



Kentucky Law Journal

Volume 5 | Issue 2

Article 2

1916

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Recommended Citation

Taft, William H. (1916) "The Attacks on the Courts and Legal Procedure," *Kentucky Law Journal*: Vol. 5 : Iss. 2 , Article 2.
Available at: <https://uknowledge.uky.edu/klj/vol5/iss2/2>

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Kentucky Law Journal

VOL. V. LEXINGTON, KY., OCTOBER, 1916 NO. 2

THE ATTACKS ON THE COURTS AND LEGAL PROCEDURE.

By Ex-President William H. Taft.*

One can not discuss the subject for tonight without considerable embarrassment. The embarrassment arises from the danger of being misunderstood in what one says in criticism of our present judicial system and its workings, and having his criticisms used for purposes and to sustain views which he would be the last one to approve. The loud—and I may say the blatant—attack upon our judicial system for the purpose of bringing about dangerous changes, instead of removing the grounds for real and just criticism, will only increase the evil that justifies it. In order, therefore, to make clear what I have to say, I shall first take up and answer the attacks upon the courts that are not only unjust but dangerous; and then state the real ground for criticisms of their work and suggest what it seems to me, would be effective remedies. There is a wave of popular demand for political change in our state governments, and indeed in our national government, sweeping across the country, from West to East, which can shortly be described as the substitution in our present democratic form of government of more democracy, for the change from a Republican representative system of government to one of direct and pure democracy, in which both legislative and executive functions are to be exercised by the people without the intervention of skilled and educated representatives and executive agents. I do not intend to dis-

*Delivered at Cincinnati Law School Commencement, May 23, 1914.

cuss the error of this movement tonight. Tonight the subject is the administration of justice, and that requires a consideration only of the application of this so-called further democratization of government to its judicial branch. Whatever may be said of this radical change proposed in executive and legislative governmental functions, the difference between the nature of the judicial function and that of the executive and the legislative functions, is so broad that even if the reforms proposed for the latter were wise, they ought to have little or no application to our judicial system. It may be well and truly said that the legislative and executive action of government should follow and manifest as nearly as may be the will of a majority of the people, as expressed in elections of legislative representatives and of executive officers; but it is not true that the conduct of judges in the work they have to perform on the issues presented to them should embody the will of the people in the delivery of their judgments. It is true that it is their function to enforce the legislative will of the people as expressed in the constitution and in the statutory law and to apply it with uniformity and equality and impartiality to all those affected by its provisions. Recall of judges and recall of judicial decisions leading to the so-called democratization of the courts, are destructive of the rights of the individual, take away the protection of the minority against the possible injustice of the majority, and are a mere recurrence to the tyranny of the Stuart Kings in their attempt to subordinate the administration of justice to their arbitrary will, except that the tyranny of the plurality of the electorate is to be substituted for the tyranny of one man. The necessary tendency of such remedies is to destroy the supremacy of the law.

A form of criticism which has been linked with the advocacy of these radically erroneous and destructive proposals has been a form of muckraking of the courts. Men have sought profit in the publication of unfounded attacks upon the personal character of judges, upon the subterranean influences that controlled them, which in these general muckraking days has found a market and a credence among large classes of people. Persons engaged in this work have not hesitated to seize upon sentences written in just criticism of the courts as a basis for such unjust slanders. I think fair-minded people concede that in

view of the small salaries which have been paid the judges, in view of the elective method of electing them which prevails in most states, in view of the very great corruption that at times has existed in the politics of the country, the freedom from venality among our judges is something of which we as American people may properly feel proud.

This leads me, however, to emphasize a very necessary distinction. Judges may be entirely free from venality and yet the method of their selection and the character of their tenure of office may not give us judges qualified by learning, skill, standing at the bar, and independence to render the best service. Criticism of the method of selection and of the character of the tenure is not an attack upon their personality, but rather an impeachment of the system under which they receive and hold their office. Comment upon this is not muck-raking—it is a discussion of the wisest organization of the judicial branch of the government.

The advocates of the new remedies attack the courts, first, because it is said they occupy much too large a field in the government of the country. They charge judges with legislating. They say that the legislature should provide, in the discharge of its duty, statutory codes covering the entire field of municipal law, simple and clear, so that he that runs can read, and the courts should merely enforce as between man and man and as between government and man this legislative will. The theory of universal codification and declaration of law by a legislature and the elimination of the judicial function of statutory interpretation was advanced by Jeremy Bentham in the latter half of the eighteenth and the early part of the nineteenth century, and it found many advocates. The present critics of the courts are only advancing the same view that Bentham advanced, with very much less force and utility, and at a time when our judicial system is not nearly so subject to the severe criticism which the English judicial system deserved when Bentham wrote. Countries have attempted to carry out Bentham's idea of codification and have sought as far as possible to minimize the office of the judges in the application of the written law; but they have utterly failed. In California it was attempted to cover the whole field of jurisprudence by codes, and yet the decisions of the courts in that state in their interpretation have been as many as in

the states where no codes exist and the citation of adjudicated cases in other states by California judges to assist them in construing their written law, is just as constant as in states where the Bentham idea has not prevailed. Nor is this result confined to American courts acting under the impulse and influence of common law precedent. The same codification has been tried in France, yet the function of the French courts seems to be growing wider and wider in statutory interpretation and in supplying defects of legislation. In other words, the expression that Bentham coined for the purpose of attacking the office exercised by the English court of his time, "judge-made" law, we may now use to describe as a part of jurisprudence that can not be dispensed with in any civilized government. It is impossible for codes to cover all the innumerable cases that arise in the transactions of men by specific provision, even when those who legislate are most learned and skilled in existing law, most experienced in the world's affairs and clothed with a knowledge enabling them to foresee as far as possible the contingencies that may arise for the application of law in the future. Nor are legislatures composed of men of this kind. The simple truth is that the judge-made law so-called is essential to the practical working of the written law and the reconciling of its inconsistencies. There is no higher, no more useful, and no more indispensable function that the courts have to exercise. The danger of its abuse is negligible because whenever the courts shall have thus wrongly interpreted or supplemented the legislative will, it needs but a legislative act to correct the error.

The second criticism of the courts is that they have usurped the sovereignty of the people in holding acts of the duly qualified legislative representatives of the people to be invalid because inconsistent with the constitution of the state or of the United States. It is said that they have interposed their own ideas of economics and of political policy to strike down the expressed will of the people. When the system of writing constitutions was adopted, there were two theories. The one was that the constitution in limiting the legislative function, the executive function and the judicial function was merely giving an admonition to those who were to exercise each as to the proper limits of their authority, and that each branch of the government was

the final arbiter as to what its authority was. The other was that the limitations of the constitution were intended to be effective and that the judicial branch in litigated cases coming before it, being charged with the duty of declaring what the law was must decide whether that which seemed to be a legislative act was in accord with the constitution as the fundamental law. To state it more exactly, the question for the court was whether the seeming legislative act was within the permissible discretion of the legislature to determine what it might do under the constitution; and if the court found the limits of that permissible discretion have been exceeded, to refuse to recognize its act as law.

The decision of the Supreme Court of the United States in *Marbury v. Madison*, that if an act of Congress was plainly in excess of its powers under the constitution, the court must declare it invalid, and a similar decision with reference to State legislation in *Cohen v. Virginia*, aroused the indignation and vituperation of Thomas Jefferson, who was a popular leader of the widest influence at that time. The court's view prevailed, however, and has prevailed down to the present day, through many vicissitudes and against recurring attacks of those supposed to be resistless leaders of the people. The same view has come to be accepted throughout the British Empire under Parliamentary constitutions given to the great British popular and independent federations in Canada, in Australia and in South Africa; the same is true in Argentina and other South American countries, and these seems to be growing a feeling among the jurists of Europe that in continental countries the same function should be vested in a high court.

I am far from saying that there may not be instances in which the courts have not given the consideration they ought to the strong rule of presumption in favor of the validity of that which the legislature has passed. Nor do I deny that at times they have followed their own nice difference of opinion with the legislature as to the proper construction of the constitution, instead of adhering to the rule that only when the usurpation of power by the legislature is clear beyond reasonable doubt can courts hold their acts invalid. But to say that the courts have sometimes erred in this regard is only to say that all

systems created by man are human. To predicate upon the statistics showing how many laws have been set aside as invalid, the claim that there has been a general abuse of power by the courts in these cases is most unjust, because such a view ignores entirely the recklessness with which members of legislatures have refused to consider the question of their powers at all, and have avowedly passed any law that seemed popular and that would commend them to their constituents on the plea that if the law was beyond their power, the courts would so declare.

The third criticism of this class against judges and courts is that in the application of the common law to new conditions, judges are out of touch with social progress and reform. They are, it is said, rigid and reactionary and fail to shape their so-called judge-made law to hasten the steps of society to the better things that social reformers plan. Indeed this is said to be true of our courts not only in the application of the common law, but also in their construction of constitutions and the interpretation of statutes. The proper discharge of the difficult duties of courts requires as judges men of great ability, wide experience, profound learning, independence and force of character, of nice discriminating judicial quality, and with the statesmanlike perception of the distinction between those fundamental principles of law that must be constantly maintained and preserved in any useful system of government and of the casual and temporary rules of human conduct that may be changed from time to time as conditions change, in the promotion of social justice and the pursuit of community happiness. Professor Pound, Mr. Warren and others have shown that the criticism of courts as reactionary and as lacking in response to the requirements of new conditions finds justification chiefly in the judgments of those courts whose judges are selected and retained in office under a system of election and short tenures, a system which is not likely to secure in the judges the learning, experience, ability and independence and impartiality that a life judiciary appointed by the chief executive affords. We could have no stronger evidence, therefore, that the very faults that the advocates of recall of judges criticise in the courts are likely to be increased rather than minimized by the so-called democratization of our judicial system.

The truth is, the great tribunal, the greatest in the world, that interprets and enforces our Federal Constitution, the Supreme Court of the United States, has shown itself peculiarly responsive in its interpretation of the fundamental law and of statutes and in its application of the common law, to that settled public opinion and that prevailing morality and that change of political and social conditions that should be properly regarded by a court.

This is shown as fully as anywhere in the case of *Holden v. Hardy*, in 169 U. S. The case presented a construction of that part of the Fourteenth Amendment to the Constitution, which is the bulwark of our liberties, providing as follows:

“No state shall make or enforce any law, shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, nor deny any person within its jurisdiction the equal protection of the laws.”

In the above case, after reviewing the many cases under the Fourteenth Amendment, Mr. Justice Brown said:

“An examination of both these classes of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure, which at the time the constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizens, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection.”

After mentioning the great number of changes that had taken place in the forms of procedure, he says:

“They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject

to constant fluctuation and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendments, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

“Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employes, as they arise.”

What, then, are the just criticisms of our courts? What is the cause of the popular discontent with the courts? We live in a state of unrest and discontent. Part of it is healthy, and part of it is not. The part that is healthy prompts to reasonable betterment by practical means. The part, not healthy, prompts to a search for a royal road to comfort, contentment, physical and mental, by legislation and without individual effort, and by undue dwelling upon the rights of persons and by undue ignoring of their duties. It does not prove that a system should be destroyed or radically changed because its operation has caused discontent among large classes of people. That discontent may have been fanned by misrepresentation and demagogic appeal and unfounded exploitation of nostrums and quack remedies which would be futile to accomplish any good at all.

What are grounds upon which the public have a right to complain? The chief grounds are first the delay in hearing and decision of causes; and second the excessive cost of litigation, due first to such delay and second to excessive fees and to the failure of the public to assume a greater share of the expense of judicial administration. The too great cost of litigation necessarily weighs upon the poor litigant and makes for the advantage of the rich litigant. If we could remedy the delay and reduce the cost of litigation, there would be very little practical reason to complain of our judicial system. The difficulties,

if any, growing out of alleged reactionary construction of the constitution, the interpretation of statutes or the application of the common law, can easily be remedied by legislative action or popular vote in a machinery ready and at hand which with the people sufficiently aroused can be made practically effective. The history of the Ives case in New York in which the workman's compensation act of that state was held by the Court of Appeals of that state to be invalid under the constitution, and which was made the excuse for the proclamation of the remedy of recall of judicial decisions, shows the efficacy of the remedy by constitutional amendment. The New York constitution requires the approval of an amendment by successive legislatures and a vote of the people at the polls. The people of New York, by adopting the required amendment, have shown conclusively the unreasonableness of a demand for such a grotesque, illogical and dangerous remedy.

When we come, however, to the two defects of delay and excessive cost of litigation, we have a problem much less easy. The enormous expansion of our population, of our commerce at home and abroad, the tremendous increase in business and in the number of transactions that call in the ordinary course of things for litigation and resort to the courts, have swamped a system that was adopted in more primitive times and was adapted to conditions of a people living in rural rather than in urban communities. Where time does not seem to have been so important, where trials in court were leisurely and deliberate and were allowed to be such because they were part of the entertainment and education of the people, the custom of delay became so inveterate as to seem to inhere in any proper judicial system. We took our law and our procedure, much of it, from our English ancestors, and the course of our law has been very much influenced by the course of English law and English procedure at a time when English procedure was at its worst, both in respect to dispatch of judgment and cost of litigation. When the Queen's Jubilee was celebrated in 1887, Lord Bowen, then a member of the House of Lords, the Supreme Court of England, wrote an address for the purpose of showing the progress that had been made in the administration of justice between 1837 and 1887, the half century of Victoria's reign.

His description of the utterly hopeless condition of civil judicial procedure and of the entirely ineffective machinery for the punishment of crime at the time of the death of William IV., and the reforms that had been wrought at the time he wrote, are most instructive, on the one hand, and most encouraging, on the other. The administration of English law at that time was a jumble. The law and equity courts applied different rules to the same case and offered different remedies for similar wrongs. The two jurisdictions conflicted. The common law courts refused to recognize claims and defenses which equity allowed, and judgments at common law were often nullified by injunctions obtained in equity. There was great uncertainty as to the proper forum for a litigation. Suits in equity were constantly dismissed because there was a remedy at law, while complainants were disappointed at law because they should have sued in equity, and even when a litigant was in the right forum, he was driven to the other jurisdiction, and then had to come back again in order to obtain complete redress. There were three courts of common law of concurrent jurisdiction, and although the volume of litigation had rapidly increased, they sat only four short terms of three weeks each. Their procedure was based upon a system of special pleading which inevitably promoted excessive technicality and consumed the energy of court and lawyers and litigants in mere discussion of form. Just claims were defeated by trivial errors in pleading, by unimportant variances between pleading and proof, while the outworn classification of forms of action made a pitfall into which a man with a good cause often fell. A fundamental rule of evidence excluded absolutely the testimony of all witnesses who had the remotest interest in the result, and the rules of evidence were so carefully framed to exclude the falsehood that very often truth itself was unable to force its way through the barriers thus created. In consequence of the application of procedure in equity to contentious and administrative business alike, persons who really had no issue between them were compelled to engage in useless contests. Equity pleadings like those at common law, were full of tautology and technicalities. No litigant entering into a chancery suit, with a determined opponent, could expect to live to witness its termination.

Two great Lord Chancellors, Lord Selborne and Lord Cairns, were able to secure, after an inquiry and report by a high commission of the best lawyers of the realm, the passage of a general judicature act that has worked a great reform. They established one court with departments of first instance, of appeal, intermediate and final, and with most informal methods of taking appeals. They united together the system of law and equity, so that when a man begins a suit he may have either legal or equity relief, as the case he states justifies it, and under most elastic rules of procedure both in civil and in criminal cases it is not too much to say that no man can possibly lose his cause on a technical point of procedure in England today and no guilty man can escape by such means. A system of county courts, and with a reasonable pecuniary jurisdictional limit with able lawyers at their head, was established all over England. It was constituted in 1887 and 59 circuits, with 500 districts, a single judge being annexed to each circuit. It has had such changes and increases as the needs of the public business have required since. Real justice is thus administered in every "Englishman's backyard," as the saying is, promptly, skillfully and fairly.

When the system is studied, the two great features of it are the simplicity of its procedure and the elasticity with which that procedure and the use of the judicial force provided by Parliament can be adapted to the disposition of business. The success of the system rests on the executive control vested in a council of judges to direct business and economize judicial force, to mould their own rules of procedure, and also on the learning, ability and experience of the individual judges and the consequent ease and quickness with which they dispose of cases coming before them, so that in the great majority of cases the judgment of the court is pronounced at the close of the argument. This is generally true in courts of first instance, generally true in the court of appeal, though not so frequently the case in the House of Lords, or the Judicial Committee of the Privy Council, the supreme courts of appeal in the Kingdom and the Empire, where a little more deliberation is had. I am bound to say, however, that in all this reform, the evil of the expense of litigation in England has not been completely remedied, though, of course, dispatch in the business

has reduced it. The history of court reform in England contains lessons of profound importance to us in this country.

Let us begin with the Federal Judicial system. In this the appointment of judges for life prevails, and, therefore, on the whole the average of judicial experience and ability is high. Congress has complete control over the procedure in such courts, in fixing the number of judges, and in determining their jurisdiction. Congress has been very derelict in this matter, than which there is none more important. From time to time some remedial measure is adopted, but only by piecemeal. Some steps have been taken but nothing radical although the subject calls for broad measures. The advantage law reformers had in England was that the highest judicial officer of the realm, the Lord Chancellor, was a member of the Cabinet, of the House of Lords and of the Government controlling legislation, while the Attorney-General and the Solicitor-General were also of the government and members of the House of Commons and in both houses were also the leading lawyers of the opposition and former Chancellors and Law Lords. The best experts upon what was needed in the way of reform were thus in places of legislative power and influence, to carry it into law. Although Congress and the Senate especially has some lawyers of high ability, they have no such influence as the leaders of the English Bar have in Parliament.

I venture to recommend for our Federal system the following reforms by Congressional action:

First—The antiquated system of a separation of law and equity should be abolished. This indeed has been done in most of our states, but not in the Federal Courts.

Second—The rules of procedure should be completely in control of the Supreme Court or a Council of Judges appointed by the Supreme Court, and they should be rendered as simple as the English rules of procedure are.

Third—The costs should be reduced to a minimum, and that as far as possible they should be imposed upon the Government rather than upon the litigants.

Fourth—Authority and duty should be conferred upon the head of the Federal judicial system, either the Chief Justice, or a council

of judges appointed by him, or by the Supreme Court, to consider each year the pending Federal judicial business of the country and to distribute Federal judicial force of the country through the various districts and intermediate appellate courts, so that the existing arrears may be attacked and disposed of.

Fifth—There should be a reduction of the appeals to the Supreme Court, by cutting down to cases of constitutional construction only the review as of right, and by leaving to the discretion of that court, by writ of certiorari, the power to hear such cases from the lower courts as it deems in the public interest.

Sixth—The Federal Workmen's Compensation Act should be passed.

First—separation of law and equity in the Federal Courts is not by any means so obstructive as it was under the English system, because there they had separate courts and separate judges, and here the hearing is in the same court, though in another case; and now the court has power to send a case on the law docket to the equity docket or the reverse. Nevertheless, it would be a great advance to have the distinction wiped out, so that legal remedy or equitable relief, as the facts may require, could be given in one law suit. It has been feared that because the expression "Law and Equity" is used in the Federal Constitution, there would be no power in Congress to unite the two forms of action in one action. There may be an incidental remark in an opinion of the Supreme Court sustaining such a view, but I am quite sure that under present conditions, no such technical construction of the constitution would be insisted upon by the court. Therefore, either Congress itself ought to abolish the necessity for separate law suits on the law and equity side of the court, or it ought to give the Supreme Court power to do so in its rules of procedure.

Second—The elasticity which the power of the judges, or a controlling council of them, to make rules of procedure gives to the procedure, and the admirable simplicity that is thus produced, and the avoidance of all technicalities, the English judicial system now abundantly demonstrates. This great reform for our Federal courts can be effected by Congressional action in one session of Congress. I urged this reform upon Congress, but though a bill is pending, nothing yet

has been done. Congress is full of a certain kind of reformers; but there is nothing about this real reform to win votes. Yet there is no more real opportunity for helping the people. Great statutes have been passed, the Interstate Commerce Law, and the Anti-Trust Law, the Pure Food Act, the White Slave Act, the Safety Appliance Acts, the Employers' Liability Acts and others. The litigation of the Federal courts has thus been greatly increased, but Congress is content to dump all this business upon the courts and then give no attention to providing the machinery for its prompt disposition. There is too much politics in Congressional reforms and not enough sincere effort and efficiency.

Third—The third great step should be the adjustment of our judicial force to the disposition of the increasing business by introducing into the administration of justice the ordinary business principles in successful executive work, of a head charged with the responsibility of the use of the judicial force at places and under conditions where the judicial force is needed. We have in the entire United States say 120 Federal judges in courts of first instance, thirty judges of the intermediate appellate courts, with power to sit in the courts of first instance, and nine supreme judges, with power to sit either in the intermediate appellate courts or in courts of first instance. Now either through the Chief Justice, and if he is to have the duty and responsibility he should have an adequate force of subordinates to enable him to discharge it, or through a judicial committee of the judges, the business of the United States Courts throughout the Union should be considered each year, and assignments made of the judicial force to various districts and circuits, with a view to the most economic use of each judge for the disposition of the greatest amount of business by him. In this way tab could, and would be, kept on individual efficiency by the Supreme Court, and nothing would so stimulate effective work of each judge in the reduction of arrears. Then if the judicial force seems inadequate, then if business is not disposed of, it will be entirely easy to know how many judges should be added and in what districts and circuits they should be appointed. Now they are increased in a most haphazard way, and other considerations than the public too frequently enter into such legislation. Of course, the judges, district

and circuit, must be appointed primarily in particular districts and circuits; but already there has been introduced in a limited way the practice of using judges from one circuit and one district in another, and there is no reason why this principle should not be extended so that the whole Federal judicial force of the country would be strategically employed, against the arrears of business, existing or probable. Then with the simplicity of procedure, then with the giving adequate sufficient force to the places where needed, we could have the dispatch of business that is essential to justice and that reduces much the cost of litigation.

The plan of executive management of the judicial force and making the head of the court responsible for the disposition of all judicial business is vindicated by the example of the Municipal Court of Chicago, where under the direction of a Chief Justice in a court of limited jurisdiction but in a court of the people with a great mass of judicial business of all sorts, the associate justices are massed at one point or another in respect of the litigation pending so that the increased speed in the disposition of cases is shown by the statistics to be marked and most satisfactory.

Fourth—The expense of litigation is a serious burden in the Federal Courts. The minimum limit of jurisdiction in the Federal Courts is \$3,000, and the assumption of the judges and those who have fixed fees in the past has been that litigants who have cases involving \$3,000 are able to pay liberal costs. More than this, the costs in the Federal courts were in times past regarded by the Supreme Court as a means of decreasing the already too burdensome docket that came to the Supreme Court by way of review. This is all wrong. The growing importance of the Federal Courts to the people of the country, by reason of the great additions to their business which the new Federal statutes have made, requires that the same care should be used to promote cheap litigation in those courts as in state courts. The costs to poor inventors in patent suits on the equity side of the court under the old system until a change in the equity rules, was outrageous, and it ought to be further greatly reduced. The clerks and marshals are generally paid by salary as they ought to be, but there is still maintained the theory that the costs earned should substantially

contribute to meet the expenses. The fees should be reduced to a minimum. The necessary and inevitable cost of employing lawyers and paying their expenses will itself prevent undue resort to courts and will avoid that increase in unnecessary litigation that has sometimes been used as an argument for the imposition of heavy fees.

Fifth—The Supreme Court has great difficulty in keeping up with its docket. The most important function of the court is the construction and application of the constitution of the United States. It has other valuable duties to perform in the construction of statutes and in the shaping and declaration of general law, but if its docket is to increase with the growth of the country, it will be swamped with its burden, the work which it does will, because of haste, not be of the high quality that it ought to have, and the litigants of the court will suffer injustice because of delay. For these reasons the only jurisdiction that it should be obliged to exercise, and which a litigant may, as a matter of course, bring to the court, should be questions of constitutional construction. By giving an opportunity to litigants in all other cases to apply for a writ of certiorari to bring any case from a lower court to the Supreme Court, so that it may exercise absolute and arbitrary discretion with respect to all business but constitutional business, will enable the court so to restrict its docket that it can do all its work, and do it well.

Sixth—I may here refer to another means of helping the administration of justice in the Federal Courts. I mean the passage of the Federal Workman's Compensation Act. Much time of Federal District Courts is taken up with suits for damages by employes of interstate railways. The Workman's Compensation Act is intended to remove from judicial cognizance the claims of the plaintiffs in such cases and to submit them to an executive tribunal for adjustment, under fixed rules of the act. It is a most commendable measure. It imposes a heavier total obligation upon the railroads than the present statistics show that the railroads have to meet, but it results in a uniform treatment of all the unfortunate who suffer injury in railroad employment, and it eliminates the inequalities and the gambling features of the present method of recovery. Now why is this measure which has been prepared with great care by Senator Sutherland to

meet constitutional and other objections, and which is the result of a reasonable compromise between the representatives of organized labor and the railroad managers delayed? It has passed the Senate, but it is held up in the House, and for what reason? It is opposed by successful lawyers of great political influence in the present Congress, members of one body or the other, who do not wish to let go the opportunity for large contingent fees in excessive verdicts. Yet these same lawyers are tremendous reformers when it comes to matters in which they are not themselves pecuniarily affected. But they will ultimately be beaten, and when they are beaten the removal of this class of litigation from the Federal Courts will give greater opportunity for dispatch of other business and will I hope be a very substantial reform, not only in bringing about more even justice and in helping all the unfortunate employes of railways, but it will be a substantial step in judicial reform.

But judicial reform in the Federal Courts is only a step, though I think an important step, as a model for the reform of the judicial procedure throughout the country, because it is in the state courts that the great volume of litigation is to be disposed of. The state courts are the courts of the people generally, and in that judicial system are courts of small jurisdiction, while, as I have already said, the Federal Courts are limited in their consideration to civil cases involving \$3,000 and upwards. Reform in the Federal jurisdiction is easier in the fact that the selection and tenure of Federal judges by appointment for life secures on the whole a higher average standard in judges. Of course, we don't pay them adequate salaries. Lawyers of large practice do not feel generally able to give up their practice to take positions on the bench. In England the salaries are adequate to a decent living for men holding such high judicial positions, and the judicial place is therefore the ambition of all lawyers, and the judicial place is the reward for professional learning, professional character and professional success. But even with this difference, the appointment and life tenure still give us a very high class of men for Federal judicial positions, and sometimes, though they may not be pre-eminently qualified when they go upon the bench, the certainty of tenure and the ambition for promotion and the experience they have,

make them excellent judges after a few years. In the state courts, I am sorry to say that the method of selecting the judges is, except in Massachusetts and a few other states, by election. It is wonderful and it shows the adaptability of the American people to neutralize bad methods in government by their common sense, that we have had some great state courts and judges, and that on the whole the state judiciary has been a great deal better than might have been expected of the system. But the state and country primaries recently introduced are quite likely to make our elective selection of judges even less satisfactory than heretofore. I don't know that we can hope that a change will be made back to selection by appointment, but I am praying that in states where the judges are still appointed, the people may not lose their sanity and take a retrograde step by changing to a system of election.

Third—Another great difficulty in many of the states in the improvement of judicial procedure is the disposition to hamper the courts by taking away the power of the judges. Great popular attacks are made upon the courts for their failure to do what is expected of them, and then from the very source from which these attacks come we find pressure to minimize as far as possible the opportunity that judges have to make the administration of justice in their courts effective. A trial by jury at common law has been defined to be by the United States Supreme Court a hearing before a competent judicial officer and a jury of twelve men, in which the court instructs the jury as to law, advises them as to the facts, the jury renders its verdict upon their independent judgment of the facts and the court has power to set aside the verdict if manifestly unjust. The distrust of judicial power has been such that one of the great obstructions to justice in our state courts is the statutory divestiture of the judge of his authority in a jury trial and the transfer of the control of the trial in such cases to the irresponsible action of shrewd and eloquent counsel, able to make the worse appear the better reason, whether engaged for one side or the other. This has the tendency not only to reach emotional, unjust and wrong results, but it drags out the trial far beyond what is necessary. This is shown in the fact that a cause which takes but one day or part of a day in England, takes here in a state court a week,

and a cause which may take three or four days or a week in England will take here a month or a month and a half. This is due both to the paralyzing of the judicial arm, the exalting of the power of the jury and of the counsel, and also to the lack of learning, experience, skill and prestige of the judge.

The third difficulty in the state courts has been the effect to improve procedure by constant tinkering with it and constant provisions for detail, which should all be left to the elastic rules adopted by judges. One of the great examples of the absurd pursuit of the idea that legislation can properly take care of everything and leave nothing to the judges, is such an enormous code or procedure as they have now in the state of New York, an obstruction to facility in judicial work, and a reflection upon the intelligence of successive legislatures in our greatest state.

Fourth—Another difficulty with the present state judicial system is the assumption that the suits between poor men should be decided by poor judges. We have had through the country a system of civil courts conducted by men who are not lawyers, by justices of the peace, with appeals from the justice's court to the common pleas court, or superior court of first instance, and then with appeals through intermediate courts of appeal to the Supreme Court. If a system could be devised that offered greater advantage to the wealthy litigant in resisting the claims of the poor litigant, I don't know what it is. The justices of the peace generally have very little knowledge of the law, are not men of skill and learning, able to dispose of business promptly and accurately, and so the cases too frequently drag along in the so-called "people's courts" until the poor litigant is discouraged and really defeated, even when he wins in a court of last resort. The poorer people are entitled to as good judges as the rich, and they can not get them by giving them an appeal to the highest court in their cases, because that involves such delay and expense. The cutting off appeals from the people's courts to the Supreme Court is one means of preventing that inequality between the poor and the rich litigant that now prevails. The proper reform is the one pursued in England in the county court system, and in the Municipal Court in Chicago, by which competent lawyers properly paid are given the power to hear

and dispose of small causes. This is a lesson from the English system of judicature that ought to be deeply graven on the hearts of state judicial reformers.

Fifth—Then, of course, the same system that I have recommended for the Federal judiciary ought to be adopted in the state courts by which all the superior courts in the state should be made into one court, with an executive head, with a council of judges to prepare rules of procedure, and with executive control to distribute the judicial force of the State in such a way as to meet the varying demands for that force in various districts of the state. All this can be impressed upon the state legislatures and the lawyers of the various states who have influence with the legislatures by a proper reform in the Federal judiciary as a model.

One great difficulty that is facing us in this country is the lack of respect for law and the weakened supremacy of the law. The idea seems to be growing that any small class that has some particular reform which it wishes to effect in its own interest may accomplish that by force and by threats of force against the whole body politic and social. In other words, physical force and lawless violence under this government of law is growing to be a calculated element in the winning of political and social issues. Now if this continues, the bonds of society will be loosed and hope of real progress, social or political, must be abandoned. The militancy of the Suffragettes in England, the threat of rebellion in Ulster, the dynamite of certain trades-unions in California, in Colorado and in Indianapolis, are all instances of what I mean; and now certain leaders of organized labor are demanding that the equitable arm of the Federal courts of justice by injunction to protect business and property against lawless injury in labor controversies shall be paralyzed.

The attempt to hamper a court of equity in enforcing injunctions is a retrograde step in law. At common law the theory was that civil courts had no means of preventing injury and wrong. The only remedy they could offer was damage after the wrong had been done, and, of course, pecuniary damages were often a very inadequate remedy. Courts of equity, by working upon his conscience, restrained

him who proposed to do the wrong from doing it. This was a long step in the direction of good morals and peace and order.

Injunctions are now to be forbidden in certain cases affecting certain classes of our citizens if labor leaders have their way. Criminal statutes that ought to have general and uniform operation are to except from their penalties the same privileged classes. Further to give reign to lawlessness the power of courts is to be weakened by a provision that no court can enforce its deliberate judgment made after full hearing against a defiant and disobedient defendant, until a jury has been called after judgment to decide that he is disobedient. This gives a defeated litigant the opportunity to have a judgment or decree carefully rendered, reviewed by a jury with every opportunity to appeal to emotion, prejudice and irrelevant circumstances. This is a recall of judicial decisions in miniature, but in its way quite as dangerous an innovation. Let us hope that there may be sufficient courage in the National Legislature to prevent such a sapping of the foundations of society. Why should not the time of Congress be devoted to the interest of all the people and the promotion of judicial procedure for all litigants instead of devoting so much time to a particular class? We hear a good deal about undue privilege, and I am not here to deny that our civilization has suffered much in that regard in the interest of large and grasping corporations, but that is not any reason why we should enthrone another class in special privilege, give it immunity under a general law and deny effective remedy from the wrongs it wishes to inflict.

What I have been saying has had more especial reference to the disposition of civil litigation, although much of it applies to the prompt and effective enforcement of criminal law. In the Federal courts, I do not think that there is much if any ground for criticism of the speedy and proper trial of criminal cases. The judges have their proper function and help the jury, and prevent counsel from taking the helm. Wrongdoers fear an indictment in the United States Courts for this reason.

In the state courts, at least in the west and south, the lax administration of criminal justice is deplorable. This is in part due to the lax sentiment of the people on the subject and in part to the transfer

of authority and importance in the trial from the judge to the jury and the counsel. The delays are due to this and to the making of minute rules of procedure, the too rigid rules of evidence and the strict restraint upon the judge's reference to evidence, a trap in which to catch the trial court on a writ of error. Endless proceedings follow, especially if the defendant is able to pay for it. The public is tired. The court is tired. The prosecution is tired. And the escape of the guilty defendant or his inadequate punishment which is too often the result is demoralizing to society and does not restrain future violation of law.

The trial by newspaper is a danger that some method ought to be devised to prevent. It does not conduce to justice. It creates a false atmosphere in the courtroom.

Simplicity of procedure and dispatch of trial will do much to obviate the greater defects. Then if appellate courts could be given power to say that an error committed in the trial is not ground for reversal unless it shall affirmatively appear from the record that a just result was not reached, technicalities would cease to be useful as an obstruction to justice.

I do not despair of substantial judicial reform. I think the lawyers of the country are aroused to the necessity of taking away from the enemies of constitutional government and the institutions of civil liberty, the only real arguments that they have against our judicial system by promoting dispatch in the disposition of litigation and reducing the cost thereof to the poor litigant.

EX POST FACTO LAWS.

To What Extent are Laws Valid That Admit Different or Other
Evidence Than Was Permissible at the Time of the
Alleged Act?

The writer is acquainted with the high character and legal standing of the late Justice Harlan of Kentucky, and appreciates his valuable services as a jurist, but earnestly desiring to have a correct understand-