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SOME PRACTICAL REMEDIES FOR EXISTING DEFECTS IN THE ADMINISTRATION OF JUSTICE

In the present scientific and industrial world, increased efficiency is the keynote of advancing civilization.

The judiciary is a branch of a people's government, and though unthinking or impassioned criticism may not stand the test of reasonable analysis, it is nevertheless true that it is a good sign of the times that the people are beginning to consider its *efficiency*. In so far as it is inefficient, the people owe it to themselves to repair it and to justify its continued existence.

When one begins to consider Courts, he is impressed with their low efficiency in respect to the effort expended. In theory, they exist to adjudge controversies in which two disputants contend against each other on the facts or the law, and to determine their rights in respect to each other on the disputed matter. The Courts must ascertain the facts, apply the law, and pronounce the judgment, they may also direct and supervise the enforcement. The facts, so far as disputed, are to be determined by evidence, the law is not always certain, the judgment is sometimes somewhat difficult to formulate. So that the work to be done is not the simplest. It necessarily involves some expenditure of time and mental effort. In any view which we take of the Courts as a machine, we must bear in mind these essential factors of their organization; unless they are to disregard the facts, or some new method of ascertaining them is to be invented; unless they are to disregard the established law

and apply some other rule of decision; unless they are to pronounce inadequate or inaccurate judgments, the necessary performance of their functions will consume a given quantity of time, and if each case is to be decided with due regard to its facts and the law and the proper judgment is to be rendered and enforced, a large amount of time must be consumed in each case, and also in the aggregate, and congestion is bound to result. For instance, if it takes a judge a day to try a case with due regard to order and decency in its disposition, and two suits are instituted each day, requiring to be tried, at the end of a year of three hundred business days, the Court having worked to the limit of its efficiency will be a year's work behind, and with each succeeding year an additional year behind. In such a case, assuming the increase of suits constant, there are only two courses open, either to double the amount of machinery or to increase the efficiency of that which exists. It would not necessarily increase its efficiency to require it to do double the amount of work, for there is in the nature of things a minimum amount of time necessary to dispose of any case justly—the facts in dispute must be elicited and the law ascertained and applied. At the bottom of all judicial proceedings lies investigation, and investigation in case of dispute takes time and attention. While one case is under investigation in open Court, all others must wait, if they are to be similarly investigated—and unless judicial proceedings are to be arbitrary, they require patience.

Therefore, in considering the efficiency of the judicial branch of the government, we must know that there is an irreducible minimum of time and effort which are the *sine qua non* of just judgments; below this point the Courts, whatever may be their statistics, become instruments of inefficiency, and when, as is the case in New York City in that part of the Supreme Court which hears and decides litigated motions, a judge is called upon to determine or dispose of as many as one hundred and fifty disputes a day, a high grade of efficiency in both quantity and quality is beyond the possibility of human attainment.

In studying the condition of the Courts and the judiciary in their relation to the administration of justice, we must then bear in mind the end to be attained, which I apprehend is the highest efficiency in doing justice as defined by law, both in quality and

quantity of product; and that no suggested reform is worthy of serious consideration which sacrifices either of these essential elements of improvement. If a high quality of product is sacrificed to speed, then courts fail of their purpose, which is not only to end disputes, but to dispose of them justly. So that mere statistics are no trustworthy record of an efficient Court; these are only one element.

In analyzing the essentials of a satisfactory performance of the functions of the Court, we must appreciate the materials and the machinery. In a sense, the materials are the witnesses and the evidence; the machinery includes the judge, the jury (if there is one), the lawyers, and the Court attendants. It is not alone the judges who administer justice; it is all of these combined. The materials are always substantially the same, except as increasing general intelligence may improve the quality of the witnesses; but it may not yet be hoped that the efficiency of Courts as machines to do a certain part of the people's work can be improved through the improvement of the witnesses or the evidence.

It is, therefore, only in the domain of machinery as distinguished from material that we must look to discover whether the Courts do their work as well as they should. If one asks himself this question, having knowledge of the actual operation of the Courts in administering justice, and he is conscientious, it seems to me his answer must be, No—and if so, his next inquiry must naturally be wherein are they deliquent, and his next, why.

The Real Deficiencies of the Courts

Starting with the primary inquiry wherein are Courts generally inefficient as agencies in the prompt and fair administration of justice, I should say that decisions of disputes are too long delayed, they are too uncertain, they cost too much, and they are too often decided upon grounds which offend the sense of right of the ordinary man.

In proceeding to the inquiry, why all of these things are, I should say first, that decisions are too long delayed, because, under present methods of practice, the Courts become congested, and by reason thereof lawyers necessarily become careless.

The Congestion of the Courts

The congestion is due primarily to the amount of business in the Courts; and it may in special instances be due to the rules of practice, to an insufficient number of judges, or to inefficient or lazy judges. But the congestion may be so great that no reasonable change in the rules and no degree of competency on the part of the judges can dispatch the business, which accumulates faster than it is disposed of. There is no remedy for this condition except the increase of the number of judicial officers. But rules of practice can and should be changed to facilitate the end in view, and inefficient judges can and should be eliminated.

Defective Systems of Practice

Unfortunately where rules of procedure constitute a system to be learned and observed, there will always be individuals, whether judges or lawyers, who will lose sight of the object in cultivating the method. This is true to an exaggerated and truly awful extent in New York, with whose practice I am most familiar; where, if I were to hazard a guess, I should say fully sixteen per cent. of the time of judges and lawyers is taken up with considering and wrangling about, and deciding the proper technical way of doing things largely interlocutory, instead of the just and final disposition of the controversy upon the merits of the original dispute between the parties.

Without pausing to explain the method of comparison, I have roughly compared the volume of reported decisions on procedure in New York since 1848, with the whole volume of reported decisions on all points in the same period, and I find it to be substantially as 3 to 5; so that procedure, which is method, compares with substantive law, which is merit, as 3 to 2; and if we use the volumetric method of calculating the relative importance of substantive law, and rules of procedure, it would give rise to a formula somewhat after this fashion:

Importance of procedure : Importance of right :: 3 : 2.

That is to say, judging by the number of points in the printed records of those points, as preserved in the published collations of practice and substantive law, lawyers and Courts, statistically, but roughly considered, have since the institution of the Code of Pro-

cedure in New York regarded questions of method as 1½ times as important as questions of substantive right; or, to put it another way, as indicated by this confessedly crude method of comparison, if a man were right in his demand before going to Court, and his lawyer was not better versed in practice than the average New York lawyer, the chances of his case going off, on method instead of merit, would be as 1½ to 1.

When we consider that rules of procedure were primarily devised to facilitate the true objects of courts in disposing of causes on their actual merits, it will be immediately seen that any system which gives the rules a superior prominence of one-half, subordinates merit to method to the extent that 3-5 of the Courts' effort in deciding points of law is taken up with questions of method and 2-5 with questions of merit. It is not claimed for these figures that they are accurate, they are merely illustrative; because one cannot with absolute accuracy judge of the relative importance of printed matter by the number of volumes in which it is contained. But on the other hand, it is not wholly inaccurate, for, presumably, the well-equipped lawyer must be fairly well acquainted with the principles of the decisions of the Courts of his own State; and if the litigated questions of procedure compare in bulk with all other litigated questions as 3 to 2, then the lawyer in order properly to protect his client's interests must spend more time in mastering methods of procedure than questions of substantive right. In short, not only does one who encounters such a system of practice feel that it exaggerates non-essentials, but it can be mathematically demonstrated that such is the case. All exaggeration of the importance of procedure is waste. It occupies Courts and lawyers and it aids congestion. The equity Courts of the United States have gotten along and administered justice so as to command respect for 123 years with no more than 94 general rules, while it has taken 3,441 sections of the New York Code of Civil Procedure, besides 84 rules of practice, to guide New York Courts and lawyers to the same goal, and almost every section has been the subject of dispute as to its meaning, without substantial regard to the merits of the controversy between the parties.

The *simplification of procedure* by subordinating method to merit, is, then. the *first* esential remedy I would suggest for removing

delay. This it would accomplish in several ways, first by having fewer disputes on practice and clearing the way for justice, and thus eliminating to a large extent what is popularly styled "the technicality of the law;" and having an excellent psychological and spiritualizing influence on judiciary and bar alike, relieving the actual congestion of the Courts, to the extent that such unnecessary technicalities now clog them, and giving both bench and bar an opportunity to cultivate an understanding of the essentials of justice by devoting to it time now spent in the necessary study and disposition of non-meritorious points of practice.

In the current annual bulletin of the Comparative Law Bureau of the American Bar Association, editorial comment is made on the recent rapid increase of what it styles "Super-Vocational Lawyers," that is to say, lawyers who take a broad view of their profession and of their opportunities as beneficent aids to mankind, and who are not exclusively engaged in the specific disputes between man and man that necessarily make up the bulk of the activities of the average practicing lawyer. But in such a state as New York, where a practitioner must necessarily have regard to the Code of Civil Procedure with its 3441 sections (now happily reduced by the transfer of about 600 sections of substantive law to other parts of the statute law) and to the 84 additional general rules of practice, and to the three royal octavo volumes (like three Webster's Unabridged Dictionaries), of annotations, construing it, the opportunities of super-vocational lawyers are greatly restricted. If they are in active practice, they must observe the rules of the game, no matter how technical or unnecessary to the merits, else they cannot properly protect the interests committed to their care, for however they may personally be inclined to disregard technicalities and devote themselves to merits, they can not forget the skilled adversary, who will avail himself of every failure to observe their strictest requirements as a weak point in their armor.

One fault of an unnecessarily intricate or specifically defined and detailed practice is that the means become too often the end, and a rule first adopted to facilitate the designs of justice becomes itself the battlefield of the legal practitioners, instead of the actual merits of the dispute between their clients. I select New York practice for my illustration, because of personal familiarity with it, and

because its Code of Civil Procedure is, I surmise, the most extensive of all mere practice regulations, which was ever conceived by the minds of men. When, as is the case here, the practice act is by many hundreds of pages the most elaborate single statute in the State, and no step can be taken in any superior Court without complying with it, the attention of Courts and bar is necessarily and unduly given to disputes about its meaning, and whether one or the other of the practitioners has transgressed one of its infinitesimal provisions. For example, when a statute prescribes the weight of paper, the color of ink, and the duty to number each hundred words of every paper in the margin before it can receive judicial cognizance, we all recognize that this makes for uniformity and permanence of public records, but it is the attorney and not the party who should suffer for violation of such regulations, and the client, who has no control over them, should not be delayed, nor should his cause be prejudiced by the failure of his attorney to observe them.

Much of the time of one of the most brilliant of recent judicial minds was taken up, both in preliminary stages and on appeal, in discussing again and again the effect and validity, in answers, of such modes of expression as "he denies that he has," "he alleges that he has not, "he has not," "he denies knowledge or information," "he denies that he has any" and so on, indefinitely. The Courts, which consider these differences seriously, are inefficient instruments in the face of the fact that there is a dispute between men, who demand justice upon the facts of their case, and the sooner the people know it and correct it, the better.

But, it is not the present generation of Courts which is responsible; it is the legislature which has interfered with the performance of the judicial function, by virtue of express constitutional permission; and the attempt of the representatives of the people to prescribe rules of practice as *laws* which the judiciary are bound to observe, has, in my opinion, ended, in New York at least, in dismal and execrable failure. In enforcing judge-made rules of practice, the Courts recognized the principle that the power that made could disregard; that they were made in the interest of orderly procedure, and for the average case, and that in a specific case, if no harm was done, then neglect could be excused, if fairness or the public interest or the

interest of the parties required it. But, unfortunately, when the legislature invaded the judicial domain and made *laws* to govern practice, then the Courts instead of regarding them as merely directory, gave them the force of mandates, and what was before wholly unimportant, became the subject of grave debate between advocates, which called for construction and enforcement by the judge; so that the question frequently became, not which client is entitled to relief against the other according to substantive law, but which lawyer has correctly construed the rule; and when, as is the case in New York, there is a right of appeal from substantially every interlocutory order, and a standing "part" of the Court, and a daily or weekly calendar (according to whether it is in city or country) for interlocutory motions mostly taken up with questions of proper practice, it is rather a tribute to the decency of lawyers that any case ever reaches its end, and that every case is not ultimately lost in the meshes of the Code of Civil Procedure, and through unending appeals. Indeed I have heard of one lawyer, who is intrusted with many litigations on a special subject, who has boasted that he can guarantee that no cause in which he is interested can be brought to trial inside of seven years; and numerous successive appeals before final judgment and upon points of practice are not uncommon. And I have had cases, one of which was twice appealed on interlocutory matters, before a trial on the merits, and even then it was only some of the issues against one party, which the court suffered to be tried, and that issue is now after a further appeal to the Appellate Division, on its way to the Court of Appeals, after five years in the Courts, while the other issues against the other parties still remain untried; in another of my own cases there were five appeals to the Appellate Division, four of them interlocutory, and two to the Court of Appeals, one of them interlocutory in its nature, before the case was finally disposed of by dismissal of the complaint upon a strictly technical proposition, although the Court of Appeals had on the first appeal indicated the law on the merits as favorable to the plaintiff, and the Appellate Division, which was finally reversed by the Court of Appeals, based its action upon what it conceived to be moral grounds, and so stated.

These suggestions by way of illustration indicate, to my mind, that it is not the judiciary, but the *law* which is in fault, and the

law in this respect owes its existence to the successful attempt of the legislature to invade the judicial province.

My suggestions to correct this growing evil, which has, so far as I know, its fullest fruitage in the State of New York, is to recognize and to put into effect *at once* the following principles: that rules of practice are only excusable as a means to an end; that the end is the speedy, but proper, administration of justice; that they should be promulgated by the Courts and not by the legislature; that]no legislature should ever undertake to formulate the details of practice; that these should always be left to the Courts; that the legislative power over practice should never be exercised except either to correct abuses which the Courts, after opportunity, refuse to correct; or else to inaugurate a fundamental change of policy, which the Courts in their conservatism would never adopt; such, for instance, as the amalgamation of the systems of law and equity. But the legislatures having indicated the way in general should let the Courts devise the specific method. This is illustrated so far as my experience goes by the judiciary statutes of the United States, as supplemented by the rules of practice in equity, admiralty and bankruptcy formulated by the Supreme Court of the United States and by the local federal Court rules to facilitate the dispatch of business; by the simple practice provisions of law in Connecticut and Maryland, as supplemented by their Court rules; and by the recent simplified practice act in New Jersey. A valuable illustration can also be drawn from the present English practice, which embodies a similar principle.

The New Jersey Practice Act, Chapter 231, N. J. Laws, 1912, is the most recent move in the direction of the civilized and efficient administration of justice. It seems to me that it would be a good thing if every State in the Union would take pattern thereby. Instead of the 3441 sections of the New York Code of Civil Procedure this Act contains 34 sections, together with tentative rules of Court, which are to remain in force until amended or altered by the Supreme Court. One of these rules is as follows:

"These rules shall be considered as general rules for the government of the Court and the conducting of causes; *and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it*

shall be manifest to the Court that a strict adherence to them will work surprise or injustice."

The Civil Jury as a Blot

The next fault in the judicial system, which I find from observation and reflection, is, again, not the judiciary, but the civil *jury.*

Once on a time, in the evolution of civil institutions, our ancestors considered it proper to have trial by ordeal and trial by battle, and, on the theory that an all-wise deity interfered to direct the result of the ordeal or the battle, they justified what otherwise would have been left to the chance of accident or of superior strength. In reflecting upon these aspects of judicial administration, and their excuses, we conclude that our ancestors assumed too much, when they counted on the direction of the verdict by the deity; and with increasing intelligence we have abandoned them, because we have concluded from observation that the ordeal did not in a fair proportion of cases result in the release of the innocent, and that the battle did not in a fair proportion of cases go to the weak, howsoever meritorious. We have concluded that the evidence of divine interference was not convincing, and that, without it, the ordeal and battle were wholly inefficient instruments for producing just results. But we are still psychologically so ignorant that we look for the miraculous in the just determination of complex disputes by submitting them to the observation of the wholly unskilled. I predict that some day the civil jury will go the way of the ordeal and the battle to the junk-heap of abandoned institutions.

Reverting to our keynote of efficiency, let us consider, not the theory of a jury in its metaphysical aspect, conceived in a closet by a logical thinker dealing with a theoretical representative of an ideal people, but the jury in practice as an inefficient means of determining disputes. If our judicial system contemplated the submission of all disputes to the "horse sense" of a dozen men chosen at random on a street corner, it might be justified as likely to get the fair average judgment of the whole body of men; but it contemplates no such thing. In the first place we withdraw from the consideration of a jury, except in rare cases, all disputes of an equitable nature, all admiralty disputes, all bankruptcy disputes,

all probate disputes and all long accounts. Occasionally, issues are framed for a jury in one of these cases, but rarely. So that we already recognize that in our system judges are thoroughly competent to determine practically every disputed question of fact, which may arise upon a conflict of evidence.

But we persistently reserve for trial by jury a large body of disputes, generally styled of a legal nature, to identify them by their origin, as derived from the Courts of common law, instead of from Courts of equity, admiralty or probate. If I sue upon a promissory note, the case must ordinarily be tried by a jury; if I sue to cancel the same note, it is ordinarily tried without a jury.

Nor is it to be understood that the jury is trusted to deliver its "horse sense" upon any question submitted to it. The evidence which it may consider is strained through the rules of pleading and the technicalities of the law of evidence; and ordinarily the jury is not even permitted to say whether it finds from the evidence that a fact asserted or denied is true or untrue, (the theoretical function of the jury), but it is harangued about the law, which the judge knows or is assumed to know, and which the jury is presumed to know as individuals in the community, but presumed not to know until specifically instructed by the judge, when it sits as a jury. And then, having been harangued about the law, which in fact they never knew, either as members of the community or otherwise, the jurors are instructed to find for the plaintiff or the defendant as the case may be, according as they find the facts from the evidence.

Any one who has had any experience in instructing students will know how apt a fair proportion of them are to misapprehend anything that is told them about a new subject, and that it is only by reiteration, persistency and familiarity, that a subject is comprehended, and even then a proportion fail upon examination to show that they konw enough of the subject to handle it intelligently. But in a jury, we have raw recruits who could not as a class do well in any one of the many activities which, in civilization, we require from any class in the community. We train recruits to bear arms, we license lawyers, physicians, dentists, midwives, veterinarians, horseshoers and chauffeurs, but, so long as a man speaks any sort of English, can hear, is on the jury list, and has not formed an

opinion, he is deemed a competent man to decide disputes in a Court of Justice. He would not be accepted to run a street car, nor to perform any number of ordinary duties for a private employer, but he is legally a fit juryman if he has these qualifications.

The true, but not the legal essentials of a competent juryman, considering his actual functions, are the ability to listen attentively, to remember testimony, to weigh evidence, to understand instructions upon the law, to argue and give heed to argument, and to unite in pronouncing a reasoned verdict, applying law as instructed to facts as ascertained. In any other vocation, this would be deemed to call for training and experience; these demands require, for their efficient exercise, a high degree of mental development, involving attention, memory, observation, reflection, apprehension, understanding, judgment and reason; but we find no such requirement upon any statute book or in any decision, although in New York, the law recites as qualifications: fair character, integrity, sound judgment, and to be well-informed. But generally speaking, given a *man*, within certain age limits, on the tax lists, or the husband of a woman on the tax lists and speaking the vernacular, and we have the making of a juror.

He must not, however; be (I am taking New York as a typical example) a public officer, legislator, judge, surrogate, sheriff, his clerk or deputy, teacher, clergyman, person connected with a lunatic asylum, State prison, or almshouse, or a physician, surgeon, pharmacist, veterinary surgeon, embalmer, attorney-at-law, person connected with a press association, or daily newspaper, or employed on a canal, or steam vessel or railroad, or by a telegraph company; or a member or honorably discharged former member of the National Guard, or of a fire company; or a steam boiler engineer; or a pilot, or a member of the police department, or a grand juror, or a sheriff's juror, for these, though they have all the mental attributes necessary for the due performance of this important function, need not serve, because it has pleased the legislators so to enact, presumably in the majority of cases, because these excepted classes can not, in justice to the people whom they serve in one capacity, be dragged away to serve them in another. It is those who regularly serve the people in well-ordered occupations, likely to beget in some

measure mental habits adequate to the duty, who are exempted by law from fulfilling it. But even with these excluded by law, the power to excuse others, freely exercised by members of the judiciary, largely exempts those whose individual tasks are so important to themselves that they will suffer serious loss from serving, and so, under this head, bankers and proprietors of large enterprises, or men upon whom rests large responsibility, usually get away.

It is the residue, men of no great responsibility, men whose occupations do not as a rule develop mental acumen, that are left to serve as juries.

The result tells both in the quality of justice administered and in economic waste. The economic waste is great; the panel is always larger than the need; in order to get jury a of twelve men, twenty-four or so are kept in attendance and in idleness; such of them as have remunerative employment, at a loss to themselves and the community. The very fact that a man is vexed in his mind by the individual loss which he suffers, and his individual duties left undone, unfits him psychologically for the task of an efficient juryman, because his attention and other requisite mental faculties are impaired by his sense of personal loss, and the distraction incident to this. Here is a substantial factor making strongly against a prime quality of justice, if such could otherwise be obtained with the present quality of juryman and the method of impressing him into the unknown field of service.

But our law recognizes the limitations of this sentimental fetich, and withdraws from it at the outset the large class of questions to which I have already referred lying in well defined categories in the juridical field; it also recognizes its mental limitations in its own field, and so requires that all matters for consideration of the jury shall be, as it were, a sort of predigested food for mental invalids; and so it strains this food, first, through the most highly developed rules of evidence, which have been evolved by the reflections of partly trained metaphysicians on the operations of the human mind; and if, perchance, the trial judge, in the rough and tumble of a hasty decision upon a much controverted scholastic proposition, as to whether this manner of giving evidence is or is not permissible, leans too far against the weight of authority,

in admitting or excluding a shred of testimony, in the whole fabric of the case, this point must or may, at a later stage of the case, be a subject of battle on appeal, before several sage judges, upon elaborate and closely reasoned briefs, exchanged between counsel, filled with appeal to precedent and argued at a length which would not have been permitted upon the trial; and then, though the judges are not satisfied that any harm was done, by the single violation of the rule, which they announce, after these preliminaries, they can not say that the jury may not have been misled, or may not have decided otherwise. If the trial took place without a jury, the appeal Court can or may cure the defect; if it took place before a jury, a second, or third, or fourth, or even fifth trial, after the lapse of years, must still take place before a jury, such is the feigned respect for this sacred institution; but, if the jury disregards the evidence or the weight of evidence, or the instructions on the law, or awards insufficient or excessive damages, or if it hears comments from counsel or from judge, which it ought not to have heard, back goes the case, from a successful appeal, to be heard before another jury, with the judge, counsel and parties thus enlightened, but with the jury just as ignorant as before, for it is a new jury. Or, if there is substantial excuse within the rules of law for sustaining the verdict of the jury, though justice has, to the mind of a fair-minded man, obviously failed in the particular case, the jury sanctifies its finding, and the verdict stands. Or, if successive juries have all, under the rules of law or the judgment of the men who sit on appeal, similarly erred, three times, then such is the feigned respect for their judgments that this very fact has frequently been announced as the reason for affirming the last successive judgment, of which the appeal Court disapproves.

In short, we recognize in every imaginable way that the jury is the weakest element in our judicial system, and yet we pander to it as a sacred institution. It causes more miscarriages of justice, and is the occasion of more appeals, reversals, and delays than any other element in the system. If a juror is disqualified, and a challenge improperly overruled, or if he hears improper evidence, or fails to hear proper evidence, offered and rejected; or if the counsel or the judge makes an improper remark before him, such is his tenderness of adjustment that his verdict must needs be set aside, and another jury given an opportunity.

I am speaking solely of civil juries; the criminal jury has a different *raison d'etre*, which I shall not discuss. We treat a jury as a sacred institution, and we regard it, in all ways in which our regard can be measured, as wholly incompetent for the purpose for which we establish it. We give Courts power to lead and instruct it, we curb counsel in addressing it, we jealously guard rules of evidence lest it be misled, we withdraw large classes of questions from its consideration because it is confessedly incompetent, and we allow appeals to correct its disregard of the very fundamental principles of a just judgment.

One of the prime elements of an efficient judicial tribunal, is impartiality and freedom from prejudice, and yet it is proverbially admitted that before an average jury in a negligence case a corporation stands less chance of judgment on the merits than an individual, an employer than an employee, a religious opponent than a co-religionist, a member of a different race from a member of the same race. Married men and fathers in certain cases are popularly supposed to give different verdicts from unmarried men. And all of this is recognized and discussed as an element in an expected decision, without regard to the evidence.

We hear much of the technicalities of the law defeating justice; the most of these technicalities have grown up and exist in a vain endeavor to prevent juries from defeating justice. There are, of course, technicalities of some sorts in the substantive law, such as that only a party to a sealed instrument may be sued upon it, even though he is agent for a disclosed principal; there are also technicalities of procedure, which are contemptible in their effect on the attainment of just ends; but the most contemptible technicalities are those of evidence, instructions, and procedure before and in the presence of juries, and their strictness is based upon the confessedly limited competence of juries. To my mind it partakes of absurdity to retain a confessedly incompetent and inefficient auxiliary in the administration of justice at so much cost in so many directions,—waste, congestion, double or multiple trials and added technicalities designed to prevent this sacred fetich from going wrong. But, nevertheless, it continually goes wrong. I never pick up a book on advocacy, or the so-called art of the advocate, that I am not horrified at the frankly unethical attitude of the

writers toward the jury. One would think that trickery, chicanery and artful craftiness are the only elements that appeal to a jury. Courts are the institutions installed, presumably to give correct judgments upon ascertained states of fact, in dispute, under the application of the established law. But when one takes up treatises on advocacy, he sees that he, a practitioner at law, must or must not resort to this petty trick or art, or fall into this or that trap, for fear of its effect on the *jury*. He must refrain from asking certain questions, or practice certain ways with witnesses, to capture or keep the favor of the jury. The jury is the great bug-a-boo, whose childish impressionability must always be reckoned with in the administration of justice by its aid. One never hears such suggestions in respect to a judge unless he is unfitted for his position! Then we hear occasionally the term jury-fixing, and we all know the suspicions that have attached to the jury in certain well-known trials. Who, after listening to a trial, could ever tell after a jury had left the Court-room how it would decide? Is it not recognized everywhere as a fitful, uncertain and incompetent factor in the administration of justice? And why should it not be? There is not one important personal or property interest, outside of a Court of justice, which any of us would willingly commit to the first twelve men that come along the street; if any of us employed such twelve men in our business without learning their fitness, he would be accounted an unsafe man in the community.

The jury has been historically a changing body existing and justified by changing reasons. Every substantial reason which ever existed has now departed in an urban community. Originally compurgators, or *jurors*, were neighbors, who swore to their belief in the justice of a defendant's cause; then they were *witnesses* from the neighborhood, who judged of the dispute from their own knowledge of the facts; then they were triers of fact determining disputes of fact, from their knowledge of the witnesses; then they were sturdy representatives of a rebellious free community, withstanding the pressure brought upon them by prejudiced and partial judges acting in the interest of royal authority. Now they are, in urban communities, at best, men chosen chiefly from the more humble positions (because of exemptions and excuses presented by others) unknown to the parties, ignorant of the witnesses or their quality,

and wholly untrained in the important functions of their position; popularly supposed to be swayed by their prejudices, racial, religious, political or otherwise, captured by ignoble devices, repelled by innocent mistakes, swayed by emotion, excited by passion, and when described by characteristic instead of by name, obviously undesirable as an impartial, competent and efficient tribunal to administer justice.

At the time the jury system was firmly embedded in our Constitutions, it had endeared itself as the bulwark of the people against corrupt or prejudiced judges acting in the interest of the royal appointing power. Now, there is no royal master for the judges to be subservient to. I have heard just two modern justifications urged for the jury, apart from its historic associations; namely, that it is valuable for its civic effect upon the jurors themselves, and that, in case of dispute, a jury is *as good* as a judge in arriving at the truth. The latter proposition is usually attributed to the late Samuel F. Miller, Associate Justice of the United States, who it would seem had but very slight opportunity to judge of the general efficiency of an average urban jury, for he came to the bench from Iowa, an agricultural, homogeneous community, and grew up in Kentucky; he sat in the Supreme Court of the United States without a jury for years, his only jury work, if any, after his elevation was once in two years, if so often, in a Circuit Court of he United States, in the Eighth Circuit to which he was assigned' and the Federal juries are notoriously of higher grade in intelligence than the average local jury. And even he did not claim superiority, but only *equality* for the jury. But if one man can do as well as twelve, why have twelve? As for the argument of civic education, it is unconvincing, in view of the cost. It would doubtless promote civic education to send every man to the legislature for a period, and to change the President each month, but it would play havoc with the public interest. It likewise plays havoc with real justice, to commit its administration to minds untrained and unfitted by experience, while vexed with the duties of the positions from which they are unwillingly torn.

In our equity, admiralty, bankruptcy and probate Courts, judges or single referees are usually the competent and satisfactory triers of fact, they ordinarily have the necessary training and ex-

perience to do efficient work and the skill to state their conclusions at length with the reasons why; they can take the testimony at convenience and review it at leisure; they can study different parts of it, in their relation to each other; they do not receive complicated instructions in an unfamiliar subject, and they are not locked up without food or conveniences and compelled to reach a conclusion; they are equipped to give attention, weigh evidence, exercise judgment, and are not as a class and proverbially swayed by trick, artifice, device or cajolery; the Courts, so far as I know, never find it necessary to take care that they shall not be misled or prejudiced by accidental slips in their presence; in short, judges, as a class, are everywhere regarded as men fitted for the business in which they are engaged, whereas everywhere, except in our bills of rights, juries as a whole are treated as the crudest possible agencies, comparing in some measure with the flip of a coin, the turn of a card, the entrails of a fowl, or a flight of birds, as a means of ascertaining the right.

As I see it, therefore, the jury is the one inapt element in our system of administering justice, antiquated, crude and inefficient, causing congestion, leading to waste, and perpetuating technicality, in order that it may even approximate fairness.

If judges are for any reason not desirable triers of fact, then, at least, the public money would be better spent, public business better expedited, and better results reached if we had standing triers of fact skilled in the art, through experience, and therefore better equipped psychologically for their function. No engineer devising a system for the administration of justice would consider for a moment a jury, as now constituted, as an element of efficiency. If triers of fact are apt to become corrupt, or are more easily corrupted, that can be provided against by other means. Being in the public eye, in a proper condition of public life, they are less easily corrupted than a single obscure juryman. And the agencies which are now moving toward improving the quality of the Judiciary, would make for the proper selection of these as well.

Inefficient Court Attendants

Court attendants are frequently incompetent, just as many of our civil servants have been grossly incompetent under the spoils

system, and in such cases they need to be selected for efficiency. But they require no further comment here. In so far as they are inefficient or dishonest, they retard the proper administration of justice.

The Inefficiency of Judges

We now finally come to the *Judiciary*. If it be recognized that the two faults which have caused all of the present-day vociferous clamor against them are not faults, but essential parts of an efficient Judicial System, namely, the exercise of the power of injunction in proper cases, and the review of unconstitutional legislation; and that the two greatest faults preventing an efficient system—the inexcusable rules of procedure, and the jury—are not of their creation, there will be comparatively little to consider in respect to the judges themselves.

Litigants and critics of the *Judiciary*, after eliminating the elements of which we have spoken, still find some things to criticise in our judicial system and its workings; foremost of these is uncertainty in the law; second, long delay in the Courts occasioned by other causes than congestion and procedural defects, and attributable chiefly, if not wholly, to one of the three causes, courtesy among counsel, frequency of appeals, and sloth of judges; third, the inefficiency of such auxiliaries as may be classed under the term patronage of the judiciary, such as masters, referees, receivers and the like; fourth, the expense of litigation; and finally, the inefficiency of individual judges.

Of all of these weak points in the system, the one which is really, on the whole, of the least importance is the inefficiency of the judiciary; not that it might not be the most important, if the entire judiciary were inefficient, but because, considering the many imperfections inherent in the system, and which no judge has the power to perfect, the judges, on the whole, are an unusually conscientious and competent body. A judge could not, if he would, in conformity with his judicial oath and duty, disregard the Constitution, abolish the civil jury, deliberately violate the statutory rules of procedure nor defy the legislative will, except where the legislature transcends its power as defined and limited by the Constitution, nor abolish or control the right of appeal. Nor can a single judge diminish to any great extent the uncertainty of the

law, or do much to relieve the congestion of the Courts. I have known conscientious men to kill themselves trying to do the latter by working over time; one judge told me he worked seventeen hours a day for three consecutive weeks on litigated motions in New York City to keep even with his calendar. Every effort to relieve congested calendars by legislation, without simplifying procedure, has only paved the way for an ever-increasing volume of litigation arising out of increase of population, increase of prosperity, and increase in the uncertainty of the law. The Judiciary has very little to do with the uncertainty of the law; this is almost entirely due to uncertain legislation, which leaves it to the Courts to construe doubtful words and evolve a plan from insufficient statutes and reconcile inconsistent or unintelligible laws.

But the duties of the judicial office, even in our system, can be defined, and they can be directed toward increased *efficiency in the administration of justice* and this, after all, is the only justifiable reform, change, modification or revolution which we ought to undertake with the Courts. It would not make for increased efficiency in any appreciable respect to provide for the recall of individual judges by popular vote, because electors are rarely in a position to know the facts, and they would mostly vote upon partisan lines and not upon lines of efficiency. If inefficient judges are elected by popular vote, as they are, they can be and will be continued in office by the same influences.

The Individual Duty of Judges

But before studying remedies, let us consider conditions. A wholly incompetent judge is rarely met with; the responsibility of the office, seems to have a developing influence on the most unpromising incumbent. Judges as individuals can, however, improve condi. tions by doing their individual duty. This indivudal duty includes administering justice according to law promptly and impartially, mastering the law conscientiously, ascertaining the facts intelligently, diligently devoting a proper portion of their time to the performance of their public obligations, distributing patronage as a public trust, and commanding the public respect by their demeanor.

It is undoubtedly suspicion of the Courts which undermines the stability of the government. Several times in my own experience

I have, with reason, suspected that unfair influences were at work to prevent the doing of justice. It is not necessary now to cite the specific instances.

Two things which have struck me most forcibly in individual cases have been the bad manners of certain judges to all who came in contact with them publicly, and the other the abuse of judicial patronage. These are, however, usually local faults, due chiefly to the character of the controlling factor in the electorate and the source of judicial nominations. Where nominations are dictated by an actual boss who wields an iron hand, or a closed fist, and his methods are overbearing and ill-mannered, it is not surprising that similar manners may characterize those whom he names for the bench; but bad manners are not inconsistent with legal and other judicial ability.

Bad manners, however, upon the bench, or in a judge, which would not be tolerated in others, diminish the efficiency of the office; and where manifested in brutality or rudeness to members of the bar, they destroy courteous comradeship between bench and bar; and when bad manners are a cover for injustice, they are especially deplorable.

I emphasize these features of judicial administration because they beget contempt for the Courts, though the contempt may be suppressed in the Courts. One cannot repeatedly come into contact with such ordinary misbehavior and entertain respect for the institution in which it prevails. A continual undermining of respect makes lawyers dissatisfied with decisions, and this leads to a multiplication of appeals, which in time adds to congestion and delay.

It would increase the efficiency of judicial machinery if the judges cultivated good, although firm manners, on the bench, and by their example to the bar, because it would diminish friction and discourage that attitude of the bar which regards the bench as its natural enemy to be held at bay by strategy, if not by actual deceit, and therefore not to be aided in a friendly way to reach a correct solution.

But a too widespread fault on the part of the judiciary is the abuse and the unethical use of patronage. While I do not recall any instance of a judge having been brought to book for abuse of

patronage except by newspaper criticism, I know of at least two instances where a judge has been denied a renomination for a refusal to abuse it. In one instance it was the refusal to abdicate the judicial power in favor of the party boss, by naming a man as clerk at his dictation; in the other case, it was a refusal to appoint to a responsible position of trust a confirmed drunkard who had shown himself incompetent in another public position and was about to be removed therefrom for incompetency. Both of these judges were distinguished men, and had served long and faithfully. In the case of one it was made a campaign issue, but, being opposed by the *organization*, he was defeated.

I hold that it is unethical to distribute judicial favors to aid a political organization, or as a reward for political services. A bench which submits to the dictation of a political boss in the distribution of public or private money is under justifiable suspicion of inability or unwillingness to draw any fine line in obedience to the boss.

If a judge appoints a referee or a master who is unfit for the duty imposed upon him; if he appoints as a referee to compute a man with no capacity for figures; or to make a sale, a man who knows nothing of the *modus operandi;* or to take testimony and report with his opinion, a man ignorant of the rules of evidence and whose judgment is worthy of no confidence; or to hear and determine, a man of general incompetence, or one who will delay or prolong hearings to increase his *per diem* compensation; or to handle funds, one who uses them for his own purposes, in the hope that he will make good later out of other similar receipts; and the judge has not first considered the character of the man for the particular duty, the judge is prostituting his office and betraying a trust.

If a judge uses his power to compel litigants to resort to an incompetent referee in obtaining justice, it is the judge, more than the incompetent, who should be condemned. The character of those whom judges select for positions within their gift should be closely scrutinized by them, and by their critics, and they should be compelled by exposure and criticism to do their duty. A judge, who does not already appreciate it, should be made to know that he will be held responsible for the faithful performance of their duties by his subordinates selected by him as a part of his judicial

patronage. Some most exasperating experiences have grown out of the inferiority of such appointees of the judiciary. Judicial appointees for such purposes should be selected for efficiency, and the judge should charge his conscience with holding his appointees to a proper sense of their responsibility and duty. A judge should be held morally responsible for the character of his appointees, and he should know it.

One judicial abuse is the misuse of advertising patronage. The object of advertising is publicity. If a judge empowered to designate a paper for publication designates one which has no circulation, or which is not calculated to give the publicity which the law intends, he is morally just as guilty of grand larceny or robbery as if he compelled the litigant to give up his money to the publisher without any consideration.

Judicial Ethics

Without multiplying examples, reflection upon those within my knowledge or information for a quarter of a century, and in many places, impresses me that, except in a few cases of incapacity, the greatest faults of the judiciary, for which they themselves are responsible, and which they could be made to rectify, if the attention of all were sufficiently called to it, are due invariably to a disregard of ordinary rules of ethics; a total failure to appreciate, in the particular instances, the high moral duties of the judge; the trust nature of his office.

Two or three years ago, in coöperation with another member of the bar, I made some inquiries of those who I thought would know, quite generally throughout the United States, to learn how, in the estimation of these, the judiciary were doing their high duties. The result of the replies was published in the *American Law Review* for July and August, 1911. Our conclusion was that generally, the judiciary measured up to the proper conception of judicial duty; that this was almost universally true in some States; that in these States they commanded general respect; that exceptional instances of incapacity existed in many States, the complete elaboration of which showed, to my mind, the supreme need of some movement to bring to the individual judges a sense of their shortcomings. The following is an extract from that article:

"This is what we find charged against present members of the judiciary in different parts of the United States: Intellectual and other incapacity; bad personal habits; improper political activity; proneness to play politics; absence of a sense of obligation to their office, to the legal profession, to the public; that the judges confine themselves too closely by legal technicalities; that they hold cases too long; that they are lazy; that they are dominated by local influence; that they are lacking in legal ability, or are of less than average ability; that they are unduly active for re-election; that they permit delay; that they are temperamentally unfit; that they are influenced by the judges in review of whose decisions they sit; that they misuse their patronage; that they are of mediocre or inferior quality; that they are guilty of conduct worthy of criticism; that they are grossly unfit (one complaint of unfitness because of habitual drunkenness was made); that their individual judicial conduct has been the subject of scandal; that they are subject to corrupt influence; that they wilfully disregard the rights of individuals; that they are guilty of excessive zeal; that they are of undue temper; that they have too great regard for their personal friends; that they are susceptible to outside influences; that they misconceive their function; that they are partial to certain classes of litigants, notably large corporate and financial interests; that they are under the control of legislators or politicians, or are influenced by political considerations; that they do not command respect or confidence; that they are inferior or second-rate men, or of a low order of ability; that they are not the best lawyers, nor lawyers of the highest standing; that the best members of the profession will not take judicial position; that they are physically feeble; that they are intellectually weak; that they are ignorant of the procedure of their Courts; that they depart from it; that they decide individual cases and not the law; that they are not well-seasoned; that they have not the judicial temperament; that they lack robust courage and independence; that the elective judiciary is not satisfactory; that they abuse the poor; that they pay too great heed to the technicalities of procedure; that they are weak in grasping and holding to legal principle, and for that reason their decisions are often conflicting with each other and most unsatisfactory in that they give poor reasons for a correct decision; that it is a common remark that you cannot tell what the next decision of the Court on the same point is going to be, and the case law is in a chaotic state; that they decide cases justly enough, but their opinions are written with such a feeble grasp of legal principle that one cannot extract any rule of law from them (and this of a supreme Court); that the opinions show a lamentable feebleness both in English style and in logical and lawyer-like reason; that local and minor judges are subject to insidious political influences; that the character and calibre of minor judges is deplorable, and that the minor justices are unfit."

A system in which such faults are tolerated, or in which any number of judges are guilty of them, demands reform in the personnel.

Lawyers should make themselves felt as a body in making inefficient judges efficient, or in securing their removal by united effort, and to my mind, this is the first and perhaps the only necessary step to bring such judges to a decent appreciation of their official and moral duties.

When the American Bar Association compiled its canons of professional ethics, its committee disclaimed the power to extend their service to the judicial field, and subsequent efforts to get the Association to take up this subject have hitherto not been successful. Since then, the people have begun to pay some attention to the bench, but it is not yet too late for the bar to take a hand in necessary judicial reforms.

JUDICIAL REFORM

This reform seems to me to demand a more careful selection of candidates for the judiciary rather than the popular recall of mistakes, and I firmly believe that the same reasons which led the American Bar Association, and so many State Bar Associations to formulate codes of ethics for lawyers, apply with equal force to the bench. It is always said in discouragement of such efforts that you cannot legislate morals into people; that you cannot make people good by enacting that they shall be good; that is true, but you can change a style of dress in a single season and for practically a whole sex in a civilized land by letting a few people adopt it, and a few newspapers talk about it; so you can set the reading public all to reading and discussing the same book by judicious advertising; likewise you can make good manners and better ethics fashionable with the bar and the bench by advertising them and calling public attention to them; and one way to do this is for the bar to call attention to proper standards, and to take thought for increasing efficiency on the bench by directing common thought to the essentials of judicial conduct and demeanor.

Since the canons of ethics for the bar were adopted and promulgated by the American Bar Association, there has been a wide awakening to what is demanded of the lawyers; in New York City,

where probably the worst offenders existed, the City Bar Association has at large expense increased its force of attorneys for investigating complaints against lawyers to three men, with several aids constantly engaged in this work, and bringing offenders to book; its grievance committee of busy lawyers in active practice, who volunteer their services, sit more than an average of once a week throughout the year to sift complaints, and literally scores of men have been prosecuted for offences leading to disbarment, suspension or censure. Those whose cases never reach the stage of prosecution are chastened and warned and have grown more wary and particular; the County Lawyers' Association, through its Committee on Discipline, is doing a similar work, though not so thoroughly equipped as the City Association, by reason of more limited resources for the work. Its membership committee found and stopped almost six hundred men from practicing or pretending to practice law in New York County without proper authority; and men have been censured and have mended their ways without severe prosecution. This Association supplements the investigation and prosecution, through the efforts of a Committee on Professional Ethics, that meets regularly once a month, and oftener, if occasion demands it, to discuss practical problems of ethics submitted to it by inquirers at the bar, some of whom seek light on their own problems; others of whom propound questions relating to what they deem the unethical practices of others; these inquiries and discussions are all impersonal, and do not result in charges or the condemnation of anything but unethical practices; the questions and answers are reported to the Board of Directors, and widely published in the Association's Year Book. Such is the awakening spirit of the Bar in New York.

In San Francisco, a local code of ethics, peculiar to their problems, has been adopted. In Connecticut, Massachusetts, Pennsylvania and Illinois, local forms of Codes of Ethics have been discussed, and in Connecticut, adopted. This is beside the perhaps perfunctory adoption by many State Associations of the Canons of the American Bar Association. In Chicago, the Board of Managers of the Chicago Bar Association has been active in the investigation of cases. These are examples that have come to my notice of the recent professional activity in promoting a greater respect for and observance of Ethical principles at the Bar. It

has resulted in purging the bar of certain unworthy members, and in making others more careful; it has instructed those who desired instruction, and dissuaded some who would have erred. The awakening conscience in respect to the abuse of the office of attorney-at-law has shown some effects in the greater activity of judiciary committees, and there is an awakening conscience at the bar to prevent the subversion of the Courts in the systematic practice of injustice under judicial auspices.

The New York State Bar Association has appointed a Committee to report at its next meeting on the statistics of judicial activity for the last five years, including the percentage of reversals on appeal. This will form a tentative basis upon which the practical efficiency of the Courts can be considered, from the standpoint of actual work done, and the permanency of its results in certain cases. The same Association has a special Committee, which will report at the next annual meeting, upon the manner in which the Surrogates in the State exercise the public trust of designating papers in which advertisements are published under their auspices. Too often these notices, in the past, which are given at the expense of widows and orphans, have been published in papers in which no prudent man, wanting an equivalent value for his money, would ever think of advertising. New York is the State in which, perhaps above all others, by reason of peculiar political conditions, the judiciary, though eminent in its higher reaches for its legal ability, has fallen short in its *nisi prius* and inferior bench, in the fundamental principles of judicial ethics.

I should consider this article written in vain, if it did not point to the advisability of informing the bench, the bar and the public, of what ought to be and is expected from the bench, as hitherto the most trusted guardians of the public interest. Their position is one which above all others demands close adherence to fundamental ethical concepts for its due administration. One may look almost in vain for any simple, concise and authoritative statement of what a judge ought to be and do. And the violation of fundamental principles of ethics by members of the judiciary is altogether too frequent to make such statement unnecessary. I have already referred to work in which I participated in ascertaining judicial conditions in the United States. The authors of that

article expressed their views upon canons stating the ethical duties of the judge, as follows:

"They should clearly and concisely make it known that the judge should so administer the law in the settlement of controversies as to show that he appreciates his position as honorable of itself and honorably to be maintained; that his conduct should uniformly be that of a gentleman and an officer and for the good of the service; that he should be ever conscious of his responsibilities, attentive to his duties, assiduous in their performance, and avoid delay as far as possible; that he should be scrupulous to free himself from all improper influences and from all appearances of being improperly or corruptly influenced; that he should be studiously regardful of the rights of litigants; that he should be an independent and representative citizen, rather than a partisan; that he should use the necessary patronage of his office as a public trust, and that in the selection of referees, receivers, or other judicial appointees he should conscientiously appoint only men known to him to be of integrity and fitness for the duty assigned; and if he is permitted to practice at the bar, or to prosecute private business, he should not permit such matters to interfere with the prompt and proper performances of his judicial duties."

In conclusion, I would recapitulate that the judiciary is not to blame for any widespread abuse of the power of injunction, and that this power should not be taken away or curtailed, except, perhaps, to adopt such regulations for the manner of its use as to prevent its arbitrary use by an arbitrary or corrupt man; that the chief fault of the Courts as instruments of efficiency, lies in their procedure, which should always be a subordinate factor in the administration of justice, and a means, not an end; that the blame for this lies with the legislature and not with the judiciary; that the legislature should be satisfied not to try to regulate the details of procedure; that the ideal procedure is a simple practice act, with all rules made by the Courts and liberally construed so as to decide all cases on their real merits; that much of the confusion of the substantive law is also the fault of the legislature, to be corrected by less legislation, better formulated, through the aid of legislative drafting bureaus; that appeals are too frequent; that such faults as are manifested within the judiciary are faults of our political system and the carelessness with which judges are selected by the nominating authorities; that the judiciary as a whole is surprisingly trustworthy considering the source of nomination and the character of the nominating authorities, and that judges are occasionally

made the pawns in political manoeuvres; that no fault characterizes the entire body; that the faults of individuals are many; that absolute incompetence is rare; that the judicial shortcomings which justify lack of confidence in those who are guilty of them, come almost entirely from a failure to appreciate and observe fundamental principles of ethics; and that the most widespread of these is the disregard of ordinary principles of honesty and responsibility in the distribution of patronage.

The remedies which I would suggest are: an early opportunity to be heard upon all *ex parte* injunctions and receiverships and that preliminary injunctions and receiverships should be only temporary until such hearing; a complete reform of all procedure in the interest of simplicity, and its subordination as a means and not an end; the establishment of permanent legislative drafting bureaus, and less legislation; the abolition of the jury in civil cases; no appeal in any interlocutory matter, except injunctions, attachments, arrests, and receiverships and similar cases where the results of preliminary steps are to deprive perhaps innocent parties of valuable rights *pendente lite;* more care in the selection of judicial candidates for fitness; the education of bench, bar and people in the standards of judicial propriety, by the formulation by Bar Associations of concise statements of such standards; strict accountability of judges for their observance of such standards to tribunals for the review of their judicial conduct, preferably Courts of impeachment, not constituted upon partisan lines, and therefore not of legislative complexion; greater ease of complaint and speedy procedure before such tribunals; and the application of severe penalties for the abuse of judicial patronage by which litigants now suffer.

When we have observed these suggestions, we will have Courts to be proud of as instruments of efficiency and justice, and our judges will enjoy our confidence.

The Judicial Recall by Popular Vote Condemned

The degradation of our judiciary, such as it is, is due to partisan politics; and the judicial recall is a device which will increase the vice. Others more able than I have written on the menace of this proposition and its logical deficiencies; with their conclusions I am in hearty accord. That device will

either be practically a dead letter, or it will be used for partisan purposes; it is just as likely to result in removing competent judges and retaining incompetent ones, as the present system of election and renomination. It will, to the extent that it is used, abolish our Courts as administrators of law, and establish them as administrators of popular fancy. The worst failures of Courts as instruments of fair justice in the history of the world have been of this order. There is no reason why democracy should be synonymous with anarchy, nor why every whim of a temporary majority should characterize our institutions; if it did our institutions would become as various as temporary fancies are numerous. It has been one of the good fortunes of our history that though partisan majorities changed, our institutions have rarely changed, and except for certain fundamental differences of policy, citizens could in the main enjoy life, liberty and property under the protection of established law, whatever party chanced to be in power; but if judges are subject to be put out of office by popular vote, after a decision, we will have applied to judges what political wisdom has declared is inapplicable to any one else, an *ex post facto* law; for punishment of a judge on account of a just and lawful decision, unpopular with the more numerous party, would be an *ex post facto* law, in its injustice to the judge. Sworn to obey the law and enforce it, he would be subject to removal by popular frenzy for obedience to an oath. The judicial recall is impossible within an established system of law, for it substitutes a vote of the people, *ex post facto*, for a predetermined law; if the vote of the people is to punish the judge for his acts in accordance with law, as it may, then the judge should, in order to avoid the law, *guess* at unexpressed popular opinion, to escape the penalty, rather than consider the law in order to render a just judgment in accordance with it.

Unlike administrative and legislative officers, a judge cannot have an individual or partisan policy, except in the administrative part of his functions; if he attempts to declare either his own will or that of his constituency, not previously a part of the existing law, he will be guessing in respect to the future in applying to past conduct present remedies. Such a system would most certainly disappoint the hopes of its advocates. I cannot believe that any great number of judges would act differently from the present, nor that the recall would ever be used in practice except occasionally

by a firmly entrenched party for strictly partisan purposes, or against a notorious offender, who, under a proper non-partisan impeachment system, could be more justly treated. It might be that a people having so little respect for a system of law, as to reserve the right to punish judges at will and without predetermined cause, would have so little respect for the office or its functions as to elect more incompetent men to the office in the first place and thus impair the system, but I cannot conceive that in a system in which justice continued to play a part the recall would be a weapon of use. It seems obvious that to the extent that judicial tenure should be subject to popular whim, law would be subordinated to the cultivation of popularity. If the popular judgment were always just or always fully informed as to the facts, we might rely on it. A demagogue is a creature who has been known and despised of political philosophers since political philosophy began; his arts, his baseness, his material and his enmity to the true interests of the people have been recognized for ages; by flattery and deceit of the people he accomplishes unjust results, through the aid of the people. If it is to become an established principle of law that a judge is to fear popular vengeance, for his judgments in accordance with law, he will be tempted certainly to disregard the law in order to merit praise; to subvert his office for his personal advantage; if the system were in full vogue an unpopular or unknown suitor could not hope to weigh before the court against one popular and well-known; the judge would require extra courage to do justice in such case, and the weak could never hope to secure justice against the man who could command the electorate.

If the judges were so debauched as to court popularity by their decisions, the political boss would own the Courts to do his will, if he could only deliver an unquestioned majority, and his unquestioned majority could be relied on to make a judge do his will, for judges could be removed until one could be found to do his will. The boss who has refused a renomination to a judge who declines to do his will, could have a judge removed for declining to do his will. Pushed to its logical conclusion such a system if inaugurated and in such successful operation as to be available for the purposes of its advocates would mean the disappearance of equality before the law, and the complete subservience of judges to the will of the popular leader. Justice would be then in all of the

Courts, as it has too often been in some of them, within the gift of the man who could deliver the votes.

A judge should certainly be removable for gross misconduct in office, but the voters at large and without a trial attended by all of them, have no means of ascertaining the facts; they would be carried hither and thither by partisan misrepresentations; they would hear no testimony; they would be governed by their imagination and worked on by demagogues. A political organization which casts a solid vote and exists for the profit of its members at the expense of the State, could perpetuate its hold and strangle the minority in the community. Such organizations have already debauched the administrative and legislative branches of the government; occasionally they have debauched individual judges; this is a device to debauch not only the whole judiciary but the system of law. Philosophically, it is unthinkable that civilization which has developed the juridical idea should now subordinate it to the will of the unscrupulous and brutal boss, so that whatever he and his followers demanded should be theirs at the hand of the judge under penalty of removal from office and substitution of one who would work their will.

What the *people* need is an *efficient* judicial branch. Efficiency is not to be accomplished through the occasional recall of individual judges by popular vote, but, by the establishment and observance of universal principles, which are of the essence of justice and can be applied to all judges alike and at all times.

Give the judges an intelligent and fair law, a simple and flexible procedure, an opportunity to administer actual justice upon the facts and merits of a controversy, relieve them from the necessity of observing unconscionable technicalities which are not of their making; and *then* hold them to strict responsibility for high character, good manners, integrity, dignity, diligence and conscientious administration of their trusts; make their removal easy, but by a non-partisan tribunal, which can judge of the case upon evidence; and let that removal be predicated only upon findings of fact and for a violation of duty, and our judiciary will be restored as an institution worthy of an intelligent and advancing civilization, an efficient branch of the government, justifying its existence and its cost.

New York, November 1912 *Charles A. Boston.*