OBSERVATIONS ON THE ADMINISTRATION OF LAW IN NISI PRIUS COURTS IN THE WESTERN STATES.

I cannot presume to speak for or fairly represent either the bench or the bar of the Western States; but submit these observations with the desire to briefly set forth the law as it is administered among the people in their courts, of which now it may be as truly said, as was said of them, by My Lord Bacon in the Good Queen's time, they are "the local centre and heart of the laws of the realm." I indulge the hope that, however humble the contribution if honestly conceived and truthfully submitted, it will in some measure aid "the better to establish and settle a certain sense of law, which doth now too much waver in uncertainty," and, perhaps, to some extent, at least, assist "in correcting unprofitable subtlety, and reducing the same to a more sound and substantial sense of law.

The Iowa Code.

Iowa first adopted a Code in 1851, and has never abandoned the system. While, with its present load of additions and amendments, much of its symmetry and congruity are lost, it is still a reasonably adequate and just body of governing law. And while it has probably disappointed the expectations of enthusiasts, it has reasonably satisfied the people and the profession.

All forms of action are abolished, and all civil remedies are classed either as actions or special proceedings. While the distinction between legal and equitable proceedings is retained, an error as to the kind of proceedings adopted does not cause the abatement or dismissal of the action, and on motion it may be changed to the proper forum.

Pleadings consist simply of petition, answer, and reply. The court, may on motion, at any time in furtherance of justice and on such times as may be proper, permit either party to amend any pleading which does not change substantially the

claim or defense; and all technical forms, common counts, general issues, and fictions are abolished.

The result of this liberality has been on the whole satisfactory. It has neither debauched the bar, nor distressed the courts. Departure from Common Law forms has caused, perhaps, some sentimental regrets, but has found ample compensation in the lessened work of both bench and bar, without substantial loss to the administration of justice. If the object of pleading is to ascertain in the quickest time and with most certainty of substance what is the exact issue of law or fact to be determined, we may claim much for the simpler system. Simplicity is always conducive to accuracy; and accuracy is not so certainly obtained by elaborateness of form as by directness of purpose. Under the simpler system, the lawyer wastes no time on syllogistic formulas. His preparation is not wasted on subtleties, and he is satisfied by results which demonstrate that the substance of truth is of far more value than the science of statement or the elaboration of form.

Opening Statement.

In our jurisdiction the parties are allowed in their opening to state "briefly" their claim or defense. Practically, the word "briefly" is ignored. What was intended, and all that is necessary or of value, is simply a *statement* of the issues and evidence. Instead, it is frequently an elaborate address or manifesto, stating with minute particularity the claim or defense, its origin, development and history; detailing not only what the evidence will be, but what counsel of fervid disposition and sanguine temperament hope it may be; and endeavoring to supply by the vigor of the asseveration what may be weak and faltering in the performance.

The disposition to enlarge the opening to the proportions and office of the address of a temporary chairman of a political convention seems to be growing. It is certainly a mischievous and unfortunate tendency. It might, perhaps, be corrected by requiring counsel to put in writing their respective offers to prove, and a reading of these, together with the pleadings, would constitute the only statement. This might

also subserve another valuable purpose, for upon these respective offers the court might often be enabled to determine that there was no issue of fact to be presented, and no case to try.

Introduction of Testimony.

Little need be said as to the introduction of testimony. Time-honored rules are almost invariably followed. Perhaps the most salient point of criticism is the unnecessary consumption of time. The examinations are too discursive and elaborate. Usually the testimony of a witness goes to a single issue of fact. A few pointed questions ought to bring out that testimony. Cross-examinations are much too long. Repetitions should be prevented. "Fishing" should not be tolerated. Judges are, perhaps, most at fault in this. The attorney, whose client expects him to catechise sharply the other side, and who desires to win the applause of the onlookers by a display of his talent in this line, cannot be expected to curb this tendency. A judge ought not to be a mere moderator between contending parties. He is charged with the grave duty of maintaining truth and preventing wrong. He ought not to hesitate to *direct* the course of the trial; not arbitrarily, and not, perhaps, even rigorously, but with moderation, discretion and firmness.

Another waste of time occurs in the discussion of objections to testimony. Arguments on these questions ought rarely to be indulged. Questions seldom arise so important and obscure that discussion should be allowed. If a court is in doubt, it would perhaps be better to reserve the point, and after consideration pass upon it.

Argument of Counsel.

In Iowa we have a singular provision forbidding the court from restricting the time of an attorney in any argument before the jury. Reasons may be imagined why this might be excusable if not justifiable in grave criminal causes. But why such a provision should govern the conduct of trials in civil cases and misdemeanors is a mystery. As might be expected, such a privilege is often abused. Frequently, the

time taken in argument is out of all proportion to the requirements of the case. Subject to review for abuse or prejudice, the court ought to have the power to limit the argument.

INSTRUCTIONS.

In most Western States the charge of the court must be in writing and confined to points of law. Requests are usually submitted by counsel in writing, informally and without argument. They are rarely given as asked, but are treated by the court as suggestions, and, if approved, are incorporated in substance in the general charge.

It is certainly of advantage in many cases for the jury to have the charge in writing and take it with them to the jury room. This is especially true when many issues are involved, and the case at all complicated. But in many cases it is entirely unnecessary and useless. In civil cases, where only a single issue of fact is to be submitted, and in most misdemeanors, the charge in writing is of no practical value, and entails an unnecessary labor upon the judge. In such cases no harm could result from allowing the judge to charge orally, if he desired.

It is doubtful if the usual requirement that the charge shall be confined strictly to the law is in civil cases wise or salutary. Why the jury should not have the assistance of the judge, and the benefit of his trained experience in detecting error, subterfuges and prejudices; in discriminating between honest embarrassment and conscious falsehood; in sifting the truth from a mass of conflicting testimony; in measuring the creditability of witnesses and the probative force of testimony, it is difficult to understand. If judges cannot be trusted to express opinions and advise action as to the facts, upon what basis of consistency can they be trusted to expound and determine the law? That their knowledge and experience fits them to be of advantage to the jury in just those especial matters in which the jury most needs assistance seems conceded; but the rule still forbids.

In my experience the court's instructions are of continually increasing weight and influence with juries. Even in cases

against corporations, and other cases where "Granger" tendencies might be expected to be influential, it is now rarely the case that a jury will disregard the manifest logic of the instructions. It is felt as a reproach and a disgrace to have their verdict set aside, and the argument in the jury room effective as against such prejudices, is that they must follow the court's instructions or their verdict will be set aside to their own discredit.

VERDICTS.

Although the unanimity rule does not carry such a load of perverted justice in our rural jurisdictions as it does in cities, it has, perhaps, outlived its usefulness, at least in civil cases, even there. It is an anomaly in our law that has little reason longer for its retention. Our government is a government of majorities. A majority in the electoral college elects a president, and in congress determines the nation's policy for peace or war. It is recognized in business when boards of arbitration decide important commercial interests. It is recognized in our judicial system and governs our National and State Supreme courts. Unanimity means the rule of the minority; for a single "fixed" or stubborn juror may prevent a just verdict.

THE BENCH.

Of the bench in our Western jurisdictions, little need be said. The people seem firmly wedded to the elective system, with short terms, and inadequate salaries. Still it is a position much aspired to, and of increasing dignity and respect with the people. In some states waves of inconsiderate partisanship carry to the bench men disqualified and unfit, but such instances fortunately are rare and soon cure themselves. Charges of corruption and of wilful wrong are almost unknown, and the people rarely make mistakes either in the character or qualifications of their judicial candidates. Still it is true that the best members of the profession are not attracted to the bench, or if they accept, serve but a few years and soon return to the lighter work and better pay of the profession.

Bar.

Of the bar, rapid changes have been noted during the last two decades. The transformation from rapidly growing and developing communities into established settlements and towns has eliminated much of the cruder elements. The standards required for admission to the bar, and the excellent work of our law schools, have also materially assisted in elevating the profession. There are certainly not more than half the active practitioners now in the average county seat there were fifteen years ago. Those who remain are those who have succeeded in establishing a practice or in accumulating property. Many of these are men of fine talents and address who lead lives nearly analogous in their established habits of life, their methods of business, and devotion to literature or some other intellectual divertisement to the English country lawyer. As a class it is, perhaps, true that an American practitioner is on the whole even more conservative than his English brother. Suggestions for improvement rarely come from him. If sent to the legislature, he uses his place on the judiciary committee to see that no foolish innovations are foisted upon the administration of the law. "Prejudices survive on the shores of the Mississippi which Bentham assailed seventy years ago when those shores were inhabited by Indians and beavers," says Professor Bryce. And so impressed with this fact was Lord Coleridge on his visit to this country a few years ago, that he recommends the location here, rather than in the land of their origin of a "pleading park" where shall be preserved by sympathetic hands "the glories of the negative pregnant, *absque hoc*, *replication de injuria*, rebutter and surrebutter, and all the other weird and fanciful creations of the pleader's brain."

In the West, as elsewhere in the Union, the bar is always a potent factor in the formation of public opinion, and its members are leaders both in thought and action. Of them higher praise cannot be rendered than to say they merit the encomium of the late Justice Miller of the United States Supreme Court, who said: "It is here that we must look for

the continuation of the race of great lawyers. It is here that the learning is sound, the principles pure, the practice established. It is from some Western prairie town rather than some great metropolis that future Marshalls and Mansfields shall arise and give new impulse and add new honor to the profession of the law."

The Jury System.

In these times when a leading American law magazine says of trial by jury, "It is the greatest farce of modern times; it is an infinite evil in civil cases; in criminal cases it is a positive curse to society. Trial by jury is simply a trial by popular prejudice;"—when an eminent American judge advises its total abolition; when Lord Herschell, in England, writes that in all complicated cases it is in his judgment "eminently unsuitable;" when Lord Coleridge adds: "Long experience and much reflection lead me to give up the opinion in favor of it which I formerly entertained, and to adopt strongly an opinion adverse to it in civil cases," it is certainly wise to examine and weigh carefully the system.

In the rural districts of the Western States, there can be little question of its merits. Mistakes are so few and the advantages so manifest that no one with practical knowledge of its working would dream of its abandonment. There is no possible substitute for the jury system but trials by courts. And it may, without hesitancy, be said that juries make no more mistakes than courts, and are as often right in their verdicts as judges are in their rulings. When this is considered, and the immense benefit that results from the people's becoming thus identified with the administration of the law, the question is hardly longer debatable. It is, however, true that this is largely owing to the superior class of men who constitute our juries. They are not street loafers or court idlers, but farmers and tradesmen, who own their own homes; who read the newspapers; who, if not highly educated, are intelligent; and who, if they do not give many evidences of culture, are thinking men who form their own opinions, and who are independent enough to be just. What I say will doubtless seem extravagant to many, but it is an opinion deliberately

formed, and one which is strengthened by every day's experience on the bench.

In our rural districts little difficulty is experienced in obtaining fairly intelligent and unbiased juries. In cities, the tendency of reputable citizens is to color strongly on their *voir dire*, their disqualifications, being anxious to avoid service. In the country it is entirely different. It is generally and usually esteemed an honor and privilege to sit. The farmer has an outing, a view into court procedure, a chance to hear a trial, always a pleasure to him. It is a step out from his isolation into the currents of life. He returns to his home dignified by his service, and carrying with him the knowledge and experience he has acquired, which is not only of worth to him, but is also of considerable educational value to the community in which he lives.

GENERALLY.

Of the orderly conduct of *nisi prius* courts in Western rural communities, too much cannot be said in praise. The badgering of counsel, the brow-beating of witnesses, the coarse jokes and vulgar stories of the olden times and pioneer days have largely passed away. Court proceedings are orderly, dignified and seemly. Usually court-rooms are large and much of the time well filled. The people are interested in their courts and attend in large numbers every important session or interesting case. This has a tendency to put everybody on his good behavior. If it tends to loquacity and "showing off" on the part of the bar, it puts them on their metal, and inattention and carelessness are eliminated. Juries, too, feel its influence; and the publicity of the performance restrains hasty and ill-advised action, and assures a careful consideration of the issues submitted.

On the whole it may be said the administration of law holds the respect and confidence of the people. The verdicts of juries and decisions of courts are generally accepted as the final determination of the matters involved. Appeals are comparatively infrequent, and reversals not sufficiently numerous to encourage them. Only such cases are appealed as after careful examination furnish reasonable hopes of a reversal.

From a record of 168 contested cases, only eight were appealed. Four of these were affirmed, two were reversed, and two were dismissed. This would show only one case appealed in every twenty-one contested cases, and only one in eighty-four reversed. I am quite sure this is not exceptional. In the 83d volume of Iowa Reports 151 cases were reported. Of these 99 were affirmed, 48 were reversed, and 4 modified.

What I have said has especial reference to my own State, but I think with slight modifications will apply to most of the Western States within the Mississippi valley. In that great domain, with its constantly augmenting population and its rapidly increasing wealth, the administration of law may fairly be said to have kept pace with the progress of the people. With much that might be better, and much that ought to be improved, there is nothing discouraging or disheartening in either its present condition or future prospects.

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