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Charles D. Breitel

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THE QUANDARY IN LITIGATION†

CHARLES D. BREITEL*

There is a quandary in litigation, and the quandary presents a paradox. Everyone knows that throughout the nation the courts are congested; yet it is also true that there is a decline in litigation.

The paradox, of course, stems from the accident case. In this field, litigation flourishes. A summons quickly follows an accident almost as a matter of course. And the accidents are many and ever-multiplying. It is these cases which cause the congested condition of the courts and which create the paradox.

But there is a decline in litigation of every other kind. There are fewer contract cases. There are fewer equity cases. There are fewer appeals in cases of that kind. Businessmen everywhere resort to arbitration in preference to the courts. Government devises one type of administrative agency after another to handle the many disputes which require determination and which stem from the tremendous growth of regulatory statutes in our economy. When neither arbitration nor government agency is available, businessmen compromise their claims, usually taking less than what they are entitled to, rather than seeking redress in the courts.

Other important kinds of court business, such as those relating to children, family matters, certain criminal or quasi-criminal offenses, are handled in administrative agencies, or special tribunals called courts, which actually function like administrative agencies, with the informality, privacy, and de-emphasis of the adversary process that is characteristic of such agencies. Most lately, there is strong demand to bring the classic matrimonial litigation within similar agencies or courts. This last demand, despite its very controversial aspects, is becoming more difficult to resist.

The litigation bar, except that part of it which handles the accident case, is smaller than ever before. In the large cities the number of dis-

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*Associate Justice of the Appellate Division of the New York State Supreme Court of the First Judicial Department; A.B., University of Michigan, 1929; LL.B., Columbia University, 1932; LL.D. (hon.), Long Island University, 1953.

tinguished and leading members of the bar who serve in the profession as litigators is ever declining. Thus, we find a decline in both number and quality.

The economic effects on the bar are marked. The most profitable area in the profession lies not in litigation, again excepting the accident case. The greatest financial reward for the practicing lawyer is found in non-litigated commercial practice. This condition is not peculiar to this nation. It is also true in England. The once-famed barrister still retains his prestige, but his significance in the legal community and the financial rewards he attains are considerably less than those of the solicitor.

The truth has even gotten through to the law student. Not so long ago, they all hoped to become litigators. Today, the more popular ambition is to excel and specialize in the tax field, the corporate field, and in contract negotiation, and to some extent, in government service.

These are the undisputed facts.

The interesting questions are: Why has this come about and what does it mean to the community and to the profession. The answers require some examination of the perspective in which the questions arise.

The substantive law, that is the law which lays down the rules how people should behave and what are the consequences of their behavior, is progressive and attuned to the needs of the times. This is true of the substantive law derived from statutes. It is also true of the substantive law derived by the process of judicial decision in the courts—the decisional law as contrasted with statutory law.

There is no significant lag in the development of the substantive law, either in the legislative process, or in the judicial process which we, in the Anglo-American jurisdictions, refer to as the common law. Indeed, the progressiveness of our substantive law is perhaps greater today than it has ever been. Certainly, it is greater in the scope of its development and in its rate of movement than it ever was in the nineteenth century. Then the dead hand of a narrowly applied doctrine of *stare decisis* tended to crystallize anachronisms in the law. Indeed, there are even some who feel that the twentieth century has seen an excessiveness in the flexibility of law—in its tendency to change too easily, too quickly, and sometimes, perhaps, unsoundly.

There are few, if any, significant demands for major revisions or codifications of the substantive law. In fact, there exists today machinery to make sure that the law progresses in attunement to the needs of a rapidly

changing society. Judicial councils, law revision commissions, the restatement work of the American Law Institute, the work of the commission on uniform state laws, the multiplying legislative commissions revising the law in particular fields, the activity of bar associations and their committees in proposing law reforms, are all rich and vital sources for significant change in the law—on the substantive side.

No analysis would find as a cause for the decline in litigation the marked development in modern substantive law. Despite changed conditions, where there is a wrong, the courts provide a substantive remedy. From this, one would assume—and rightly so—that such dynamism in the substantive law would be productive of more, rather than less, resort to the courts.

But let us now look at what the lawyers call the adjective or procedural law—the law that governs the manner in which actions and proceedings are brought, tried and concluded. In this field there have been revisions too. There have been repeated recodifications. But is that procedure in harmony with the needs of a modern society? The answer is a doleful no.

Before the Field codes of the middle of the nineteenth century, adjective law was largely handled according to the common law. All of the common law does not go back to the year books and the later middle ages, but a good deal does. Shreds and remnants of the feudal period remained. Formalism, technicalities, long-winded documentation, literalism, and sometimes what seems to laymen like nothing more than abracadabra, governed the mode of litigation. A Charles Dickens made the most of it.

Then came the Field codes in the middle of the nineteenth century. This, everyone hoped, was the beginning of a new era. The common law forms of action were to be abolished. The rigid separation between law and equity was to be eliminated—they thought. Pleadings were to be simplified—they said. Litigation delays were to be short-circuited—they hoped. The concept was that the appropriate relief should follow from a statement and proof of the pertinent facts—that form should not prevail over substance. It was to be expected, however, that many of the old procedures would persist. They did.

Unquestionably, the Field codes were a great improvement. They were a revolutionary change for the good. The movement was started in New York, and spread to the rest of the nation. In some states, the spread was very slow. Even so populous and busy a state as Illinois came over only a short time ago.

But let us not forget that the Field codes had their genesis in the mid-

nineteenth century. The United States was then still a young, second-ranking nation. Its development as a great commercial community was just beginning. The technological development of our society was still well ahead in the future; although to the possessor of the steam engine, the steamship, the telegraph, the railroad, and the about-to-be iron ship, it seemed like a very modern world indeed. But the highways were still traversed by vehicles drawn by animal power. The mechanical, chemical, and electronic revolutions were still to occur.

But this is to speak only of physical things. Our communities were quite different. People were not so many. Their relationships were comparatively simple, whether it was the relationship of the family or of the group, or the relationship between groups. The term "big labor" would have been meaningless. There was virtually no "big business" in the sense that we use that term. The problems associated with our complicated society were hardly conceivable.

This is the period in which the Field codes were developed.

Reference was made earlier to the fact that there have been repeated revisions of the Field codes. But none of the revisions represents any more than a tinkering—albeit, sometimes, a great tinkering. Even as conceived in the Field codes, procedure has always remained tied to involved concepts of process that bring parties before the court, formal pleadings which state the claim, motions made to obtain clarification or raise points of law with regard to the pleadings, still more motions to obtain additional information by way of bills of particulars or by examinations before trial, or the discovery of documents. Appeals from these preliminary matters may be taken.

After all this has occurred, the case eventually comes to trial. The trial moves at a nice deliberate pace. And after the trial there may be time before there is a decision, or judgment, of any finality. Even in jury cases there are still motions for new trial and to set aside the verdict. After judgment is obtained there may be leisurely appeals, with their own complement of motions and, in many states, a still further appeal to a third court.

Finally, after a judgment becomes as final as one can be, usually years after the action was started, the question often arises as to what one does with the money judgment. I mean just that; how does one collect it? And then we are off to more proceedings, more motions, more examinations, and even lawsuits, and maybe eventually, redress will be done. But, of course, even the successful litigant will have to pay his attorney and the many expenses.

It is not surprising that the layman does not like litigation. And by that I do not mean that he should have any particular joy or satisfaction out of any kind of dispute determination, but I use the phrase in its colloquial sense to mean that he does not like it as he does not like death. Anything else is better. And, as a matter of fact, I do not know any lawyers who like litigation for themselves.

So, there is a sharp dichotomy between the substantive law and the procedural. The one is modern, contemporaneous, and largely in harmony with the society in which it exists. The other is largely a remnant of another day which does not serve the needs of our society.

The accident case, of course, presents its own peculiar face.

There always were accident cases, but there were never so many. There were never so many people killed, maimed and made sick and disabled as we have today. And it is all due to more people—more people involved with modern machines, modern structures and modern activities that have made ordinary living more dangerous and more deadly than ever, except for the world wars of this century. The result has been this great flood of litigation in one area of the law, keeping those engaged in that kind of litigation busy and congesting the courts, but, in contrast, there is the decline of almost every other kind of litigation.

The accident case has given the courts a very special problem. This is the problem of calendar delays. This is quite different from the kind of delays in litigation about which I have been speaking. This is the delay that arises because the courts, with existing procedure, just do not have the quantity of men and facilities to handle the great volume of such cases. It is not caused by anything in the accident case that peculiarly makes for delay in the progress of the litigation itself. In fact, most accident cases involve fairly simple procedure because the issues of fact fall into such simple categories and most of them involve a repetition of the same principles of law. But my purpose is not to discuss the calendar delay caused by the accident case, or even the suggestion made by some, with which I strongly disagree, that their very volume alone may require that accident cases be disposed of by some sort of administrative agency.

Nor do I think that the prevalent use of the jury in the accident case is the basic cause of all our congestion troubles. Even if it were, I would not be willing to sacrifice the jury system in this country for the sake of expedition. At the same time, one should be aware that in England there has been a most satisfactory elimination, for all practical purposes, of the jury system

in civil cases. But England is another country. Yet again, my purpose is not to discuss the jury system and its possible effect in protracting litigation.

On the contrary, my purpose is to discuss the delay in procedure of the non-accident case, its costliness, its anachronistic aspects and its lack of adaptation to modern conditions which have made for the decline in litigation. This, even in the non-jury case.

The result of these weaknesses in non-accident litigation has led the community, particularly the commercial community, to resort to the arbitration process. The arbitration process is a very good one. It is quite ancient. It was used even in the time of the Romans. It is relatively expeditious, much less costly than litigation, although not nearly as inexpensive as many people say. When properly used it invokes the expertness of persons who are familiar with the very subject-matter of the issue being submitted to arbitration. It avoids appeals by not allowing them. It avoids delay by permitting only the most limited judicial review of the agreement to arbitrate and the general validity of the award. The findings of the arbitrators on the issues of law and the issues of fact are just about conclusive, no matter how erroneous. Arbitration is, in short, an efficient way in which to dispose of disputes, but the word "efficient" should have quotation marks around it.

Arbitration is a very fine device, but it very definitely is not good for all kinds of disputes. Because the arbitration is largely conducted by non-professional persons, on a part-time basis, there is often a lack of skill applied and a lack of responsibility that attaches to a task done by one whose job it is to do it. Because there is no judicial or appellate review there is no way of correcting mistakes, and mistakes are recurring human products. Because arbitrations are handled on a case-by-case basis and the arbitrators are not bound by precedent, the determinations have no precedent value and may be quite inconsistent with another. The advantage of each side being able to predict the result at the outset is thus lacking. The proceedings are largely conducted in private. Furthermore, the adversary system—that is, the system by which each side is represented by counsel so that there is some equalization in the capacity to present one's position—is often lacking in arbitration. Sometimes it is even absent because there are trade associations, although they are declining in number, which forbid the presence of counsel in arbitration proceedings sponsored by the association.

One complaint frequently registered is that arbitrators—unlike ex-

perienced judges—have a tendency to compromise even the most meritorious claim. It may safely be assumed that King Solomon, great jurist that he was, would not, in the end, have cut the baby in half. Nor would he have decreed that the custody of the child be divided between the two alleged mothers.

Despite all this, many of our businessmen, and others as well, have chosen arbitration as the device for dispute determination because of their unhappiness with what is entailed in judicial litigation. At least there is speed, less expense, and there is still the possibility of justice.

As in our modern society there have been developed new programs in the regulation of the affairs of business, labor, and in the care of the unfortunate in the community, government, too, has avoided the courts. The avoidance is accomplished by the creation of the administrative agency.

In the administrative agency, formalism and the involved procedures of judicial litigation are curtailed. Strict rules of law are, to some degree, dispensed with. The rules of evidence are substantially dispensed with. Hearings are informal. Determinations are summary, and the further proceedings to enforce determinations are equally summary. Generally, there is little publicity attached to the proceedings and the part of the lawyer is usually slight. There is quite limited judicial review. The process is expeditious, not costly, and there again is the possibility of justice.

This analysis should not be taken to mean that the arbitration process and the administrative process do not have their unique place. Indeed, they do. They are as modern and as necessary as the electric light.

The distinction is that because arbitration and the administrative agency are good for many purposes, they should be used in areas where they are not so good because the judicial process in litigation is presently inadequate. And this, in fact, is what has happened.

There have been some interesting instances where this last distinction has been tested out. After World War I there was control of residential rents in New York State. It was handled exclusively through the courts. It worked quite well and what is very important the rent controls did not last longer than the emergency required.

In World War II residential rent controls were placed in effect by the federal government. And those rent controls were handled exclusively on an administrative agency basis. When the federal controls ended New York State carried forward the same system of controls, utilizing a state administrative agency for that purpose. We still have in New York such rent

controls and an administrative agency that administers them. Perhaps this had to be because during World War II and its aftermath, the scope of residential rent controls was so great and so narrowly defined that perhaps it was not capable of being handled in the courts.

But here we have an interesting comparison. In New York State when the war was over a very serious condition occurred with regard to commercial space in New York City. The need for controls became evident if the commercial community was not to be destroyed by the economic accidents of the war's aftermath. Controls were imposed by the Legislature, but this time the system devised was to handle them through the courts by a summary procedure that was as unlike the common law or the Field code type of procedure as could possibly be.

The results were literally magnificent. After a short period of congestion and false starts, the new system worked very smoothly. Proceedings were summary, but all of the typical safeguards of the judicial process were attained. All of the proceedings were open to the public. The rules of law and rules of evidence were applied. The right of appellate review was kept intact. Proceedings were expeditious. They were not costly. And because of the use of all of these safeguards the incidence of justice in the results had to be about as high as human beings could make it. At the present time we still have those controls, but much reduced in scope and they are definitely on the way out. Most commercial space is no longer controlled. We do not have the practical, political problem of abolishing an administrative agency.

This last illustration indicates that there are ways of so drastically revising our procedure in the courts that they can handle better tasks of the kind we now pass to administrative agencies and to arbitration. It also suggests that what may be wrong with our courts today is our adjective law, rather than anything with the nature of courts as such.

Lest there be a misunderstanding, this is no special plea for the lawyer, or even for judges. The greatly expanded government services, and especially the administrative agencies, have required huge numbers of lawyers in areas where there were no lawyers before, because there was not that area of law before. The arbitration process uses great numbers of lawyers. So this is no special plea for the lawyer who practices at the bar. He will earn his bread whether we have more or less judicial litigation. Indeed, the decline in the litigation bar is partly due to the fact that he is earning his bread so much better in non-litigation fields of the law.

It is the public that is the loser in the decline of the litigation process

and the litigation bar. There are surviving values in the judicial process which should not be lost.

Let me tick them off.

The court proceeding offers the jury system for determining the facts. It is not infallible but, in most cases, the best device available.

There is also a professional, experienced, permanent judiciary, the traditions of which impose standards hard to parallel. Given obvious limitations, the members of the bench have an independence which promotes impartiality and disinterestedness unmatched in other fields. The proceedings are open to the public. The record which formed the basis for the court's determination is there for all to see.

Associated with the judicial system is the adversary process. Each party, or his chosen representative, is expected to present his case as best he knows. There is no dependence on the skill or enthusiasm of government-designated or part-time "third parties."

There is also the system of appellate courts. From a somewhat broader and detached view, they review the record to make certain that the correct law was applied, that the trial was fair and that the trial court's determination was not the product of prejudice or expediency.

In the judicial proceeding, there is the permanent, formal court, with a dignity and tradition developed through the centuries. Our courts are tied inseparably to constitutional rights which we cherish and a framework of rights and duties which makes our approach the ideal of being a government of law, not of men. Inevitably, the judicial process, relying on precedent but focusing on the case at bar, must make a substantial contribution to the development of a sound body of rules of behavior. This is the grand tradition of the common law courts.

The judicial process is a fine one; yet it is in decline. What is the answer then?

The answer is a drastic revision of our procedure. But this means more than just recodification of the statutes, as needful as that is, or even a simplification of the several existing steps in procedure. Thus, the fine recodification and revision in Missouri, good as it is, and overdue as it was, does not meet the problem I suggest any more than the past or proposed recodification in my state or the great advances of the federal procedure. The revolution must be much greater.

The key to the solution lies in the development in what we today regard as summary procedure. It is not unlike the change that was wrought

in the development of summary proceedings to gain possession of real property, as contrasted with the common law action of ejectment.

Summary procedure requires that—at the outset—the parties and the court come to grips with the controversy both with respect to its fact and its law aspects. The issues of fact, if any there be, must be delineated; the applicable law determined and immediately applied. Where there are no real issues of fact, the court must not hesitate to decide the case forthwith. Where there is an issue of fact to be tried, summary procedure calls for management by the court, but at the instance of a party, of the pre-trial proceedings and of what we now regard as the calendar aspects of the case.

Let me be more specific.

There is no reason why most commercial litigation should not be instituted by process accompanied by papers disclosing at the very inception the plaintiff's evidentiary proof. The defendant would then lay bare his proof. And this should be done on short notice, except when reason is shown for proceeding otherwise. In other words, the typical commercial contract action would be instituted, or at least be capable of initiation, on the kind of papers now submitted on a motion for summary judgment.

On the return, the court would in many cases be able to dispose of the controversy. Where this is not possible, stipulations of facts and the limitation of the controverted issues of fact would be possible. Issues of law could be framed and, in some cases, decided. Moreover, the further progress of the case should be discussed informally and disputes as to procedure resolved. In short, applications for intermediate relief, examinations before trial, discoveries, particularization, and whatever else there may be, should be decided then and there. A schedule would be established to be followed by the parties, and automatic remedies provided for failure to comply with the schedule.

Much of this has already been successfully attempted in the English practice. Our own scattered imitations of the English summons for directions have been partially successful, and the partial quality of the success is due only to our failure to absorb the full spirit of summary management.

What is being suggested, however, is not to be confused with the pre-trial conference and pre-trial order adopted in the federal procedure, and so recently adopted in Missouri. This pre-trial procedure, good as it is, is but one step in a procedure which is still basically like that which followed the Field Codes. The real need is for the development of a summary procedure which initiates and concludes the seeking of relief at the hands of the court.

Thus, the need is for informal and speedy summary proceedings as we have them already in the courts, plus the use, borrowing from the administrative agency, of court management of the case from start to finish, even as to the enforcement of the judgment, and the use of speedy, inexpensive and direct modes of proof.

Built into this whole framework of summary and court-managed procedure, which thrusts the affirmative responsibility on the court of managing and progressing the action, there should be residual power in the court to devise and adapt flexible procedural devices to meet the needs of particular litigation. This should all be keyed to expedition and the lessening of costs. In other words, the very direct, and sometimes informal, procedure that we associate with a well-run arbitration or a well-run administrative agency should be utilized in the courts.

Just by way of example, consider the problem of expert proof. Our present judicial method is just short of being disgraceful. The use of controverting experts before judges who are not particularly expert in the field or before lay jurors is notoriously a lottery of decision rather than a rational process. Especially in the commercial case, there is no reason why, as a part of the pre-trial managed procedure, issues of fact involving expertness in technical fields should not be handled by reference to impartial experts and their findings be binding upon the parties in the action.

One of the vaunted arguments in favor of arbitration is that, for instance in the textile trade, the issue of quality on a breach of warranty claim can be determined in minutes by expert arbitrators who are familiar with the field. There is no reason why in a judicial proceeding the value of such submission to experts could not be attained by pre-trial reference to impartial experts, and at less expense. This is just an example of the kind of thing that is needed.

There are many similar examples at hand. Thus, in cases involving complex accounting problems, the findings of a court-appointed impartial accounting firm would seem a much more reliable and expeditious basis for decision than the method presently used.

Just the other day, in an accident case, our court was presented with an appeal illustrating what I am driving at. The plaintiff had sustained serious injuries as the result of falling on an exposed metal rod which extended through a concrete block. Liability turned, in part, on the question whether it was physically possible and the custom in the construction trade to bend such rods over during the course of other work. The experts, as usual,

testified both ways, and the jury had to decide the issue by assessing their credibility. Much more satisfactory would have been the testimony or report of an impartial expert with first-hand knowledge of the practice in the industry, supported by a survey.

As to appeals—there is no justification, and the responsibility rests more on the bar than the bench, for appeals taking a year, if not longer, before they are determined. The imposition of a mandated schedule for progressing appeals with automatic dismissal provisions would do much to eliminate this kind of delay, or at least reduce it to reasonable proportions. A judicial proceeding would still take longer than one before an administrative agency or in arbitration, but the difference would not be so great.

Something must also be done to cut down the printing costs of appeals. In some cases, appeals can be decided on the typewritten record, perhaps supplemented by printed portions. But for the larger number of cases new methods of reproduction must be devised or means discovered for shortening records. We know already, from extensive studies in New York State, that this is a most difficult problem. Nevertheless, a solution must be found if appeals are not to become prohibitive in cost.

Moreover, with regard to appeals, summary procedures should also be readily available. There is no reason why stays pending appeal, as well as the fixing of schedules for the serving and filing of briefs and records, should not be handled on a summary basis before one justice of the appellate court. In my own court, as a practical matter, this has been frequently done. The matter is usually set in motion by an application for a stay pending appeal. The clerk telephones opposing counsel, and the matter is resolved at an informal conference in chambers at a time convenient to all. A clerk of the court attends the hearing in order to advise the court and the attorneys as to when the appeal may be heard and to assist in the prompt preparation of any paper work that may be involved. But such handling should not depend upon the accident of a stay application. Rather, the procedure should provide for such management, as a matter of course.

The question of the amount of paperwork is very much a part of this picture. Cost of stenography today is many times that which it was only a generation ago, and much of our paperwork is an empty formalism. Even our pleadings in the common case are all but a waste of time. In many inferior courts throughout the land, pleadings are dispensed with and no harm is done. The mere statement in most general terms of the nature of the claim suffices. There is no reason why similar devices could not be used

even in superior courts, especially where court participation at the inception of the case is available. In some states, such as Florida, and sometimes even in such a busy court as the district court for the District of Columbia, applications are brought on merely by a short written notice of the nature of the application to be made. The application is decided by oral argument, and affidavits and briefs supplied only when it appears necessary after both sides have presented their position to the court.

It is not possible within the scope of this discussion to detail the many possibilities. Moreover, it would be unwise for anyone to think that the possibilities should be developed out of head and out of hand. It is no easy task to develop the spirit of a summary procedure in the courts. But this brings me to the kind of procedure revision and reform we still attempt.

There is persisting fallacy that simplifying the language of statutes, making them shorter rather than longer and reshuffling their location, is procedural reform. It is not at all. At best it is an improvement, and worthwhile only in facilitating the understanding and handling of existing procedural law. It does not mark the fundamental kind of procedural reform which is needed. In my own state we did just that in the 1920's. Today we are about to do almost the same thing in order to catch up with the procedural reform of England, the federal courts and with what was done in Missouri quite recently. But if the quandary in litigation is to be solved much more must be done.

This suggests to mind another question whenever procedural reform is discussed. When the statute simplification, code reshuffling, statute shortening device is resorted to, one is told that it is better to accept half a loaf rather than none. The trouble is that in accepting this half-loaf, we are inclined to believe we are getting something which we are not. It is good to have statutory simplification, and whatever simplification in procedure is available, but we should not confuse the reform of a statute and the simplification of an existing procedure with fundamental reform in the procedure to which it relates. We should not believe that we have thus solved the problem of the decline in litigation. It is more than simplification of the existing forms of procedure that we need. It is the provision of a drastically summary procedure, available as an alternative to traditional, even if simplified procedure, that is required.

If I am right as to the cause of the decline in litigation, the whole philosophy for its handling in the courts needs complete revision. There is need for the invention of new methods—new for the courts, that is, and

largely borrowed from what we have seen succeed, without the loss of justice, in the field of the administrative agency and of arbitration. The trick is to borrow these summary, informal and less costly procedures and yet preserve the values that we find in the judicial system.

This mammoth problem will not be solved soon, quickly or easily. Nor may it be solved merely by conferring rule-making powers upon the courts. Moreover, it cannot be solved by the courts alone, the legislatures alone, the bar alone or the law school alone. It can only be solved by all participating in the process of solution and before that happens the dream must be envisioned and then the time spent to develop a sound program. It requires the imaginative invention that will make even the Field code revolution seem only a partial step in the modernization of litigation when that occurred.

This may never happen. The conservatism of bar and bench in effecting changes in the judicial process is notorious, indeed. If it does not happen, however, the trend will continue. And that trend is, as was noted earlier, to lift from the courts more and more of the subject-matter of litigation except only for the accident case and the area of governmental litigation. The loss will be great—great to the community, to the people and incidentally to the law.

The condition is no one's fault. It has arisen from the development of a society. The fault will be only if we should fail to remedy the outmoded procedural concepts causing the decline in the courts.