The Open Court

A MONTHLY MAGAZINE

Devoted to the Science of Religion, the Religion of Science, and the Extension of the Religious Parliament Idea

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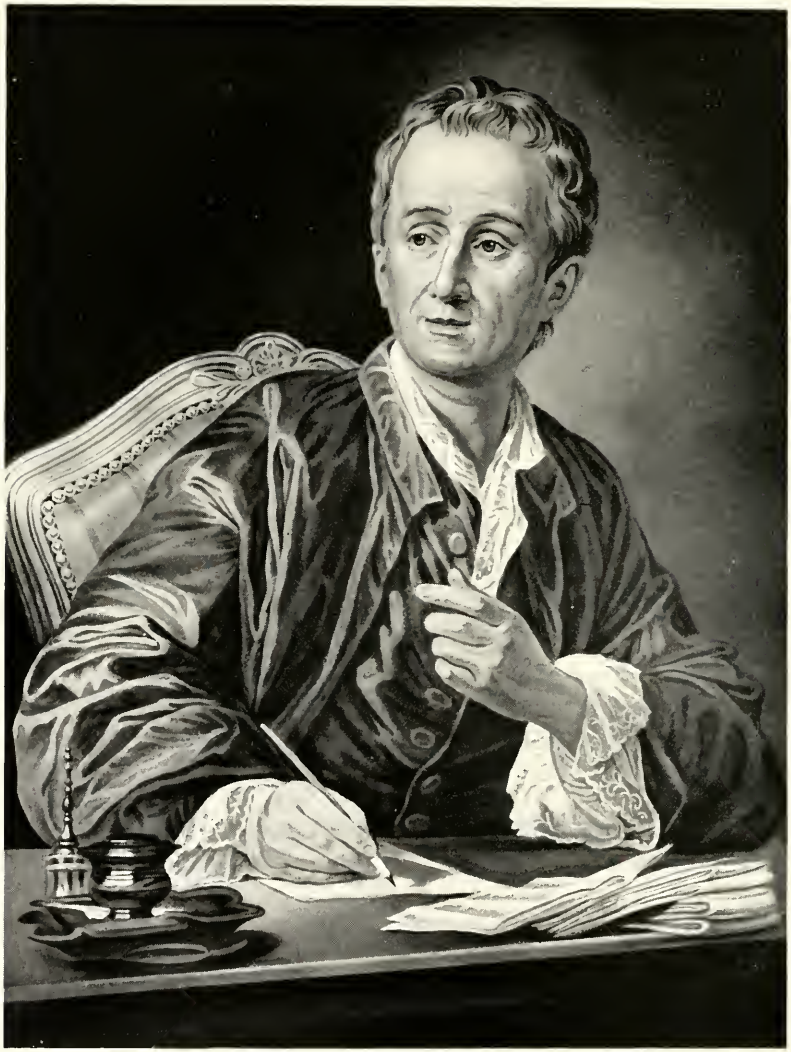

DENIS DIDEROT.
(1713-1784.)

Frontispiece to *The Open Court.*

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VOL. XIII. (NO. 12.) DECEMBER, 1899. NO. 523

THE DELAYS AND UNCERTAINTIES OF THE LAW.[1]

BY THE HON. CHARLES CARROLL BONNEY, LL. D.

Counsellor of the Supreme Court of the United States; Ex-President Illinois State Bar Association: Ex-Vice President American Bar Association, etc.

FROM sea to sea, and day by day, there come through the public press unceasing complaints that the administration of justice in this country has become dilatory and inefficient. It is but too true that in a large majority of cases, speedy and substantial justice is denied to suitors. It is, alas, too true that in this country there is but little worthy the name of justice administered by the tribunals established by law for the trial of the causes of the friendless and the poor. No words can exaggerate the magnitude of the evil.

The great difficulty which we meet at the outset—the cause of causes of the present delay and uncertainty in the administration of justice—arises from the fact that the country has outgrown the old methods provided for the transaction of legal business. While in other departments the increase of facilities has kept pace with the growth of business, the perfecting of the laws and the administration of justice have scarcely done more than to stand still. Certainly the increase of judicial methods and machinery has been so scanty in comparison with the progress and development of the country, that we may truly say there has been no progress worthy of the legal profession and of the cause of justice.

While the *law* should be fixed, *administration* should be flexible; and I conceive it to be one of the greatest evils of our day, that the practice-acts in the several states have descended into un-

[1] In criticism of a Committee Report to the American Bar Association.

necessary and minute details, which, being fixed by statute, are inflexible, and work more injustice than justice in their application. We must in the theory of legislation and in the practical application of the laws, draw sharply and clearly the distinction between the law, i. e., rules of right and conduct, and rules of mere judicial procedure.

It is beyond the power of the State Legislature, or the State courts, to make any rules or regulations which would change the administration of justice in the national courts, but surely it would be competent for Congress to make an important change. Now, if I have a case in California, or Maine, or New York, in equity, I can prepare my bill with a knowledge of all the facts, and send it to my correspondent in that state, and he can file the bill and prosecute the case advisedly; but if, on the other hand, I have an action at law, I, who know all the facts and have become acquainted with the circumstances in detail, am compelled to send a statement of those facts to my correspondent in another state, for him to prepare the pleadings; the man who knows all the facts can not prepare the pleadings, and the man who prepares the pleadings can not know all the facts. I testify from my own experience, and appeal to the experience of my brethren in the profession to witness, that in almost every such case there is some blunder or mistake which works a disadvantage more or less serious. Whereas, if Congress should repeal the Conformity Act of 1872, and enact that all proceedings in civil causes in the United States courts shall be according to the forms and practice in equity, saving a trial by jury where it may lawfully be demanded, we would then have a practice which is simplicity itself, and one which is familiar to all intelligent lawyers, from Maine to Oregon, and from Oregon to Florida. I urge that we advocate an extension of the practice under the rules in equity, to all civil causes, saving the right to a trial by jury in proper cases, instead of sweeping that practice away, and introducing the state practice in cases in equity, in the United States court, as recommended by the report. The success which would follow the change I advocate would, in my opinion, speedily lead the State Legislatures to adopt the same method of practice for the local courts, and thus secure the immense benefits of a uniformity of judicial procedure throughout the Republic.

I must most earnestly protest against the proposal that in no case should there be a postponement of a trial on account of the engagement of counsel elsewhere. I think such a rule would work

the greatest injustice. A client who has paid a lawyer for understanding and preparing to argue his case, should not be forced to trial, and compelled to employ a new lawyer, because the counsellor in whom he confides, and whom he has paid, is actually employed in another court. No client can afford to employ a lawyer who is at liberty to have but one case.

There is much complaint against what is called, *judge-made law*, and the proposed remedy is what is called a codification of the law. *What is codification?* I understand it to be a statement of the rules of law relating to the different topics of jurisprudence, with a sub-statement of the exceptions to those rules.

True codification would be, to take the statutes, text-books, and decisions, on evidence, contracts, real estate, personal property, carriers, corporations, damages, torts, trusts, insurance, equity, and other departments of the law, and reduce them to a clear and distinct statement of rules and exceptions, to be enacted into statutes. I beg you to consider for a moment, what amazing ability, what wonderful learning, what perfect knowledge of language, and what keenness of discrimination are required to perform this task. Certainly the highest qualities of a trained and gifted intellect would be taxed to the uttermost in accomplishing the vast and splendid work. But I am in favor of such codification, just as rapidly as the circumstances will allow it to be performed, with the necessary means to facilitate its progress, and bring it to a just conclusion. But such a codification can not be made by our legislative bodies. There never sat in any state, nor can be constituted under existing laws, a legislative body capable of performing the work of codification desired. It is as much beyond the qualifications of the average legislative bodies as would be the construction of a perfect chronometer or other complicated machine. As between legislature-made law and judge-made law, give me always that which is declared with some deliberation, based upon the professional knowledge of those who have made the study and application of laws a specialty.

In our system of jurisprudence, it is perfectly within the judicial province, when a new question of law arises, to answer it by declaring the new rule of law that results under the new circumstances, from established principles. The adaptability of what is decried as judge-made law, to new conditions as they arise, is its crowning glory; the want of such adaptability is one of the most serious objections to statutory law.

We advocate therefore the establishment of judicial commis-

sions, constituted of members of the profession who have served at the bar, or upon the bench, long enough to qualify them to execute the work of proper codification, department by department, and when completed, ask at the hands of the Legislature a declaratory statute, declaring the codification to be law. Legislatures may discover and declare the principles of human relations, but they can not make them, for they exist in the nature of human society.

Thus, a proper codification of the law is a reform that would help us greatly to overcome the delays and uncertainties of the laws. But there are other suggestions which I conceive to be the most needed specific remedies.

First.—No man should be allowed to bring a cause in any court, except upon filing his submission both to do and to receive *substantial justice*, without regard to any technicality or matter of form.

Second.—No man should be allowed to conduct litigation at the public expense except there be *probable cause* that there is something to litigate.

In every case there should be a *preliminary inquiry*, to determine the existence of such cause. And if no such cause appear, there should be an immediate decree, and its immediate enforcement, unless the trial judge, or an appellate judge, should certify probable cause for an appeal. The doctrine of probable cause has long been familiar to the profession in criminal jurisprudence, and there is no good reason why it should not be extended to civil cases.

Third.—At the end of every bill in equity, petition, complaint, or declaration, and as a part of every defense, and appellate proceeding, the pleader should be required to specify *the exact questions* about which the parties differ, and the adverse pleader should be compelled either to admit the questions to be truly stated, or to specify them, whether of law or fact, as he claims them to be, and the litigation should be confined to those exact questions, unless on grounds of public policy the court should otherwise order.

Fourth.—I think the greatest evils which the American people now suffer in their administration of justice, arise from the fact that the constitution of the primary courts is entirely wrong. We begin with a foundation of ignorance, incompetency, and resulting injustice, and then we wonder that trials are delayed, decisions unsatisfactory, and appeals multiplied. The remedy, first of all, is to put great and wise and learned judges at the fountain head. When the highest and most capable judges shall sit to hear, in the first

instance, the causes of the people, especially the complaints of the poor and friendless, whose court of first instance is, in ninety-nine cases out of a hundred, also their court of last resort—when it is made and accounted an honor to administer the utmost right and justice to the people in the first instance, then appeals will be lessened, ligitation will decrease, and the administration of justice, fruitful of good results, will become indeed the crowning glory of the civilisation which is our boast.

The theme of the delays and uncertainties of the law has been near my heart for more than twenty years, and whenever the opportunity arises, an abiding sense of the grievous wrongs which the people suffer from the delays and uncertainties of judicial procedure, impels me to declare, at least briefly, the means by which, as it seems to me, those wrongs might be wholly, or in part, removed.