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E. Ray Stevens

ENGLISH COURTS AND PROCEDURE

By HON. E. RAY STEVENS*

Lest I should be accused of blowing trumpets of alarm because of the fact that I have attempted to portray in somewhat full outline some of the defects of our present practice and procedure and some of the defects of our court organization, I want to begin by saying that I believe there is less in Wisconsin practice and procedure that should be changed than in that of a great majority of American states; perhaps less than in any other state in the United States, because we have succeeded so well in preserving and in reviving the spirit of the Code of 1856. But I feel that the fact that we have succeeded so well ought not to lead us to shut our eyes or close our ears to anything that may be an improvement in our practice and procedure, or in our court organization.

The experience of more than twenty years upon the trial bench in Wisconsin has given me the deep-seated conviction that, so long as our courts are compelled to work with existing legal and judicial machinery, they cannot in all cases administer speedy and even-handed justice—a deep-seated conviction that there is need for change in the organization of our courts and in our rules of practice and procedure; and that until such change is made the administration of the law will be justly subject to criticism, but not by any means to all of the criticism that has been current in recent years.

Those who have engaged in the work of the court know how their ability to administer even-handed justice has been curtailed by rules of practice and procedure that have been imposed upon them—not by the courts, not by the members of the bar, but by the public acting through its representatives in the legislature.

Our codes of procedure were enacted in the belief that the way to improve the administration of justice was through a legislative code. But after nearly three score and ten years experience under the most perfect rules that legislative action has yet been able to devise, we still hear the same criticisms that led to the enactment of the codes. The reason is plain. Rules of procedure must be made flexible to meet the needs of individual

*Judge of 9th Judicial Circuit. Address delivered at the annual conference of the Wisconsin State Bar Association, June 28, 1923.

cases. They must be readily changed when change becomes imperative, without waiting the slow, cumbersome and uncertain action of the legislature. The body that is best qualified to make the rules that are its working tools is the body that uses these rules every day. The legislature is no better qualified to make the working tools of the courts than are the courts qualified to prescribe rules of procedure for the legislature.

It has been my privilege during the past twenty years, acting as an individual and as a representative of the Board of Circuit Judges, to appear before legislative committees to ask the enactment of laws that would remove some of the barriers that bar progress along the path that leads to a better and more just settlement of the rights of those who appeal to the courts for aid. In a very large measure these efforts have failed, not because the legislature is not interested in improving the administration of justice, but because most of its members have not had the training that qualifies them to pass on such questions. They are therefore inclined to continue existing rules rather than to enact new ones whose force and effect they do not understand. If the lawyers and judges who attempted to secure the passage of these bills had devoted the same amount of time and energy to an improvement of the rules of practice and procedure there would remain little cause for complaint. Insofar as these statutes impede progress and tie the hands of the courts, the people who criticize the administration of justice must share responsibility for these statutes with every other citizen of the state.

The distrust of the legal procedure of the present day is shown by the rapid increase in the number of commissions, commercial courts and provisions for arbitration, because in these tribunals parties can have their differences settled without being bound by the rules of practice and procedure that hamper the courts in the administration of justice. The demand for a change is so insistent and so widespread that it seems certain that rules of practice and procedure will be changed. But change does not necessarily mean improvement. It may mean the exact opposite. The changes made in England which we are to consider meant improvement because they were conceived and put in form by the ablest members of the bench and bar of Great Britain. Because of their knowledge of the problems that arise in the administration of the law lawyers should take leadership in the formulation of such changes as will remove all just criticism of the ad-

ministration of justice. In so doing they will perform a duty which they owe to the state and a duty which they owe to their profession, because the rightful compensation of the lawyer is decreased, his labor increased, and the scope of his useful activities limited by rules of practice and procedure that impose needless burdens upon his time and energy.

The lawyer's duty will not be fully performed when he has formulated the changes that should be made, for there still remains the equally difficult task of securing the needed legislative action. In England judicial reform progressed slowly. Fifty reports dealing with needed reforms were formulated and a half century passed before the Judicature Act of 1873 became a law. But the task which confronts Wisconsin is small compared with that of England and Wales, which had a court organization that had grown Topsy-like out of the institutions of primitive England. Many of these courts had a strange mixture of executive and judicial functions. There were separate courts to settle controversies arising in the church, or in the forest, or between merchants, or soldiers or sailors. Each of these courts had its own rules of practice and procedure.

Many of the rules of practice and procedure that have brought these changes in England are now in force in Wisconsin. Some of them were a part of the code of 1856. The last twenty years have been particularly fruitful in improving the administration of justice in Wisconsin. It was during these two decades that the supreme court by its decisions breathed new life into the code, bringing practice and procedure into harmony with its spirit and its true purpose by ridding the code of many old common law rules that had been engrafted upon it in its early administration by those who were trained in the technicalities of the common law.

During the past two decades the legislature has adopted some of the best provisions of modern English procedure, which are found in such statutes as those permitting the joining of defendants against whom relief is demanded in the alternative, liberalizing amendments so that actions may be changed from law to equity or from tort to contract, the transfer of actions in whole or in part to the court that has jurisdiction in case the action is brought in the wrong tribunal, liberalizing statutes as to the joinder of causes of action and as to the bringing in of third parties as well as those relating to appeals.

The spirit of these recent statutes is exemplified by the legislative declaration that no appellate court shall reverse a judgment or grant a new trial for errors in instructing the jury, in the admission of evidence, or for any error in any matter of pleading or procedure, unless it shall affirmatively appear that such errors have affected the substantial rights of the party appealing. These beneficent changes have all been taken from the reformed procedure of the country from which we acquired our common law.

The fundamental concept of practice and procedure in Great Britain is that every action should proceed promptly to a decision on the merits and that the parties ought never to be turned out of court because of some error in practice or procedure which in no way involves the merits of the controversy. With this end in view they have so framed their rules as to eliminate all unnecessary delays, to narrow the issue and to shorten the trial. They conceived: "That the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in a particular case," to quote the language of Collins, Master of the Rolls, a great English Judge.

It is the inflexible general rule of procedure prescribed by legislative action that often compels the courts to do that which may cause injustice in the particular case and result in just criticism. But the responsibility rests, not with the lawyer or the judge who is sworn to administer the law as he finds it, but with the legislature which prescribed that particular inflexible rule. Nor is the legislature justly subject to criticism because it has not had the infinite wisdom to enforce all the difficult questions that may arise in the administration of the legislative rule.

England has recognized that it is impossible for any legislative body to establish rules of practice and procedure that will not result in injustice in some particular case, and has solved the problem by vesting the rule-making power in the Rule Committee composed of the presiding judges of the three divisions of the great trial court of England, with four other judges and four practicing lawyers chosen by the Lord Chancellor. This body of eleven men possesses all the power of both the legislature and the courts of this country to prescribe rules of practice and procedure, subject, however, to the right of either House or Parliament to

nullify a rule after it has been promulgated by the committee. So satisfactorily have the rules been formulated by this Rule Committee that not one of its rules has been nullified by parliamentary action since the Judicature Act was passed in 1873.

This method of prescribing rules of practice and procedure is now in use in all but a half dozen of England's widely scattered possessions, which shows that as a method of regulating practice and procedure it is well adapted to widely divergent conditions, ranging from populous modern industrial communities to sparsely settled pioneer countries.

This method of rule making does not involve the exercise of any new and untried power in this country. All courts have the power to make rules, the only limitation being that such rules shall not contravene legislative acts. The equity rules recently prescribed by the Supreme Court of the United States demonstrates the ability of such a rule-making body to modernize, simplify and greatly improve practice. To have made the same improvements by legislative action would have taken years, if it could ever have been accomplished.

By far the greater number of legislative acts passed in Wisconsin in the last two decades for the purpose of liberalizing and modernizing practice and procedure were drafted and their passage urged by the judges of Wisconsin. Chapter 219, Laws of 1915, is the greatest single contribution to the improvement of the administration of justice which has been made in the past twenty years. This act was drafted by the justices of the Supreme Court in response to a legislative resolution adopted in 1913. There is a well founded suspicion that this resolution was drawn by a member of the court. How much simpler it would have been if the court could have promulgated these rules and made them effective at once, subject to legislative veto, instead of awaiting the action of two biennial sessions of the legislature.

Some significant facts appear upon a comparison of English and American procedure. Some of the most important cases that come before the English courts are finally decided by the Court of Appeals within ninety days from the time when the action is begun. In this country it often takes more than ninety days to join issue, or if issue is joined in less time it may be an issue of law which may delay the trial of the case for six months or even a year if an appeal is taken. In England less than one half of one per cent of all cases are decided upon appeal or

questions of practice and procedure. There have been American jurisdictions in which as high as fifty per cent of the cases reversed on appeal were decided upon questions of practice and procedure which in no way involved the merits of the controversy.

These and similar facts lead us to inquire why the courts of England seem so much more efficient than those in America. Many causes contribute to bring about this result. One that especially interests the American judiciary is that the English judges, who correspond to our circuit judges, receive salaries of £5,000 a year and they are always knighted upon appointment, so that these places upon the bench attract the best legal minds of the realm. English courts are so organized that the time of their judges can always be used to the best advantage. But neither the ability of the judges nor the organization of the courts could accomplish these results were it not for their rules of practice and procedure.

The distinguishing feature of these English rules is that every step in the action from its inception is controlled by masters who have the powers of a judge at chambers. It is their purpose to simplify the issue, to eliminate all unnecessary proceedings and to expedite the final determination of the case on its merits.

In England an action is begun by the service of a writ of summons, without pleading, except that in the case of liquidated demands, the plaintiff may by indorsement upon the writ state the nature of the claim and the relief demanded. The defendant must in most cases enter his appearance in eight days. If he does not appear judgment goes by default. If the defendant appears, the plaintiff is required to serve on defendant a summons for directions, which brings the parties before the master, who hears counsel representing the parties, ascertains the issue, determines whether pleadings shall be served, and, if so, when service shall be made, determines the place and method of trial and settles all other matters which are preliminary to a trial on the merits. If the parties desire to take depositions or adverse examinations or to have the right to inspect documents, the time, place and manner of examining such witnesses or documents are fixed by the master. Thus at a single hearing, in advance of pleading, all matters preliminary to trial on the merits are arranged.

The parties have no right to take any of these steps without the order of the master. Often adverse examinations or other similar proceedings are rendered unnecessary by admissions made at

these conferences or by books and documents voluntarily submitted for examination. All who have participated in such conferences in the judge's chambers know how quickly such matters may be arranged without the necessity of a formal hearing.

Usually the statements of counsel in response to questions by the master or by opposing counsel develop the issue to be determined with greater certainty than do formal pleadings. The master or the parties may dictate a statement something like this: "Action on promissory note for £500 given January 10, 1923, by defendant to plaintiff. Defendant admits giving the note, but alleges that it was paid by work performed for plaintiff between January 10, 1923, and June 28, 1923." With the preparation of this statement the case is at issue without further pleadings. In other cases the master may direct that letters or affidavits stating the positions of the parties stand as pleadings in the case, or he may direct the service of formal pleadings.

When formal pleadings are ordered counsel are required to follow the model forms prescribed by the rules which are in the form of tabulations that disclose the essential facts at a glance. Our verbose pleadings, on the other hand, conceal the facts in long drawn out narratives which serve no useful purpose unless it be to increase the taxable costs. If the English lawyer should draft such a pleading, instead of taxing costs therefor, he would have costs taxed against him for failing to follow the prescribed model.[1]

The fundamental purpose of the master is to ascertain the exact issue upon which the case turns and then to so frame that issue

[1] By way of illustration a few of the model forms are given herewith:

In the High Court of Justice
Chancery Division.
Between John Doe, Plaintiff,
and
Richard Roe, Defendant.
Statement of Claim

1. The plaintiff is mortgagee of lands belonging to defendant.

2. The following are the particulars of the mortgage.

(a) Date: April 16, 1913. Mortgagor: Richard Roe. Mortgagee: John Doe.

(b) Amount: £5,000.

(c) Interest: 6 per cent.

(d) Property mortgaged: Home Farm Kent.

(e) Amount due: £5,320.

that the parties will be fully informed as to the position of their adversary. Under this procedure by which the parties are required to lay their cards on the table face up, each party is able to determine more accurately the probable result of the trial—in fact the proceeding before the master is a trial in miniature. The result is that a very large percentage of the cases are settled, compromised or dismissed while they are before the master.

The same results may be achieved in American courts. During the week prior to the opening of a jury term it is my practice to bring the parties and their counsel together for a conference as to the adjustment of their cases. Frequently a large percentage, sometimes a majority, of all jury cases are settled in these conferences to the entire satisfaction of the parties and of the lawyers, for a client will gladly pay more for a good settlement than for a bad beating.

The plaintiff claims payment, or, in default, sale, or foreclosure.

John Brown,
Solicitor for Plaintiff.

* * * * * * * * * * * *

Statement of Claim

(TITLE)

The plaintiff has suffered damage from the seduction and carnally knowing by the defendant of G. H. the (daughter and) servant of the plaintiff.

Particulars of special damage are as follows: Loss of service from the 1st of March to the 30th of November, 1899 ..... £ 100 s. 0 d. 0

Nursing and medical attendance 10 10 0

110 10 0

The plaintiff claims £500.

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(TITLE)

Statement of Claim

The plaintiff has suffered damage from offensive and pestilential smells and vapors caused by the defendant in the plaintiff's dwelling-house, No. 15 James Street, Durham.

The plaintiff claims:

1. £50.

2. An injunction to restrain the defendant from the continuance or repetition of the said injury or the committal of any injury of a like kind in respect to the same property.

These English masters are lawyers of ability who are especially trained in matters of practice and pleadings. They receive salaries in excess of that which Wisconsin pays her circuit judges. They relieve the trial judge of the consideration of all questions preliminary to trial, which consume so much of the trial judge's time. Thus the judge is free to devote his entire time and energy to the decision of cases on the merits. Much of the delay in American courts is due to the time and energy consumed in playing the game according to the stereotyped rules of procedure, which attach too much importance to form and too little to substance.

Another distinguishing feature of English procedure is that it is framed to promote certainty in the issue to be determined. To this end demurrers and general denials are abolished. In England denials must be specific, putting in issue the particular fact that is to be litigated. Questions of law are raised by the pleadings. But the points of law so raised are not determined in advance of the trial unless it appears that these points of law may be decisive of the case.

Parties may narrow the issue and shorten the trial by demanding that their opponents admit or deny specific facts. Parties are chary about denying any fact at any stage of the action without good reason for so doing. The court has the power to compel the party denying any fact to pay the costs of establishing such fact on the trial unless the court finds that he had good reason for such denial. And English costs are not the mere taxable costs of American jurisdictions, but they include the fees of solicitors and barristers, who itemize their bills down to the writing of a post card. These costs furnish a most effective means of enforcing rules of practice and procedure, of narrowing the issue and of expediting the trial, because parties may be compelled to pay the costs of establishing any fact denied, even if they prevail in the action.

English rules are much more liberal than ours in permitting the joinder of parties and of causes of action. Generally speaking all persons may be made defendants against whom any relief may be demanded whether jointly, severally, or in the alternative. Practically the only limitation upon the right to unite causes of action is that causes shall not be tried together which would embarrass the defendant in the preparation and presentation of his defense or which would add unnecessarily to the expense thereof.

One is constantly impressed with the flexibility of English procedure. Judgments may be entered piecemeal as soon as any issue entitling any party to any relief has been determined. The court may accept an incomplete special verdict, retrying only the issues not determined by the questions answered. A new trial may be granted as to part of the issues and judgment entered later as to other unrelated issues. In cases involving questions of expert or technical knowledge the court may call to its aid assessors who possess such expert and technical knowledge and who sit with the court and advise the judge upon such questions, but their advice is in no way binding upon the court.

The appellate procedure of England provides a most simple and direct way of reviewing the action of the trial court. Appellate jurisdiction is invoked by a motion to review, which states the specific questions raised. The motion transfers the record of the trial court, including the judge's minutes of the testimony, to the appellate division. No bill of exceptions is prepared. No printed cases or briefs are submitted. No general assignment of errors and no motion for a new trial or to set aside the judgment is required. The procedure in the appellate court is much the same as that upon a motion for a new trial in the trial courts of this country. The motion for review in the appellate court must be made within fourteen days if to review an order and within six weeks in all other cases.

The appellate judges examine the record and statements of counsel prior to the argument of the case and usually decide the case orally at the close of the argument. The appellate division is in almost daily session. It decides from six hundred fifty to one thousand matters submitted to it each year. It is interesting to note that new trials are ordered in less than three per cent of the cases decided. This surprisingly low percentage is due in part at least to the fact that the appellate court may amend pleadings, receive evidence upon questions of fact by oral examination in court, by deposition or by affidavit, and that it may draw inferences of fact the same as the trial court and enter any judgment or make any order which the justice of the case may require. This English court of appeals has with much justice been called "the most perfect working tribunal for the adjustment of conflicting rights which the wit of man in any age has devised.[2]

[2] Leaming, A Philadelphia Lawyer in the London courts. Page 107.

Turning to the question of court organization we find in Wisconsin a static court organization that was established in the day of the ox team, the cradle and the flail, which has become a veritable crazy quilt with a municipal court attached here, a superior court there, and a county court with civil or criminal jurisdiction somewhere else, until the state is well nigh completely covered by these special courts created with no attempt at system, merely to meet the demands of the locality to be served by them, into which a litigant must go with the open statute in hand lest he make the futile attempt to secure some relief which lies outside the jurisdiction granted to that particular tribunal. Generally speaking the judges of these special courts have no power to act in any jurisdiction outside that in which they were elected. Their position is not unlike that of the judges of the ancient English courts, each with its own special jurisdiction and with no responsibility for the work of any other court than their own.

Contrast with our court organization the efficient unified courts of England. The Supreme Court of Judicature, under the administrative direction of the Lord Chancellor, performs the combined functions of the appellate and trial courts of this country for a population of forty millions of people in England and Wales. In the divisions which do the work that corresponds with that done by the Circuit courts of Wisconsin there are twenty-six judges actively engaged in trial work, which is but one more than the circuit judges in Wisconsin. But these English judges have fifty-five Masters, Registers and Referees who relieve them of all work, except the trial of contested cases, and who also try and determine many contested issues of fact.

The Supreme Court of Judicature of England has an appellate division and three trial divisions: Chancery, Probate, Divorce and Admiralty and King's Bench, in which latter division ordinary civil and criminal cases are tried. Judges are assigned to work in the division of the court in which they are best qualified to sit, but there is complete flexibility in the organization of the various divisions. Any judge in any trial division may be called to sit in the appellate division or in any other trial division which may need assistance. All divisions are up with their work and each judge is doing his full judicial duty. There are many advantages in this ready interchange of trial and appellate court work.

With the exception of the appellate jurisdiction of the House of Lords and of some minor courts, many of which have only

police court jurisdiction, the judicial organization of England consists of only two courts: the Supreme Court of Judicature, which has just been described, and the County Courts, which have replaced the justices of the peace. The county courts generally speaking have jurisdiction of all actions at law which involve £100 or less. There are fifty-seven county judges, receiving a salary of £1,500 a year. They hold court in all parts of England and Wales, sitting in about 500 different places, thus bringing the means of administering justice in the smaller cases into every locality in the kingdom.

In each place where a county court sits there is a register in charge of the records of the court, who has the power of a master in the Supreme Court of Judicature. He disposes of the great majority of cases without referring them to the judge. There are no pleadings in this court. A plaintiff gives the register a statement of his claim. The defendant is notified to appear on a given day, when the parties come with or without counsel as they prefer. The register takes their statements and usually minor disputes, such as those that relate to wages, bills for goods, etc., are immediately adjusted by the register. If judgment is entered, unless the defendant is able to make immediate payment, the judgment provides for payment in instalments, which are paid into court. The county courts dispose of about 1,250,000 cases a year. There are from 100 to 150 cases set for hearing each court day. But in considering the volume of business done by the county courts we should keep in mind that the county judge passes upon about one case in forty, the other thirty-nine cases being disposed of by the register without taking any of the judge's time.

Many of these registers, masters and referees that aid in the work of the English courts receive larger salaries than we pay the judges of the Supreme Court of Wisconsin and are men of recognized legal and judicial ability. The work performed by these judicial aids is an important factor in promoting the prompt and efficient administration of justice in England.

An effort has been made to present the rules of English practice and procedure and the features of English court organization that seem adapted to American conditions. England has not achieved perfection. There are many things connected with English lawyers, judges and courts that have no place in America, among which we may instance their brutality in the treatment of

men accused of crime. It shocks the American sense of fair play and justice to find men accused of capital crimes in Great Britain compelled to stand trial without the assistance of counsel and often without witnesses. But American constitutional guaranties insure the people of this country against such procedure in the United States.

The two fundamental things that deserve the most careful consideration of the American lawyer are the reorganization of our system of courts and the vesting of the power to make rules governing practice and procedure in a rule committee composed of representatives of both the lawyers and the judges.

The fact that the progress in improving practice and procedure in the past two decades has come so largely through the efforts of the lawyers and the judges clearly indicates that the path of progress leads to the adoption of the English practice of committing the rule making power to the representatives of the bench and bar, retaining to the people, acting through their representatives in the legislature, the full power to nullify any and all rules that do not meet with their entire approval.

There is so much of unnecessary delay and expense incident to our method of appealing and presenting cases in the Supreme Court that we ought to study with care the English appellate procedure, which preserves every right that the parties now possess and at the same time cuts all unnecessary red tape, expense and delay. It has been found that the record together with the testimony and the exhibits transmitted by the trial court serves every purpose of a bill of exceptions, while a statement of facts and citation of authorities is as valuable an aid in the administration of justice when it comes from the typewriter as when it comes from the printing press.

Most if not all of the rules of practice and procedure which we have discussed can be adopted by legislative action. But when we approach the question of a reorganization of our courts we are confronted with the necessity of making constitutional changes in most American jurisdictions. The results achieved by the Board of Circuit Judges and the Board of County Judges in Wisconsin have demonstrated the great advantages that come to the public through a unified organization of our courts. Before the Board of Circuit Judges was created each circuit judge felt that his responsibility to the public was discharged when he cared for the work in his own circuit, although he often responded to

the call to try cases in other circuits. But since the organization of the board, the circuit judges have recognized that they owe a duty to the people of the state as a whole to go wherever their services are needed to keep the circuit courts of the state abreast of their work. If all trial courts of the state were organized as are the circuit courts, there would be little need of considering a reorganization of trial courts in Wisconsin, for the Board of Circuit Judges has in its organization all the essentials of the great trial court of England. But we have in Wisconsin forty-nine other courts, in addition to county courts with civil or criminal jurisdiction, which have limited concurrent jurisdiction with circuit courts, whose judges have no power to perform judicial work outside the jurisdiction in which they were elected and who do no work outside their own bailiwicks, regardless of the question of whether their work fully occupies their time. We should have a court organization that gives every judge in the state an opportunity to devote his whole time and energy to the service of the people.

Perhaps the most important step taken in the reorganization of the courts of England was the establishment of the uniform system of county courts, in which the work of the court was placed in the hands of able, well paid judges, who brought the administration of justice practically to the door of every inhabitant of the kingdom. It is a serious defect in our system of administering justice that makes the right to appeal to a court manned by able judicial officers dependent upon the amount in controversy. The small claim of the wage earner may be of greater importance to him than is a claim of much greater magnitude to the man of larger affairs. Each is entitled to the same consideration when the state plans the organization of its judicial tribunals. Much of the just criticism now made of our administration of justice comes because we have not given the man with the small claim the quality of judicial service that he is entitled to receive. These defects have been remedied in some American jurisdictions, where the court organization of England has been used as a model. Notable among these American examples is the Municipal Court of Chicago. The organization of our federal courts is in many ways similar to that of the courts of England. The question of reorganizing state courts on the English plan is now being considered in several American states.

England has pointed the way of progress which other states

have followed, demonstrating that the practice and procedure and the court organization of the mother country are equally well adapted for use in America. A single example will suffice. Ontario in 1881 adopted the English system of courts and of practice and procedure, which was prescribed by rules formulated by a rule committee. Ontario might be called a sister state of Wisconsin, so near does it lie to both the northern and eastern boundaries of the state. Like Wisconsin it is a great agricultural state with a widely scattered population, which is practically the same in numbers as that of Wisconsin, with a wide expanse of territory that is four times the area of Wisconsin, with mines and forests and railroads and manufacturing and commercial centers. Nearly fifty years of trial of the judicial system of England has shown that it is adapted for use in a newly settled western American state as well as in the congested centers of population in Great Britain.

The present day criticism of our administration of justice constitutes a call to service on the part of the lawyers and judges. The members of the legal profession have never failed to respond to the call to service. They have never hesitated to sacrifice their time and energy when public service demanded such sacrifice. They did not hesitate to give their lives when their country called. They will not be found wanting in this new call to service.