Advertiser 28-3-23.

LAW REFORM.

DR. JETHRO BROWN EXAMINED.

IMPORTANT CHANGES ADVOCATED.

The establishment of a Conciliation Court presided over by, say, a lawyer as chairman, and two laymen, was advocated by Dr. Jethro Brown, President of the State Industrial Court, in his evidence before the Law Reform Commission yesterday.

Dr. Jethro Brown, President of the State Industrial Court, gave evidence on Tuesday before the Law Reform Commission, and advocated a number of important changes in procedure.

The members of the Commission present were:—Mr. H. D. Young, M.P. (chairman), Hon. J. Carr, and Messrs. F. W. Birrell, T. Butterfield, P. Reidy, and A. W. Robinson.

The Chairman informed the witness that the Commission would like to hear his views regarding law reform, and particularly concerning a Conciliation Court, which they thought might be useful in domestic, maintenance, and children's cases.

Dr. Brown said he had prepared a general statement, and after he had read it, he would be prepared to deal with any questions that might arise. Before he ventured any suggestions regarding law reform he desired to stress some limitations which, if obvious to some and disconcerting to others, were not in his opinion adequately realised by the average citizen. He would give a few illustrations:—

(1) No simple and brief code of law could be devised which would be adequate to the needs of a modern, highly organised society. Civilisation may or may not be something worth while, but at any rate it necessarily involves an elaborate network of regulation by law. The network may be irksome; it may require constant readjustment, but it is in any case inevitable.

(2) Courts of law could not function efficiently without the aid of a body of experts to assist by defining issues and by the preparation and elucidation of evidence and argument. The alternative to a legal profession would be an indefinite multiplication of courts or the enthronement of a so-called discretion (or caprice) in the place of the governance of human relations by reasoned principles and rules of law.

(3) Lawyers as a class do not devote their energies to the promotion of litigation. The average lawyer is more commonly engaged in an endeavor to guide and restrain the combative instinct of the average citizen. In other words, he has more frequently than not to advise his client either that he has no cause of action, or that, if there be a cause, the grievance can be adjusted or should be endured. Undoubtedly litigation is more expensive

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Mr. President Brown.

than it should be. Undoubtedly there are lawyers who are out to fight. But in every profession there are members who fall short of the general level of professional ethics.

(4) The work of the courts and of the legal profession in criminal cases is no measure either of the quantum of services to the community rendered, or of the nature of those services. The ordinary citizen is apt to form his idea of law and the administration of justice by reference to criminal cases reported in the press at length out of all proportion to their real importance to the community.

(5) Such litigation as exists is mainly a reflex of differences of individual lay opinion. The average citizen believes in his own opinion, and his own rights. He believes in sticking up for them. As he is denied the sword, he is only too prone to say, in effect, "I will fight the matter to a finish in the courts."

(6) Expedition in the administration of justice, though highly desirable, cannot be expected to follow necessarily from inexpensive litigation. A too easy access to the courts would result in a deluge of litigation.

(7) The judges, however impartial they may try to be, are not above public opinion. They are to a large extent an organ of public opinion. Evidence has been given before the Commission suggesting that the judges should do far more than they do in restraining advocates from indulgence in prolonged or harassing examination of witnesses. In so far as the evil exists, its ventilation before the commission will go far to strengthen the hands of judges, and at the same time raise those standards of professional etiquette which tend to govern, to a far larger extent than is supposed, the demeanor of advocates in the conduct of causes before the courts.

(8) While lawyers jest and the public raves about fees, the fact remains that the totality of fees paid to lawyers bears no serious proportion to the sums or issues involved in questions decided by the courts. The average lawyer tries to keep his client out of court unless there be good reason. Further, if a matter actually reaches the stage of litigation, the fees paid to lawyers should be viewed in relation to the importance of the issues involved, whether those issues relate to life, liberty, or property. This would be more generally realised but for the common ignorance of the immense amount of work lawyers have to do out of court. An hour's address before a judge may have been the result of weeks of labor in discovery of facts, in the search for authorities, in the definition of issues, and in the statement of binding or persuasive principles of law.

If the elementary facts are borne in mind, one must conclude that law reform, however desirable, is no easy matter. The most obvious thing would be to abolish both the courts and the legal profession; but the beautiful simplicity of this plan would not commend itself to prudent opinion. Another plan would be to reform human nature (including lawyers); but here, again, so far as immediate achievement goes, the difficulties are obvious.

Turning to the practical question of what may be done in the way of law reform, a broad distinction must be drawn between the reform of substantive law and the reform of the mode of enforcing substantive law. The former is for legislative consideration. I agree in substance with the definition of law as common sense; but the common sense is too often the common sense of an outgrown period, and an ill-fitting garment for the developed organism of to-day. When people talk about law reform they usually have in mind the mode of enforcing law.

Within this province the most hopeful lines of development were:—

First, the establishment of a Conciliation Court. A sort of clearing-house. I might illustrate by reference to duties which I was personally called upon to perform when I undertook the position of honorary poor-man's lawyer at the Bermondsey University settlement in London. I had often to disillusion persons suffering from a real or imaginary grievance regarding their real position in law. Sometimes I held informal conferences with disputants, often, though, of course, not invariably, securing an adjustment of opposing views. Where amicable conference failed, it was open to me to suggest whether parties had better proceed by way of arbitration or by ordinary litigation in courts. A court of conciliation would have an official status, and much more authority and power.

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Much expense involved in connection with the advice to clients and the administration of justice is due to the chaotic condition of law. The statutory law of this State is no exception. There is no such code as exists in many other countries. We cannot even claim to have an adequate index to which the citizen or lawyer may refer with confidence when he wants to know the local law applicable to the facts of his case.

A Parliamentary draftsman does as best he can. That does not prevent Acts being passed from time to time which create more difficulties than they resolve. When Jowett, Master of Balliol College, Oxford, was told that one student of the college had "so much taste," he responded:—"Yes, so much, and all of it so very bad." John Stuart Mill advocated the constitution of a body of experts to act in concert with the Legislature and to revise Bills after due consideration of their relation to pre-existing law and to immediate purposes in view. This would mean extra expenditure—but the expenditure would be repaid tenfold.

It has been well said that although all men may be equal in the eyes of the law, they are not equal in the hands of the law. The need for reform is apparent. The means are difficult to suggest. Such a Court of Conciliation as I have suggested will go some way to meet the difficulty, especially if the court is properly constituted, and empowered to sit in public and so place issues before the bar of public opinion.

Some encouragement as well as guidance may be gained from a careful study of achievements in other parts of the world. Professor Phillipson has referred in his evidence to some measure of law reform in European countries. The Bar Association of New York created in 1914 a committee on the prevention of unnecessary litigation. In 1916 the committee was authorised to negotiate with the Chamber of Commerce for the adoption of rules for prevention of unnecessary litigation. The committee included in the rules the following statement:—"After the facts upon which a dispute can be based have become fixed, either before or after a dispute has arisen, it is possible to do much to prevent litigation. What can best be done in each case, and whether with or without legal advice, necessarily depends upon the facts and the parties to the prospective controversy. Differences may be minimised, adjusted, or arbitrated. If not so disposed of, litigation will usually ensue. Where differences cannot be adjusted between the parties or their attorneys and the intervention of a third party becomes necessary, there are several forms which arbitration may take. The arbitration may be (1) informal, (2) under the code, (3) under the auspices of a commercial body, or (4) under the auspices of a bar association. The experience of many business men and lawyers testifies to the advantage of these methods of adjusting differences wherever possible. They are inexpensive, speedy, and peaceful."

In 1920 there was passed, as a result of the combined operation of the Bar Association and the Chamber of Commerce, what is known as the arbitration law of the State of New York. The history of the negotiations, and the New York Statute, are discussed in an article in the "Yale Law Journal," December, 1921, written by Mr. J. H. Cohen, of the New York bar. The writer summarises certain results as follows:—"The courts are relieved of the burdensome technical trade questions, which heretofore have been decided by juries, advised by the very experts, as witnesses, who are now selected by the parties to dispose of the issue. By one movement there is removed the expensive and time-consuming process of determining simple questions of trade customs and trade facts. Questions of damages involving consideration of market values are likewise disposed of on the basis of trade experiences. On the other hand, the supervision of arbitrations by the court is preserved. Instead of being ousted of jurisdiction over arbitrations, the courts are given jurisdiction over them, and where fraud, palpable mistake, or failure to consider the evidence in the case is presented, the party aggrieved has his ready recourse to the courts. In short, if the parties believe that the waiving of technical objections to the admission of evidence and of a jury trial are in their interest, they may so waive them by entering into an arbitration agreement."

Replying to the Chairman, the witness stated that, so far as any evidence which he could get showed that the Conciliation Board in America was working most satisfactorily. He could see no reason why a similar result could not be obtained with it in Australia.

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Mr. Robinson—Do you agree with Professor Phillipson that the cross-examination by some of the lawyers here is outrageous, and would not be tolerated in the English courts?—I agree with that, but one must be careful not to include the type in the exception.

In response to the Chairman, Dr. Brown said—"The Bar Association took the initiative in the conciliation movement in New York. The Law Society in South Australia does a good deal of work in protecting the public against lawyers."

Mr. Birrell—Is there too much law?—I am afraid so. That brings one to the suggestion that legislation might be carried with the subsidiary operation of a body of experts in helping to qualify and consolidate the laws, and to give advice regarding whether "such and such" would be obtained by proposed legislation.

Mr. Butterfield—Do you think a code really necessary?—I do not think it is really necessary, and I am afraid it is too much to hope for.

What do you think should be the constitution of the Conciliation Court?—That is a matter to which I have not given sufficient consideration to express a final opinion offhand. However, I think there should be a chairman and two others representative of various interests in the community. I think the chairman should be a lawyer, and the others laymen. If only one party approached the court it would then rest for the court to say what course it would adopt in the matter.

Hon. J. Carr—Would you suggest that counsel should be debarred there?—Personally, I have found counsel of the utmost assistance in clarifying the position where matters have been complicated or there has been reason for the taking of much evidence. In the first instance, however, the court could dispense with counsel. A court that denotes business—that business would include the promotion of harmony among the community, the minimum of expense in the proceedings, and the administration of justice—would be in a position to say whether counsel should be allowed in any particular case.

Replying to Mr. Reidy, the witness said he agreed with Professor Phillipson that the judges might do more, in some instances, to restrain objectionable questions by counsel. They could not hope to eliminate altogether everything that might be undesirable in the courts. He could not see how irregularities were to be controlled, except by giving the judges some power. In the long run irregularities were best controlled from within.

The Chairman—Can you suggest anybody or committee that would be helpful in giving us assistance in forming a conciliation scheme, if we should decide to recommend one?—It would be embarrassing to me in my official position to ask me to make any suggestion in that direction. I will consider the question, however, when I am before you again, and if you desire I will give some reply.

The Commission adjourned until Monday, April 9.

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THE LEAGUE OF NATIONS.

INTERNATIONAL LABOR CONFERENCE.

AUSTRALIAN REPRESENTATION.

By F. W. Birrell, M.P.

Professor Darnley Naylor's remarks concerning Australia's representation at the Assembly of the League of Nations constrains me to comment on our representation at the International Labor Conference held each year. This Conference is composed of delegates from 54 States, members of the International Labor Organisation. The States, whether large or small, have equal rights and voting power at the Conference. Each is represented by two Government delegates, one employers' delegate, and one workers' delegate. The balance of representation between the Governments, on the one hand, and the employers and workers on the other, was decided by the authors of Part XIII. of the Peace Treaty, because it was felt that, as the execution of the decisions of the Conference largely rested on the action of the Government, they should not be placed in a position of inferiority in relation to the other two groups. Each delegate may be accompanied by technical advisers, who