take the initiative in doing so. Not a little friction has resulted from application of rules based upon this theoretical equality in communities divided into classes with divergent interests. A great deal of ineffectiveness has come from application of common-law principles, developed to an extreme in adapting them to pioneer communities, to elements of the city population which do not understand our individualism and our tenderness of individual liberty, and from [18] reliance upon individual initiative in case of other elements which by instinct and training are suspicious of authority and of magistrates. Mr. Train's book, *Crime, Criminals and the Camorra*, shows vividly

how fear of courts, bred of conditions in another land, may lead immigrants to tolerate gross oppression rather than to go to the law for relief.

Finally the social workers in our cities have had to wrestle with the problem of freeing administration from the rigid limitations imposed in the last century. The attempt to confine administrative action within the narrowest possible limits gave us at the end of the nineteenth century a multitude of rules which hindered as against few which helped. Regulation of public utilities, factory inspection, food inspection, tenement-house inspection and building laws have compelled us to turn more and more from the criminal law to the administrative supervision and prevention which the pioneer abhorred. So thoroughly did he hamper administration that the reaction has given rise to a real danger that we go too far in the opposite direction and withdraw such matters wholly from the domain of law. The pioneer's public and administrative law cannot endure. We must work over the whole along new lines.

Reviewing the influence of the pioneer upon our law, it may be conceded that we owe not a little to the vigorous good sense of the judges who made over the common law of England for our pioneer communities. Science might have sunk into pedantry where strong sense gave to America a practical system in which the traditional principles were made to work in a new environment. On the other hand this rapid development of law in a pioneer environment left a bad mark on our administration of justice. The descendants of the frontiersman have been slow to learn that democracy is not necessarily a synonym of vulgarity and provincialism; that the court of a sovereign people may be surrounded by dignity which is the dignity of that people; that order and decorum conduce to the dispatch of judicial business; while disorder and easy-going familiarity retard it; that a counsellor at law may be a gentleman with fine professional feeling without being a member of a privileged caste; that a trial may be an agency of justice among a free people without being a forensic gladiatorial show; that a judge may be an independent, experienced, expert specialist without being a tyrant. In the federal courts and in an increasing number of the states something has been done to secure the dignity of judicial tribunals. But the country over there is still much to do. Not the [19] least factor in making courts and bar efficient agencies for justice will be restoration of common-law ideals

and deliverance of both from the yoke of crudity and coarseness which the frontier sought to impose on them. ■



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