

selves satisfied with their present representative system, then it is of course their right to keep that system unchanged; and it is nobody's business but theirs. But in actual practice it has been found in very many states that legislative bodies have not been responsive to the popular will. Therefore I believe that the state should provide for the possibility of direct popular action in order to make good such legislative failure. The power to invoke such direct action, both by initiative and by referendum, should be provided in such fashion as to prevent its being wantonly or too frequently used. I do not believe that it should be made the easy or ordinary way of taking action. In the great majority of cases it is far better that action on legislative matters should be taken by those specially delegated to perform the task; in other words, that the work should be done by the experts chosen to perform it. But where the men thus delegated fail to perform their duty, then it should be in the power of the people themselves to perform the duty. In a recent speech Governor McGovern of Wisconsin, had described the plan which has been there adopted. Under this plan the effort to obtain the law is first to be made through the legislature, the bill being pushed as far as it will go; so that the details of the proposed measure may be threshed over in actual legislative debate. This gives opportunity to perfect it in form and invites public scrutiny. Then, if the legislature fails to enact it, it can be enacted by the people on their own initiative, taken at least four months before election. Moreover, where possible, the question actually to be voted on by the people should be made as simple as possible. In short, I believe that the initiative and referendum should be used, not as substitutes for representative government, but as methods of making such government really representative.

"Action by the initiative and referendum ought not to be the normal way of legislation; but the power to take it should be provided in the constitution, so that if the representatives fail truly to represent the people on some matter of sufficient importance to rouse popular interest, then the people shall have in their hands the facilities to make good the failure. And I urge you not to try to put constitutional letters on the legislature, as so many constitution-makers have recently done. Such action on your part would invite the courts to render nugatory every legislative act to better social conditions. Give the legislature an entirely free hand; and then provide by the initiative and referendum that the people shall have power to reverse or supplement the work of the legislature should it ever become necessary.

"As to the recall, I do not believe that there is any great necessity for it as regards short-term elective officers. On abstract grounds I was originally inclined to be hostile to it. I know of one case where it was actually used with mischievous results. On the other hand, in three cases in municipalities on the Pacific coast which have come to my knowledge it was used with excellent results. I believe it should be generally provided, but with such restrictions as will make it available only when there is a widespread and genuine public feeling among a majority of the voters.

RECALL OF JUDGES DISCUSSED

"There remains the question of the recall of judges. One of the ablest jurists in the United States, a veteran in service to the people, recently wrote me as follows on this subject:

"There are two causes of the agi-

tation for the recall as applied to judges. First, the administration of justice has withdrawn from life and become artificial and technical. The recall is not so much a recall of judges from office as it is a recall of the administration of justice back to life, so that it shall become, as it ought to be, the most efficient of all agencies for making this earth a better place to live in. Judges have set their rules above life. Like the Pharisees of old, they have said, 'The people be accursed, they know not the law' (that is our 'rule'). Courts have repeatedly defeated the aroused moral sentiment of a whole commonwealth. Take the example of the St. Louis hoodlums. Their guilt was plain, and in the main confessed. The whole state was aroused and outraged. By an instinct that goes to the very foundation of all social order they demanded that the guilty be punished. The hoodlums were convicted, but the supreme court of Missouri, never questioning their guilt, set their conviction aside upon purely technical grounds. The same thing occurred in California. Nero, fiddling over burning Rome, was a patriot and a statesman in comparison with judges who thus trifle with and frustrate the aroused moral sentiment of a great people, for that sentiment is politically the vital breath of both state and nation. It is to recall the administration of justice back from such practices that the recent agitation has arisen.

"Second, by the abuse of the power to declare laws unconstitutional the courts have become a lawmaking, instead of a law-enforcing agency. Here again the settled will of society to correct confessed evils has been set at naught by those who place metaphysics above life. It is the courts, not the constitutions, that are at fault. It is only by the process which James Russell Lowell when answering the critics of Lincoln, called 'pettifogging the constitution,' that constitutions which were designed to protect society can thus be made to defeat the common good. Here again the recall is a recall of the administration of justice back from academical refinements to social service."

APPLYING THE LAW

"An independent and upright judiciary which fearlessly stands for the right, even against popular clamor, but which also understands and sympathizes with popular needs, is a great asset of popular government. There is no public servant and no private man whom I place above a judge of the best type, and very few whom I rank beside him. I believe in the cumulative value of the law and in its value as an impersonal, disinterested basis of control. I believe in the necessity for the courts' interpretation of the law as law without some other thing than law for it. But I agree with every great jurist, from Marshall downwards, when I say that every judge is bound to consider two separate elements in his decision of a case, one the terms of the law, and the other the conditions of actual life to which the law is to be applied. Only by taking both of these elements into account is it possible to apply the law as its spirit and intent demand that it be applied. Both law and life are to be considered in order that the law and the constitution shall become, in John Marshall's word, 'a living instrument and not a dead letter.'

"Justice between man and man, between the state and its citizens, is a living thing, whereas legalistic justice is a dead thing. Moreover, never forget that the judge is just as much the servant of the people as any other official. Of course he must act conscientiously. So must every other official. He must not do anything wrong because there is popular clamor for it, any more than under

similar circumstances a governor or a legislator or a public utilities commissioner should do wrong. Each must follow his conscience, even though to do so costs him his place. But in their turn the people must follow their conscience, and when they have definitely decided on a given policy they must have public servants who will carry out that policy.

Keep clearly in mind the distinction between the end and the means to attain that end. Our aim is to get the type of judge that I have described, to keep him on the bench as long as possible, and to keep off the bench and, if necessary, take off the bench the wrong type of judge. In some communities one method may work well which in other communities does not work well, and each community should adopt and preserve or reject a given method according to its practical working. Therefore the question of applying the recall in any shape is one of expediency merely. Each community has a right to try the experiment for itself in whatever shape it pleases. Under the conditions set forth in the extract from the letter given above, I would personally have favored the recall of the judges in California and in Missouri; for no damage that could have been done by the recall would have equaled the damage done to the community by judges whose conduct had revolted not only the spirit of justice, but the spirit of common sense. I do not believe in adopting the recall, save as a last resort, when it has become clearly evident that no other course will achieve the desired result. But either the recall will have to be adopted or else it will have to be made much easier than it now is to get rid, not merely of a bad judge, but of a judge who, however virtuous, has grown so out of touch with social needs and facts that he is unfit longer to render good service on the bench. It is nonsense to say that impeachment meets the difficulty. In actual practice we have found that impeachment does not work, that unfit judges stay on the bench in spite of it, and indeed because of the fact that impeachment is the only remedy that can be used against them. Where such is the actual fact it is idle to discuss the theory of the case. Impeachment as a remedy for the ills of which the people justly complain is a complete failure. A quicker, a more summary, remedy is needed; some remedy at least as summary and as drastic as that embodied in the Massachusetts constitution. And whenever it be found in actual practice that such remedy does not give the needed results, I would unhesitatingly adopt the recall.

"But there is one kind of a recall in which I very earnestly believe, and the immediate adoption of which I urge. There are sound reasons for being cautious about the recall of a good judge who has rendered an unwise and improper decision. Every public servant, no matter how valuable, and not omitting Washington or Lincoln or Marshall, at times make mistakes. Therefore we should be cautious about recalling the judge and we should be cautious about interfering in any way with the judge in decisions which he makes in the ordinary course as between individuals. But when a judge decides a constitutional question, when he decides what the people as a whole can or can not do, the people should have the right to recall that decision if they think it wrong. We should hold the judiciary in all respect; but it is both absurd and degrading to make a fetish of a judge or of any one else. Abraham Lincoln said in his first inaugural: 'If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the

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