THE SELECTION AND TENURE OF JUDGES

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THE most conspicuous feature of the new government under the Federal Constitution was its division into three parts—the legislative, the executive and the judicial. Experience has vindicated that division, except, it may be, that some lack of efficiency has shown itself in the absence of more useful cooperation between the executive and the legislative branches. The wisdom of keeping the executive and the legislative branches apart from the judiciary has, however, been confirmed by the event, not only under the American Constitution, but in England and in all the states under her flag. In the United States, where judicial systems have different degrees of this quality, permitting comparison, the greater the independence of the courts the stronger their influence, and the more satisfactory their jurisdiction and administration of justice.

In a popular government, the most difficult problem is to determine a satisfactory method of selecting the members of its judicial branch. Where ought such power to be placed? It is a great one. It is said it ought not to be entrusted to irresponsible men. If this means that judges should not be men who do not understand the importance of the function they are exercising, or the gravity of the results their decision may involve, or do not exert energy and sincere intellectual effort to decide according to law and justice, every one must concur. But if it means that judges must be responsible for their judgments to some higher authority, so that for errors made in good faith they incur a personal liability, then we know from centuries of actual experience that the interest of justice, pure and undefiled, requires their immunity. Finality of decision is essential in every branch of the government, or else government cannot go on. This is as true of its judicial branch as of other branches. Therefore, somebody must have the final word in judicial matters, and the only question is who can best exercise this power. The answer to the question must be found in the real character of the function which the judges are to perform.

There is a school of political philosophers today who say that there are no positive standards of right and justice, but that these vary with the popular will, and that we are to learn what they are from its expression.

If right and justice are dependent on the votes of the electorate, and if what are known as individual rights are merely privileges held at the will of a majority, then the proposition that the judicial officer represents the people in the same sense as the executive officer, so that when the electoral majority differs from his judgment he ought to be removed, has some logical foundation. So, too, in this view, the proposition that the final decision of the courts shall be submitted on review to a popular election has reason in it.

But I shall assume, for the purposes of this discussion, that principles of right and justice and honesty and morality are not merely conventional and have a higher source than a plebiscite.

There is a broad field for the proper exercise of legislative power in prescribing rules of human conduct, and it is the function of courts to interpret them. This is the work of trained lawyers who know the theory and purpose of government, who are familiar with previous statutes, and who understand legislative methods of expression so that they can put themselves in the attitude of the legislature when it acted. When it is the duty of a court to say whether what was enacted by the legislature under the forms of law is within its power, it must discharge a delicate duty and one requiring in its members ability, learning and experience properly to interpret both the seeming law and the constitution, and properly to measure what was within the permissible discretion of the legislature in construing its own authority. The majority of questions before our courts, however, are neither statutory nor constitutional, but are dependent for decision upon the common or customary law handed down from one generation to another, adjusted to new conditions of society, and declared from time to time by courts as cases arise. Thorough study is required to enable a judge to know and understand the whole range of legal principles that have thus to be discriminatingly adapted and applied. Work of this kind requires professional experts of the highest proficiency who have mastered the law as a science and in practice.

Where are we to get such experts? When a man of high character, ability, and intelligence is to be selected for the chief executive office, the electorate can be safely charged with electing one from the necessarily few candidates who are sufficiently prominent. But what of the searching out in a large profession the best expert, the men with real learning, with judicial temperament, with keenness of perception, with power of analysis and nice distinction, with large technical experience? Can he be found better by election or by appointment? There can be but one answer to this query. The selection can be really popular without resorting to an election. The chief executive elected by the people to represent them in executive work does, in appointing a judge, execute the popular will. He can search among the members of the Bar and can inform himself thoroughly as to the one best qualified. Generally he has sources of information, both of an open and a confidential character, and if he is not himself a lawyer or personally familiar with the qualifications of the candidates he has an Attorney-General and other competent advisers to aid him in the task.

For these reasons, in every country of the world, except in the Cantons of Switzerland and the United States, judges are appointed and not elected. With us, in the decade between 1845 and 1855, when new constitutions were being adopted in many states, a change was made to the elective system. It was not an improvement. In some states the change was not made. A comparison between the work of the appointed judges and of the elected judges shows that appointment secures in the long run a higher average of experts for the Bench. The principle of the short ballot, which is much put forward nowadays by reformers, and which thus far is much more honored by them in the breach than in the observance. really limits the election by the people to the chief executive and to legislators, and delegates to the elected executive the appointment of all other officers, including the judiciary. The executive who makes the appointments is properly held re-

sponsible to the public for the character of his selections.

We have had many able judges by popular election. These have owed their preferment to several circumstances. The effect of the old method of appointment was visible in the working of the new system for a decade or more, and good judges were continued by general acquiescence. In some states, indeed, the practice of re-electing judges without contest obtained until within recent years. Moreover, able judges have been nominated often through the influence of leading members of the Bar upon the politicians who controlled the nominations. Shrewd political leaders have not ordinarily regarded a judgeship as a political place, because the office has had comparatively little patronage. If the nominee has been a man of high quality, conspicuously fit, commanding the support of the professional and intelligent non-partisan votes, it has tended to help the rest of the ticket to success. The instances of great and able judges who have been placed on the Bench by election are instances of the adaptability of the American people and their genius for making the best out of bad methods, and are not a vindication of the system. That has resulted in the promotion to the judicial office of other judges who have impaired the authority of the courts by their lack of strength, clearness, and courage, and who have shown neither a thorough knowledge of the customary law, nor a constructive faculty in the application of it. Great judges and great courts distinguish between the fundamental and the casual. They make the law to grow not by changing it, but by adapting it, with an understanding of the progress in our civilization, to new social conditions. It is the judges who are not grounded in the science of the law, and who have not the broad statesman-like view that comes from its wide study, that are staggered by narrow precedent and frightened by technical difficulty. The decisions of courts criticised for a failure to respond to that progress in settled public opinion which should affect the limitation upon the police power, or the meaning of due process of law, have generally been rendered by elected courts. Paradox as it may seem, the appointed judges are more discriminately responsive to the needs of a community and to its settled views than judges chosen directly by the electorate, and this because the executive is better qualified to select greater experts.

More than half a century's experience with the election of judges has not, therefore, commended it as the best method, though, for the reasons stated, its results up to this time are better than might have been expected. But with the changes proposed in the manner of making nominations and of conducting elections of judges the system is certain to become less satisfactory. Now we are to have no state or county or district conventions, and the judges are to be nominated by a plurality in a popular primary, and to be voted for at the election on a non-partisan ticket, without party emblems, or anything else to guide the voter. Like all the candidates for office to be elected under such conditions, they are expected to conduct their own canvass for their nomination, to pay the expenses of their own candidacy in the primary, and in so far as any special effort is to be made in favor of their nomination and election, they are to make it themselves. They are necessarily put in the attitude of supplicants before the people for preferment to judicial places. Under the convention system it happened not infrequently, for reasons I have explained, that men who were not candidates were nominated for the Bench, but now in no case can the office seek the man. Nothing could more impair the quality of lawyers available as candidates or depreciate the standard of the judiciary. It has been my official duty to look into the judiciary of each state, in my search for candidates to be appointed to federal judgeships, and I affirm without hesitation that in states where many of the elected judges in the past have had high rank, the introduction of nomination by direct primary has distinctly injured the character of the Bench for learning, courage and ability. The nomination and election of a judge are now to be the result of his own activity and of fortuitous circumstances. If the judge's name happens to be the first on the list, either at the primary or the election, he is apt to get more votes than others lower down on the list. The incumbent in office, because he happens to be more widely known, has a great advantage. Newspaper prominence plays a most important part, though founded on circumstances quite irrelevant in considering judicial qualities.

The result of the present tendency is seen in the disgraceful exhibitions of men campaigning for the place of state supreme judge and asking votes, on the ground that their decisions will have a particular class flavor. This is the logical development of the view that a popular election is the only basis for determining right and justice; but it is so shocking, and so out of keeping with the fixedness of moral principles which we learned at out mother's knee, and which find recognition in the conscience of every man who has grown up under proper influence, that we ought to condemn without stint a system which can encourage or permit such demagogic methods of securing judicial position. Through the class antagonism unjustly stirred up against the courts, fiery faction is now to be introduced into the popular election of judges. Men are to be made judges not because they are impartial, but because they are advocates; not because they are judicial, but because they are partisan.

It is true that politics have played a part even when judges have been appointed. They have usually been taken from the lawyers of the prevailing party. The president or a governor appointing them has been elected on a partisan ticket, is the titular head of his party, and is expected to give preferment to those who supported him. This has not, however, resulted in political courts, because the control of the government has naturally changed from one party to another in the course of a generation and has normally brought to the Bench judges selected from both parties; and then, if the judges are made independant by the character of their tenure, the continued exercise of the judicial function entirely neutralizes in them any possible partisan tendency arising from the nature of their appointment.

More than this, there is a noticeable disposition on the part of some chief executives to disregard party in making judicial appointments, and this ought to be so. In the early history of our country, and indeed down to the Civil War, the construction of the Constitution as to the powers of the federal government was a party question, and doubtless affected the selection of federal judges. Yet the effect of the judgments of Marshall and his court was not weakened by Taney and his Democratic associates when they came to consider the constitution. The Federalist party died in 1800, but its national view of our government was vitalized by John Marshall,

and preserved by the Supreme Court in unchanged form until the Civil War robbed the state's rights issue of its political and sectional importance. Today a sound and eminent lawyer of either party who can conscientiously take the oath to support the Constitution may be appointed by a conscientious executive. What is true of the National Government is true of the state governments, and there is not the slightest reason why an executive should not appoint to the judiciary of his state qualified persons from either party.

I come now to consider what should be the judicial tenure of office. In our federal and state Constitutions the rights of the individual as against the aggression of a majority of the electorate, and, therefore, against the government itself, are declared and secured in a way peculiar to our Anglo-Saxon ancestors. The abstract declarations in favor of personal liberty and the right of property in the fundamental law of the continental countries were often as ample as in ours, but it was in the provision for the specific procedure to secure them that the early English charters of freedom, the Magna Charta, the Petition of Right and the Bill of Rights, were remarkable. This procedure is preserved in our constitutions and upon the initiative of the individual who conceives his rights infringed, is to be invoked in the courts. Therefore, the first requisite of the judiciary is independence of those branches through the agression of which the rights of the individual may be impaired. The choice of the judges must always rest either in a majority of the electorate of the people, or in a popular agent whom that majority selects, and so must be directly or indirectly in control of the party to be charged in such controversies with the infringement of individual rights. How, therefore, can we secure a tribunal impartial in recognizing such infringements and courageous enough to nullify them? It is only by hedging around the tenure of the judges after their selection with an immunity from the control of a temporary majority in the electorate and from the influence of a partisan executive or legislature.

Our forefathers who made the Federal Constitution had this idea in their minds as clear as the noonday sun, and it is to be regretted that in some of their descendants and of the successors in their political trust this sound conception has been clouded. They provided that the salaries of the judges should not be reduced during their terms of office, and that they should hold office during good behavior, and that they should only be removed from office through impeachment by the House of Representatives and a trial by the Senate. The inability of Congress or of the Executive, after judges have been appointed and confirmed, to affect their tenure has given to the federal judiciary an independence that has made it a bulwark of the liberty of the individual. On the other hand, this immunity has had some effect in making Congress grudge any betterment of the compensation to these great officers of the law. Congress has failed to recognize the increased cost of living as a reason for increasing judicial salaries, although this fact has furnished the ground for much other legislation. They have declined to conform the income of the judges to the dignity and station in life which they ought to maintain, and have kept them at so low a figure as to require from that class of lawyers who are likely to furnish the best candidate for judicial career a great pecuniary self-sacrifice in accepting appointment. I presume, therefore, that in spite of the efforts of the Bar and of men of affairs to increase judicial salaries and in spite of the confession as to the cost of living in Washington that actual service in the government wrings from the advocates of a simple life who happen to get into office, we must continue to require from those who have the honor, the responsibility and the labor of the exercise of judicial functions under the federal government, mean living and high thinking, and we must endure the indignation that is justly stirred in us when widows and children of men, able and patriotic, who have served their country faithfully and have done enormous labor for two or three decades on the Bench, are left without sufficient means to live. Nothing but the life tenure of the federal judiciary, its independence and its power of usefulness have made it possible, with such inadequate salaries, to secure judges of a high average in learning, ability and character.

When judges were only agents of the King to do his work, it was logical that they should hold office at his pleasure. Now, when there is a recrudescense of the idea that the judge is a mere agent of the sovereign to enforce his views as the only standards of justice and right, we naturally recur to the theory that judges should hold their office at the will of the present sovereign, to wit, the controlling majority or minority of the electorate. The judicial recall is a case of atavism and is a retrogression to the same sort of tenure that existed in the time of James I, Charles I, Charles II and James II, until its abuses led to the act of settlement securing to judges a tenure during their good behavior. It is argued that there is no reason to object to a recall of judges that does not apply to judges elected for a term of years. The answer is that the conceded objections to an elective judiciary holding for a short term of years are doubled in force in their application to judicial recall. The states which have elective judges have gotten along somehow through the political capacity of the American people and the force of public opinion to make almost any system work. Under the present system a judge is certain to retain his position for a few years, and during that time at least he is free from interruption or the threat of popular disapproval. This certainty of tenure, though short, conduces to the independent adminstration of his office. As he draws near another election and hopes to have another term, it is true that his courage and his impartial attitude toward issues that have any political bearing are likely to be severely tested. Because the country has survived a judiciary largely selected in this manner does not seem to be a very strong reason why we should proceed to increase the evil effect of the short tenure by making it merely at the will of the plurality of those of the electorate who choose to vote.

I have stated my reasons for thinking that appointment of judges results in the selection of better experts in the science of law than the elective system. But even if the qualifications of the two incumbents under the two systems were equal upon their accession to office, the longer experience afforded by the life tenure and the greater opportunity it gives to learn judicial duties make the better average judges. It matters not how experienced a man may be in the learning of the

law, and in its practice, there are still lessons before him which he must learn before he can become of the greatest public service.

Other benefits from the life tenure in its effect upon the judges who enjoy it are that it makes the incumbents give their whole mind to their work, to order their household with a view to always being judges, and to take vows, so to speak, as to their future conduct. They must put aside all political ambition. One of the great debts which the American people owe to Mr. Justice Hughes is the example that he set in the last presidential election when the most serious consideration was being given to making him the candidate of the Republican party. He announced his irrevocable determination not to enter the political field because he has assumed the judicial ermine.

What, now, are the objections urged to a life tenure? The first is that it makes judges irresponsible, in the sense that they are so freed from the effect of what people think of them that they are likely to do unjust and arbitrary things. The immunity of life tenure does make some judges forget that it is nearly as essential to give the appearance of doing justice as it is to do substantial justice. They forget that the public must have confidence in and respect for the courts in order that they achieve their highest usefulness in composing dangerous differences and securing tranquillity and voluntary acquiescence in the existing order. Still, the life judges in whom these faults really exist are comparatively few. The criticism is apt to be made in many cases where it is not deserved, because of the contrast that lawyers and litigants find in dealing with courts under the two systems. The federal judges have the power which the English judges have. They are so far removed from politics or the fear of election that the counsel before them exercise only the authority which their eminence as lawyers justifies. Under state statutes, following the tendency to minimize the power of the court, the judge is greatly restricted in the exercise of discretion to free the issue before the court from irrelevant and confusing considerations. The jury trial given by the federal constitution is the trial at common law given by a court and jury, in which the court exercises the proper authority in the management of the trial and assists the jury in a useful analysis and summing up the evidence, and an expression of such opinions as will help the jury to reach right conclusions. All this tends to eliminate much of what almost might be called demagogic discussion which counsel are prone to resort to in many of the local state courts and which the state judge fears to limit, lest it be made the basis of error and a ground for new trial under some statute narrowing his useful power. We must, therefore, weigh the frequent characterization of the federal judge as a petty tyrant in the light of the contrast between proper authority exercised by him and the control exercised by judges in state courts, where opportunity is too frequently given to the jury to ignore the charge of the court, to yield to the histrionic eloquence of counsel, and to give a verdict according to their emotions instead of their reason and their oaths. Why is it that every law-breaker prefers to be tried in a state court? Why is it that the federal courts are the terror of evil-doers? Is it not because the judge retains his traditional control of the manner of the trial and of the counsel and really helps, but does not constrain, the jury to a just verdict? Is it not because law and justice there prevail rather than buncombe and mere sentiment?

But it is said that the unpopularity of the federal courts among the lawyers as a whole shows that the life tenure has a bad effect upon their character as judges. I agree that when a judge is thoroughly disliked by the Bar, who are his ministers and assistants, it is generally his fault, because he has much opportunity properly to cultivate their goodwill and respect. Still, much must be allowed for in the impatience of the general Bar at federal judges, because there are many lawyers who appear but rarely in United States courts, are embarrassed by their unfamiliarity with the mode of practice, and feel themselves in a strange and alien forum.

There are substantial causes for the local unpopularity of federal courts and these exist without any fault of the judges. The chief reason for creating local courts under the federal authority was to give to non-residents an opportunity to have their cases tried in a court free from local prejudice before a judge who had the commission of the President of the whole country, rather than a judge whose mandate was that of the governor of the state where the cause was tried, or of the people of the county in which the court was held. In other words, the very office which they serve, that of neutralizing local prejudice, necessarily brings them more or less into antagonism with the people among whom such local prejudice exists.

A similar answer may be made to the charge against the federal courts, that they are biased in favor of corporations. This has grown naturally out of their peculiar jurisdiction. Throughout the western and southern states, foreign capital has been expended for the purpose of development and in the interest of the people of those sections. They have been able to secure these investments on reasonable terms by the presence in their communities of the federal courts, where the owners of foreign capital think themselves secure in the maintenance of their just rights when they are obliged to resort to litigation. While this has been of inestimable benefit in rapid settlement and progress, it has not conduced to the popularity of the federal courts. Men borrow with avidity, but pay with reluctance, and do not look upon the tribunal that forces them to pay with any degree of love or approval.

Then, an important part of the litigation in the federal courts on the civil side consists of suits brought to prevent infringement by state action of the right of property secured by the Fourteenth Amendment to the Constitution. Such action is usually directed against large corporations, who thus become complainants. If any such suits are successful, and state action is enjoined, it is easy for the demagogue and the muckraker to arouse popular feeling by assertion that the federal courts are prone to favor corporate interests. It is not the bias of the judges, but the nature of their jurisdiction, that properly leads litigants of this kind to seek the federal forum. The unsuccessful suits of this kind are never considered by the critics of the federal judiciary. Hence the plausibility of the charge. But it is unjust. In no other courts have the prosecution of great corporations by the government been carried on with such success and such certainty of judgment for the wrongdoer, and the influence of powerful financial interests has had no weight with the federal judges to prevent the enforcement of law against them.

Again, the litigation between non-resident railway and other corporations and their employes in damage suits has usually been removed from the state courts to the federal courts, where a more rigid rule of law limiting the liability of the employer has been enforced. This has created a sense of injustice and friction in local communities that is entirely natural, and has given further support to the charge that the federal courts are the refuge of great corporations from just obligation. It was the business of Congress to remove this by adopting an interstate commerce employers' liability act like that which is now on the statute book, giving the employes much fairer treatment, and by passing the workman's compensation bill which is pending in Congress and will, I hope, soon be enacted into law.

But it is said, "When you get a bad judge you cannot get rid of him under the life system." That is true unless he shows his unworthiness in such a way as to permit his removal by impeachment. Under the authoritative construction by the highest court of impeachment, the Senate of the United States, a high misdemeanor for which a judge may be removed is misconduct involving bad faith or wantonness or recklessness in his judicial action or in the use of his judicial influence for ulterior purpose. The last impeachment and removal of a federal judge, that of Judge Archbald, was on the ground that he sought sales of property from railroad companies, or their subsidiary corporations, which were likely to be litigants in his court, and indicated clearly by a series of transactions of this sort his hope and purpose that such companies would be moved to comply with his request because of his judicial position. The trial and the judgment were most useful in demonstrating to all incumbents of the federal Bench that they must be careful in their conduct outside of court as well as in the court itself, and that they must not use the prestige of their judicial position, directly or indirectly, to secure personal benefit. Mr. Justice Chase was tried in Jefferson's time for gross improprieties of a partisan political character calculated to cast discredit on his court. It would seem in this day and generation that he ought to have been removed, but the spirit of the impeachers was so partisan and political that it frightened many of the Senators and neutralized the improprieties that were made the subject of the impeachment articles. It was this case which evoked from Thomas Jefferson the comment that impeachment was "the scarecrow" of the Constitution, and that it was impracticable as a means of disciplining judges. Under the ruling in the Archbald case and the evident tendency of the Senate, the criticism of Jefferson has lost much of its force.

The procedure in impeachment is faulty, because it takes up the time of the Senate in long-drawn-out trials. This fact is apt to discourage resort to the remedy and has lessened its proper admonitory and disciplinary influence. The pressure upon both Houses for legislation is so great that the time needed for inquest and trial is grudgingly given. An impeachment court of judges has been suggested, but the public would fear in it lenity toward old associates. The wisdom of having the trial by the higher branch of the Congress, entirely free from the spirit of the guild, commended itself to the framers of the Constitution and is manifest. A change in the mode of impeachment, however, so as to reduce materially the time required of the Senate in the proceeding would be of the greatest advantage. If the whole Senate were not required to sit in the actual trial, and the duty were remitted to a committee like the judiciary committee of that body, whose decision could be carried on review to the Senate in full session, the procedure might be much shortened. The Judicial Committee of the English Privy Council is now a supreme court for colonial appeals, probably having its origin in the difficulty of assembling the whole Council to attend to litigated causes. The English House of Lords is a court, but sits only with the Law Lords, who are really a judiciary committee of the Peers to act as such.

It has been proposed that instead of impeachment, judges should be removed by a joint resolution of the House and the Senate, in analogy to the method of removing judges in England through an address of both Houses to the King. This provision occurs in the Constitution of Massachusetts and in that of some other states, but it is very clear that this can only be justly done after full defense, hearing and argument. Professor McIlwain of Harvard has written a very instructive article on the subject of removal by address in England, in which he points out that this is a most formal method, and that in the only case of actual removal of a judge by this method a hearing was had before both Houses of Parliament quite as full, quite as time-consuming and quite as judicial as in the proceeding by impeachment. Advocates of the preposterous innovation of judicial recall have relied upon the method of removal of judges as a precedent, but the reference only shows a failure on the part of those who make it to understand what the removal by address was.

By the liberal interpretation of the term "high misdemeanor," which the Senate has given it, there is now no difficulty in securing the removal of a judge for any reason that shows him unfit, and if the machinery for holding the trial could be changed from the full Senate to a judicial committee, with the possible appeal to the whole body, impeachment would become a remedy entirely practical and effective.

One who is convinced that the federal judiciary, both supreme and inferior, because they are appointed and hold office for life, are the greatest bulwark in the protection of individual right and individual liberty and the permanent maintenance of just popular government, must have a strong personal resentment against any member of that body who in any way brings discredit on the federal judiciary and weakens its claim to public confidence. I feel, therefore, no leniency or disposition to save the federal judges from just criticism and I am far from making light of serious charges against them or of defects that have cropped out from time to time.

Some local federal judges are not sufficiently careful to avoid arousing local antagonism in cases where they have a choice as to the method of granting a suitor relief. Congress has taken steps in this direction so that one judge is not enough to authorize an injuction where it is sought to prevent the enforcement of a state statute claimed to violate individual rights.

Again, the patronage that judges have exercised has disclosed a weakness that can be prevented by changing the system. Judges now appoint clerks and the relation established between the judge and the clerk is so close and confidential that it is often difficult to secure from the judge the proper attitude of criticism toward the clerk's misconduct.

I am convinced that the clerks ought to be appointed by the Executive, be brought within the classified civil service, be subject to removal for cause either by the Executive or by the judge.

Abuses have grown out of court appointments to receiverships and to other temporary lucrative positions. It would be well if possible to relieve the judges of such duties. In the case of national banks, the receivers are appointed not by the courts, but by the Comptroller of the Currency. I think it might be well in the case of interstate railroads, the creditors of which seek relief in the federal court, to have the receivers appointed by the Interstate Commerce Commission. Patronage is very difficult to dispense. It gives to the court a meretricious power and casts upon it a duty that is quite likely to involve the court in controversies adding neither to its dignity nor its hold upon the confidence of the public. Some great English judges have tarnished their reputation in its use. A receiver appointed by another authority would be quite sufficiently under control of the court if the court could remove him for cause and punish him for contempt of its orders.

Again, the judges have not shown as strong a disposition to cut down the expenses of litigation as they should in the federal courts; but this is completely in the control of Congress, which would help the people much more by enacting a proper fee bill than by such attempts as we have seen, to impair the power of courts to enforce their lawful decrees. The attitude of the federal courts as to the cost of litigation was originally brought about by the increase in litigation and the hope that heavy costs would operate as a limitation, but this works great injustice and is an improper means to the end.

The great defects in the administration of justice in our country are in the failure to enforce the criminal laws through delay and ineffectiveness of prosecution in the criminal courts, and in the cost and lack of dispatch in civil suits. In the enforcement of the criminal laws of the United States in the federal courts there is little to criticise. They might well serve as models to the state courts. On the civil side, the same cannot be said. The costs may be and ought to be greatly reduced. The procedure in equity causes has been greatly simplified by the new equity rules just issued by the Supreme Court. A bill to authorize that court to effect the same result in cases at law is likely soon to pass. Then we may hope that the federal courts will furnish a complete object lesson to state legislatures in cheap, speedy, and impartial judgment.

I have thus taxed your patience with the reasons that convince me that appointment and a life tenure are essential to a satisfactory judicial system. They may seem trite and obvious, but I have thought in the present disposition to question every principle of popular government that has prevailed for more than a century, that it might be well, at the risk of being commonplace, to review them.

In the present attitude of many of the electorate toward the courts it is perhaps hopeless to expect the states, in which judges are elected for short terms, to return to the appointment of judges for life. But it is not in vain to urge its advantages. The federal judges are still appointed for life, and it will be a sad day for our country if a change be made either in their mode of selection or the character of their tenure. These are what enable the federal courts to secure the liberty of the individual and to preserve just popular judgment.

THE EMPLOYEE'S DUTY

IN Essex Trust Co. vs. Enwright, (Mass,) 102 N. E. 441, the court had before it the following question: In case a reporter on a newspaper in the course or by reason of his employment learns that the premises on which the business of publishing the paper is conducted are of peculiar value to his employer or one carrying on his business, has he the right without his employer's knowledge to take a lease of the premises and hold them as his own to the injury of his employer's property? The question was answered in the negative. The court said: "The doctrine invoked by the plaintiff in this suit had its origin in two decisons by Lord Eldon. In Yovatt vs. Winward, I Jac. & W. 394, the defendant (formerly employed as a clerk by the plaintiff, who was a veterinary surgeon) was enjoined from using medicines compounded from the plaintiff's recipes which he (the defendant) had surreptitiously copied while in the plaintiff's employ. In Abernathy vs. Hutchinson, 3 L. J. (O. S.) Ch. 209, the publication in the *Lancet* of lectures on surgery delivered by the plaintiff at St. Bartholomew's Hospital, which the defendants had obtained from the students attending the lectures, was enjoined. The ground on which Lord Eldon went in this case was subsequently stated by Turner, V. C., in these words: 'I well remember that upon the first argument he refused to grant the injunction on the ground of copyright, Mr. Abernathy not being able to swear that the whole lecture was written, but that afterwards on a second argument he granted it on the ground of breach of confidence.' See Turner, V. C., in Morison vs. Moat, 9 Hare 241, 257. . . . There are two cases, one in California and the other in Illinois, which have gone as far in the application of this doctrine as we are asked to go in the case at bar. In Gower vs. Andrew, 59 Cal. 119, 43 m. Rep. 242, the defendant, a clerk employed by the plaintiffs, who were warehousemen, secured a lease of the warehouse in which the business was conducted, behind his employers backs by telling the owner of it that the 'plaintiffs would probably give up the warehouse,' and offering an advance of fifty dollars a month in the rent. The defendant then began soliciting custom for himself as the successor of his employers. On this becoming known he was discharged by his employers and was ordered by the court to assign the lease to the plaintiffs. In Davis vs. Hamlin, 108 Ill. 39, 48 Am. Rep. 541, Davis, who was the defendant in the court below, was hired by Hamlin, the lessee of one of four important theaters in Chicago, as his business manager. A year and three months before Hamlin's lease expired Davis behind Hamlin's back secured a lease for himself by giving $4,500 more rent a year. It appeared in evidence that Hamlin had built up a good will in connection with this theater by ten years' occupancy. Davis was directed to hold the lease which he had secured as trustee for Hamlin. The defendant has argued that he was not within this rule because the duty of securing a lease was not intrusted by his employer to him. The same contention was the main argument put forward in Davis vs. Hamlin and was true of the clerk in Gower vs. Andrew. The complaint against the defendant is that he has made use of information which has come to him in his employment to the detriment of his employer. In our opinion that is enough to entitle the employer to equitable relief."

—*Law Notes.*