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The Jury System under Changing Conditions

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THE JURY SYSTEM UNDER CHANGING SOCIAL CONDITIONS.

When we stop to theorize about our courts, we find no room for the conception of a judicial tribunal which is not perfectly unbiased and free to determine the facts as they exist and to apply the law as it stands. But judicial tribunals must be composed of men—with men's infirmities, both mental and moral. No human tribunal can be infallible in its judgments; but on the whole, no country has succeeded better than the English speaking people in providing for the just determination of causes—notwithstanding the fact that reforms in judicial procedure are needed, especially in this country. Our judges command respect for their learning and judicial temperament. Respect for the men has begotten respect for the office and that, in turn, has caused the men to be selected with a view to their fitness. This seems to be generally true, whether the office is filled by appointment or by popular vote. And yet, in spite of the general presumption that must exist in favor of a judge's fitness to preside in the trial of causes, so jealous is the law in the administration of justice that there are cases in which a judge, by reason of his relation to the parties in the cause, or to the subject matter, is absolutely disqualified from acting. In certain jurisdiction, were he to insist upon performing the judicial functions in such a case, the proceedings before him would be a nullity. In other cases, the judge is expected to recuse himself if he finds in his own mind a bias which might influence his rulings. To the honor of our judges, be it said, this confidence reposed in them by the law is rarely abused.

In the matter of juries, however, the framers of our judicial system had a different problem to solve. Jurors come and go, and are not subject to the powerful moral influences that help the judges to uphold the dignity of their high position. Jurors can not be selected with special ref-
erence to their fitness to sift out the truth from a mass of conflicting evidence; for under our system this is not their only function—they represent and are expected to voice the average taste, opinion and attitude of the community with respect to a multitude of matters. In order to prevent this difference in personnel between judges and juries from having a sinister effect on the trial of issues of fact, our forefathers and ourselves have displayed much ingenuity in devising means to produce a negative result, i.e., the selection of a jury which shall not be subject to improper influences, while having, in theory, at least, a representative character. From the time that jurors are selected by lot to the moment when they are sworn in, every opportunity is afforded to litigants to weed out undesirable material. And there are cases in which, at least under State systems of procedure, when it appears reasonably certain that an unbiased jury can not be secured, a change of venue may be had.

In the jurisprudence of our States, the change of venue was inherited from the common law of England. But in view of the very tender regard which we have for persons accused of crime, it is a curious fact that this proceeding has as yet found no place in the Federal system of administering justice.

In early days, the change of venue was a more conspicuous safeguard of personal liberty than it is now. Communities were isolated, communication was scant; personal bias against an accused might well spread itself within a county and as well expend itself at county lines. But in these days of dense population, it must be a community preserved in its last-century setting that can not readily furnish a qualified jury, unless the case to be tried be one that has aroused bias of more than a personal nature against one of the parties.

The barrier to the change of venue in Federal practice is probably insuperable. And it may well be that the very conditions existing a century and a quarter ago, which made the change of venue a prized institution of the State
courts, made the proceeding an unnecessary one in the Federal courts, inasmuch as a Federal district comprised several counties—in some instances, a whole State—and the jurymen might be drawn from the district at large.

The Federal Election Crimes Act was passed in 1870, and we know how bitter was the sectional feeling existing at that time and for years afterwards, and the charges that were made of the oppressive use of the Federal power during the reconstruction period. It was in 1879, at a time when conciliatory policies were beginning to get in their work, that Congress amended the Judiciary Act with the evident intention of taking the sting out of the Election Crimes Act. Like many provisions that are simply compromise measures, this amendment went through as a rider to an appropriation bill. It was intended to make the political complexion of all juries bipartisan; or, at least, to prevent the drawing of any jury completely one-sided in the political affiliations of its members. This provision is as follows:

"And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons possessing the qualifications prescribed in Section 800 of the Revised Statutes which names shall have been placed therein by the clerk of such court, and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which the court is held, and a well known member of the principal political party opposing that to which the clerk may belong; the clerk and said commissioner each to place one name in said box alternately without reference to party affiliations, until the whole number required shall be placed therein."

Note the peculiar wording of the statute fixing the qualifications of the jury commissioner: "A well known member of the principal political party" opposed to that to which the clerk of the court belongs. The act does not call for two distinct qualifications—that the commissioner shall be well known and that he shall be a member of the political party opposed to that of the clerk. A man may be well known throughout his district for business success or for his philanthropy, or for anything unconnected with pol-
itics, and he may at the same time be a consistent member of a political party; but having kept his politics to himself it may not be well known to what party he belongs. The act obviously requires the court to appoint a man who shall be well known as a member of a certain political party—not a member of such party, who for some reason has achieved fame, or, it may be, notoriety in his district. The distinction is important and should be borne in mind as shedding light on an incident in our judicial history, the details of which have never been made public, and which I propose to relate for the purpose of showing how ineffectual a protection the statute may become in the very crisis it was framed to meet.

The scene of this incident was one of the States which had been put through the corroding process of reconstruction; the year is immaterial; and the actors of historical interest were the officials of the United States Circuit and District Courts.

During the previous year there had been a marked re-crudescence of the animosities which had characterized the bitter days of reconstruction, all through the South. While the hereditary citizens of this State had succeeded in repressing the negro vote, a full casting and counting of which would have changed the political complexion of many counties and perhaps of the whole State, the peaceful invasion of the South by the North had furnished the material for a powerful office-holders' organization of the Republican party; and, as many of the members of this organization came from parts of the country where the most up-to-date methods of practical politics were in vogue, those sons of the State whose citizenship (and politics) came to them by inheritance were hard pushed to maintain their supremacy. The seriousness of the situation can only be appreciated by reminding ourselves that men act (as they must be judged) according as the conditions appear to them. In this State there was now an organized body of men who were absolutely determined to leave no stone unturned to restore the negro to the plane
of political equality with the white man which was given him by the Fifteenth Amendment. On the other hand were those whose citizenship came to them by inheritance, who believed with a strength of conviction that left no room for argument, that the political equality of the negro meant his social equality and political control, and these two meant to the white man material ruin, degradation and social chaos. Judged by their own feelings, standards and convictions, they were at bay, threatened with the loss of all that made life worth living and blinded with the desperation of men for whom all laws but one fade into meaningless words when the instinct of self-preservation has been aroused.

This was the situation in the Black Belt when the general election of a year which I shall not mention was held. To question the fact that the negro vote was suppressed in the Black Belt would be to ignore what at the time was not only not denied, but was defiantly admitted. The immediate effect of these latest frauds on the ballot was to arouse the Washington authorities. Orders were sent out to prosecute all offenders against the Federal election laws. The announcement that prosecutions were to be instituted added one more to the grievances of those whom I call the citizens of the State by inheritance. It was the one thing needed to enlist the sympathies and the co-operation, if called for, of those who had looked askance on election methods. The bad feeling that had existed before was intensified by the threatened interference of the central government with what was considered the sacred right of the State to manage its own affairs, and the atmosphere of the whole State became charged with apprehension, malevolence and potential violence.

In this state of bitter feeling, it is not to be wondered at that sane judgment on both sides disappeared—that the Republicans, almost to a man, looked upon every Democrat as a presumptive violator of the law; while the Democrats believed that every Republican was a member of an outrageous conspiracy to deprive them of the political control
of the State by means of prosecutions in which the accused would be denied the full benefit of the presumption of innocence.

Then the judicial mill began to grind; and in making all the orders that were passed, the District Judge was the one to act, except, as will appear, on one particular occasion, when one phase of the prosecution was acted on by the Circuit Judge.

In those days the United States Circuit and District courts had concurrent jurisdiction of all Federal crimes not capital, with this important distinction: that a man tried and convicted in the District Court could have his sentence reviewed by the Circuit Court upon a writ of error, while, if he were tried in the Circuit Court, his sentence was final in the sense that it could not be reviewed by any other tribunal. It was doubtless assumed by the framers of the old Judiciary Act that if the trial were had in the Circuit Court, it would be presided over by both the District Judge, as ex-officio judge of the Circuit Court, and by the Circuit Judge, who would see to it that no errors were committed, to the same extent that he could correct errors sitting as appellate judge, were the trial had in the District Court. The assumption was probably correct in the early days, but at the time of which I am speaking the great increase of business in the Federal courts had made it impossible for the Circuit Judge to pay more than rare visits to each Circuit Court in his circuit and then his time was mostly taken up with admiralty appeals; so that as a general proposition the work of the Circuit Court was performed by the District Judge sitting alone.

The first move on the part of the government was to secure an order discharging the then jury commissioner and appointing a new one. Now, the old jury commissioner was a man who answered the requirements of the law in every respect—in letter and spirit. He was a Democrat, active in party work and well known as such throughout the State; and he was, by election, and had been for many years, the incumbent of the most lucrative public office in
the State—clerk of the State court of general jurisdiction in the principal county of the State. No man had ever been heard to question his integrity. It is a singular thing that no man of his day and generation ever hinted that he was connected with any scandalous transaction in either private or public life. And to complete his qualification, the clerk of the United States Circuit and District Courts was a Republican.

The new appointee came from a county in the Black Belt. He had always been a quiet, unobtrusive citizen—a member of the Democratic party, but he was absolutely unknown outside of his own county until the State election two years before he was made jury commissioner. At that time he bolted the Democratic State ticket, headed an independent ticket in his own county and was elected, with the help of such Republican votes as could be polled. Having been elected, he made a great outcry that the Democrats had cheated him out of 500 votes. It was this outcry that brought him to the notice of the State at large. Compare him with the man called for by the statute. The Judiciary Act called for a well known member of the principal political party opposed to that to which the clerk belonged. The new commissioner never would have been known at all outside of his own county had it not been for his bitter denunciations, after the election, of the Democrats and their election methods. These denunciations helped to make "stuff" for the newspapers and he became suddenly well known throughout the State—as a bolter and as an active and vociferous antagonist of the Democratic political organization. But he called himself a Democrat, and, once in the Assembly, he was admitted to the Democratic caucus, although he was at the same time repudiated and denounced by the great mass of the party to which he said he belonged; and it is safe to say that he could never thereafter have received a straight Democratic nomination to office without a new confession of faith and profession of allegiance.

Now this appointment, standing by itself, would not be
worth recording. It could not give rise to the slightest sus-
picion that the government was not desirous, in bringing
the threatened prosecutions, to give to the accused the ben-
efit of that liberal interpretation of laws enacted for their
protection, which is rooted in the Englishman's love of fair
play, and which we have inherited from the mother coun-
try. It is only in the light of what followed that the inci-
dent acquires any significance. But in the light of what
followed, it seems not unfair to conclude that it was part
of a well-devised and exceedingly ingenious plan to avoid
any mistrials.

The clerk of the Federal courts now furnished a contribu-
tion in furtherance of the government's case. In the
District it had been made a rule of court that the jury
drawings should be made in public, in the court room, and
that the clerk should give notice of each drawing by post-
ing a notice on either the door of the clerk's office or the
door of the court room. The court room had been built
with three doors; one giving access to the clerk's office;
one at the rear, which was the public entrance; and one at
the side of the judge's bench. The last door was not used.
It was kept locked and the jury box was placed against it
on the inside. It was no more the door of the court room
than would have been a trap door in the ceiling. But no-
tice of the jury drawing was posted on this door on a
piece of paper the size of a visiting card. The trick had
no merit of either ingenuity or novelty. 'It was at least as
old as the tables of Caligula. Moreover, it was a perfectly
needless attempt to maintain secrecy where the law said
there should be publicity; for I never heard of any mem-
ber of the public attending a jury drawing, and if the no-
tice had been given in the proper place on a poster the
size of the court room door, it is probable that no attention
would have been paid to it. The manner of posting the
notice simply shows that the court officials preferred se-
crecy to publicity in the matter of drawing the jury, and as
evidence of a plan of prosecution it may well be consid
The next man to lend a hand for the government was the United States marshal. He wrote to a deputy marshal stationed in another county the following letter upon one of the printed letter-heads of the United States Marshal's office:

"Sir:—You will at once confer with Mr. ______ and make out a list of fifty or sixty names of true and tried Republicans from your county registration list for jurors U. S. Court and forward same to Hon. ______, clerk U. S. Court, and it is necessary to have them at once, as you can see. Please acknowledge this. I am

Yours truly,

_______ U. S. Marshal."

The man with whom the deputy was instructed to confer was chairman of the Republican Executive Committee in the deputy's county, one of the very few counties in the State in which there was at that time a large proportion of white Republican voters. The marshal, in assuming the duties of his office, had sworn to support the Constitution and laws of the United States. Compare this letter with the terms of the law requiring the names to be placed in the box without regard to political affiliation, and form an idea of how the marshal regarded party service, however, questionable in character, as superior to his obligation as an officer.

The deputy was a most obedient officer. He conferred with the chairman of the Executive Committee and together they agreed on fifty men as being "true and tried Republicans," and the names of these fifty men he sent to the clerk of the court, as was afterwards learned from the deputy's letter, which the clerk had absent-mindedly placed in the files of his office instead of in the fire.

The records of the court showed that the drawing was made pursuant to the notice which the clerk had hidden on
the side door of the court room; but no one but the court officers was ever found who could vouch for the truth of the record. By one of those marvellous coincidences which shake one's faith in the doctrine of probabilities, the names of all the fifty "true and tried Republicans" came out of the box.

It was necessary to draw twenty-three names for the grand jury and thirty-six names for the petit jury panel. When the drawing had been made, it was found that the grand jury consisted of twenty-two true and tried Republicans and of one lone Democrat who would not even have the privilege of making a minority report; while the petit jury panel of thirty-six men consisted of thirty-four "true and tried" and of two Democrats. It was at once apparent that with four peremptory challenges at the government's command, it could in any case, at least until the panel was exhausted, tender to any accused an entirely partisan jury, whereby the object of the statute was utterly defeated unless the court could be induced to quash the venire.

The government now applied for and secured two orders of an extraordinary nature. They were extraordinary, not because it was unlawful for the court to make them, but because the application for them, taken in connection with securing the appointment of the new jury commissioner pointed in no uncertain way to an intention to stack the cards.

It was ordered that all indictments found at the approaching term of the court should be returned to the Circuit Court, and that all criminal cases should be tried in the principal city of the district.

As I have stated, the Circuit and District Courts had concurrent jurisdiction of all crimes not capital; but up to this time all such cases had been tried in the District Court, thus giving to the accused the opportunity for a writ of error in the event of conviction. As we have seen, the great majority of trials in the Circuit Court were presided over by the District Judge sitting alone; and the ef-
fect of this order was to deprive the accused of the possibility of a writ of error and to make all rulings of the District Judge incapable of review. That the right of an accused to a fair trial, if his trial were presided over by a judge who might be dominated, however unconsciously to himself, by political considerations, would thus be jeopardized, is perfectly apparent.

This district consisted of three divisions, court being appointed by law to be held at the principal city before mentioned, and at two others. The object of the law was to serve the convenience of suitors and to enable persons accused of crime to be tried in the division in which the crime was committed, that being generally the division of the residence of the accused. But the law did not direct that they should be tried in the division nearest to the place of residence, or of the commission of the crime, nor was there any provision in the Judiciary Act for a change of venue from one Federal court to another, even in the same district. Fortunately this defect in the law has been partially remedied in the new Judiciary Act, which went into effect last January. It can not be said, therefore, that the second of these orders violated the right of any of the persons who expected to be indicted for crime. But taken in connection with the secret application for an appointment of a new jury commissioner, and the way in which that commissioner measured up to the statutory standard, the trick by which the public failed of notification of the jury drawing and the way in which the jury actually was packed, it strengthened the growing conviction throughout the State that the government was determined to bring certain men to trial before a jury chosen according to the "true and tried" standard, and presided over by a judge, of whose rulings it felt reasonably sure in advance. And in this connection it should be recalled that there was no provision of law by which a Federal judge could be forced to retire on account of bias and allow another to act in his place. The new Judiciary Act has changed this also.

Shortly after the government had finished its prepara-
tions, court convened, and the grand jury began to hand up indictments. One of the defendants, who was held to answer the charge of conspiring to prevent by force and intimidation the holding of an office of trust under the United States, challenged the array of grand jurors on the ground that the new commissioner lacked the statutory qualifications. The court found the facts as I have already given them, specifically pointing out that the commissioner while in the legislature had "acted with" the Democrats. The decision practically was that a man was a member of the Democratic party if he called himself such, that he need not be "dyed in the wool" and that his political beliefs made him a "member" of the party and not his standing with the other members. There being absolutely no question as to the fact that the clerk of the court was a Republican, the commissioner was held to be a well known member of the principal political party opposed to that to which the clerk belonged, and the challenge was overruled.

But the interesting and instructive part of these proceedings began when one of the defendants filed special pleas in abatement and among them one attacking the actual drawing of the jury. This plea was to the effect that the jury commissioner and the clerk, in selecting names to be placed in the jury box, from which the grand jury which found the indictment against the defendants was drawn, did not comply with the law, and select names without regard to party affiliations, but did select such names with regard to the party affiliations of the persons selected. The government demurred to these pleas.

By a curious coincidence, on the day set for a hearing on the demurrer, the Circuit Judge appeared on the scene and took his seat on the bench.

In an opinion rendered by the Circuit Judge, the District Judge concurring, it was held that all the pleas were bad in substance and presented no matter of which the defendants had any right to avail themselves; but as to the particular plea attacking the selection of the grand jury, the court held that it was equivalent to a charge that the
jury had been packed for political purposes and while it could not avail the defense, it was enough to put the court on inquiry. The district attorney was ordered to traverse this plea with a view to a hearing thereon. Having rendered this decision, the Circuit Judge left the city, and the District Judge was left to deal with the remainder of the case alone.

Issue having been joined in accordance with the direction of the Circuit Judge, the case came on to be tried the next morning before the District Judge without a jury. The first witness called was the deputy marshal. Counsel for the defense offered to prove by him that he was a deputy marshal; that he had received from the marshal the letter which I have quoted, and that he had obeyed its instructions, and the letter was produced and offered. But the court refused to admit this evidence unless it should first be shown that there had been collusion between the marshal and the clerk and that the clerk had been privy to sending the letter. Counsel for the defense then produced a paper found among the court records purporting to be a letter to the clerk containing a list of names to be used in selecting the jury. The lower end of the sheet, including the signatures of the writer, had been torn off. It was offered to be shown by the witness that this was his letter to the clerk in obedience to the orders of the marshal. The judge then shifted his ground and ruled that this testimony was irrelevant, holding that Republicans were not incompetent to serve as jurors, and it must be shown that the clerk put the names in the box because they were those of Republicans. This ruling drove the defense to its last stand, and the offer was made to prove by the clerk that he had put the names contained in the deputy marshal's letter in the box because it had been represented to him that they were the names of Republicans. But without any objection being made by the government and before the clerk had time to claim a personal privilege, the judge interfered and said that he would not permit the clerk to be examined because the clerk was the virtual de-
fendant in the proceedings and he would not permit the clerk to be asked any questions that might tend to criminate him. It was then proposed to put the marshal on the stand and to prove the facts by him. The court simply forbade this without giving any reason. At this point the court adjourned for the day.

It will be noted that the court had been called upon to rule on three points of evidence: the competency of the marshal’s letter, the admissibility of the deputy marshal’s letter, and the privilege of the court officers.

When the Circuit Court opened the next morning, the District Judge announced that he had given the matter careful consideration over night and had decided to call the marshal to the stand. The marshal was sworn and the judge put to him this question: “Did you write the letter to your deputy after anything on the subject of the letter had been said to you by the clerk?” The answer was, “No.” And then, in spite of the most clamorous attempts on the part of the defense to examine the witness farther, the court absolutely refused to permit another question to be put. The judge said that the matter was concluded as far as the witness was concerned and that he could stand down. The defense had nothing further to offer and the plea was overruled. This was a judicial finding by the court that the officers of the court had not been guilty of improper conduct in the matter of selecting the grand jury—that the grand jury had not been packed for political purposes.

One of the most significant facts in connection with this bit of judicial history was the way in which the judge put a single question to the marshal and accepted as conclusive an answer that was absolutely inconclusive. Indeed the marshal’s answer, standing alone, was nothing less than a negative pregnant. The issue was one of collusion between the marshal and the clerk to stuff the jury box with the names of Republicans. If there was collusion it might just as well have taken place after as before the marshal wrote the interesting letter to his deputy. Hence the denial that there had been any collusion before the letter was
written was inconclusive. The marshal's denial may have been perfectly true, and yet, non constat but that he wrote the letter and before mailing it showed it to the clerk and came to an understanding with him as to what should be done with the names of the fifty "true and tried" after they were received.

The ruling of the court left the general impression that the whole scene in which the examination of the marshal was set had been carefully rehearsed over night, and it served to intensify the impression of the defendants and their sympathizers that in this case justice was not as securely blindfolded as she was traditionally supposed to be.

We are not concerned with the guilt or innocence of the accused in these extraordinary proceedings, nor with their fate. We are only concerned with the situation that arose under the law—or rather in spite of the law. As a matter of fact, after a couple of convictions had been secured and two deputy United States marshals had been shot in the execution of process, and a majority of the white population of the State had worked itself up to a pitch of excitement bordering on armed rebellion, a fire destroyed the records of the court and the government concluded to drop the pending prosecutions.

If in time of peace it is well to prepare for war, how much more ought we in times of quiet and mutual good-will and confidence to adopt all reasonably demanded safeguards of the integrity of our judicial proceedings, and especially to strengthen those safeguards that we received from the mother-country.

It does not make for righteousness nor for the cause that lies at the foundation of all constitutional government that a judicial decision reach the very right of the matter in controversy, when all the proceedings leading up to the decision were distinctly unfair in appearance. Those who approved of the action of these court officials argued in this way: "Crime has unquestionably been committed. The guilty men should be punished. But if they are tried by a
jury selected in the manner which Congress has deemed necessary to fairness, it will be impossible to convict them; for in the present state of excitement and general unreason, every case would result in a mistrial.” No exception could be taken to this reasoning up to this point. But the conclusion was drawn thus: “Therefore, in order to make possible the conviction of guilty men, it is permissible to draw the jury in a mode forbidden by law, as long as the jurors drawn are not themselves incompetent to act—we must fight the devil with fire.” This line of argument is the only possible justification for lynch law. Indeed, it is impossible to point out the difference in principle between lynch law and such intentional violation of law as characterized these prosecutions. In both cases, the object is to meet a condition of crime that the law is powerless to cope with.

I want it distinctly understood that I am not throwing stones at any of the officers of the court. They did not act for personal gain. They felt themselves fully justified in what they did.' They acted under the obsession of a dominant idea, and that a political one. They were convinced that the future of the republic and the happiness of its people depended upon the suppression of Democratic frauds upon the ballot. The morality of what they did no more occurred to them than it occurs to us now to question the morality of a certain destruction of private property in Boston Harbor. They acted in accordance with what they supposed to be a higher duty than that imposed upon them by the Judiciary Act, just as their political opponents had acted, as they supposed, in obedience to the law of self preservation. Such doctrine in practice is subversive of government; but we can not fasten on its holders the moral obliquity of the man who commits crime for the sake of personal gain.

The defects in the Judiciary Act, in so far as it provided for the trial of persons accused of crime, were:

First, that it denied to an accused the right to have his conviction reviewed upon writ of error. This defect in the
law has since been remedied. And yet had the right to a writ of error existed, it would have availed these defendants nothing so far as their attack on the grand jury was concerned (assuming the ruling of the Circuit Judge to have been correct), for an inquiry into the mode of selecting the jury was not a matter of right in the defendants, but was required as a matter of public policy to vindicate the dignity of the court.

Second, in providing that juries should at least not be intentionally of one political color, Congress doubtless intended to give defendants bread, but as the gift has been construed it became a stone, for they were given no right to make the observance of the statute a *sine qua non* of an irreversible conviction. This defect remains to the present day.

Third, there was no provision for a trial in the division of residence or of the commission of the crime, nor for a change of venue, nor for compelling a change of trial judge on account of bias. The new Judiciary Act offers a slight protection in the way of a change of venue from one division to another of the same district. It also provides that an accused may file an affidavit that the judge has a personal bias or prejudice against him, with a view to a substitution of judges, but as the affidavit must state the grounds for the charge, and as political bias or prejudice is a very different thing from a personal feeling, it would seem that, for the same reason that the attack on the "true and tried" jury was not sustained, such an affidavit would be unavailing in a like case. The act, however, has made one important change by providing that all prosecutions for crime shall be had within the division in which they were committed unless transferred upon the application of the defendant.

But in spite of the new safeguards afforded by the act of March 3, 1911, the same situation with regard to the selection of the jury that arose in these prosecutions is liable to arise again; for there are times when whole communities work themselves up to such a pitch that few individuals
retain their perfectly sane judgment as to matters arising out of the cause of the excitement. Now, at such times, if the excitement arise out of such conditions as I have described, the effect of a faithful observance of the law in the selection of the jury will not be a fair trial of an accused, but a disagreement of the jury—at least that is the only substantial benefit that an accused could derive from such observance. To say, therefore, that an accused has the right to a bipartisan jury in any case where it would benefit him is to say that he has a right not to be convicted, and this makes a dead letter of the Federal statutes—something that is not conducive to respect for the law. It stands to reason that under ordinary conditions, juries, even in political trials, may be trusted to render their verdicts regardless of their political affiliations. But if the law is permitted to remain as it is, the day will come when the government will feel as it did in these cases, that political affiliations are an essential part of its case. That this scandal may not be repeated, the law ought to be amended. How ought this to be done? It may be admitted that the obstacles in the way of a change of venue to another State are insuperable. It has been suggested that the accused be given the privilege of selecting from the circuit the judge who shall preside at his trial. Naturally, he would select one of his own political persuasion. If an accused had this right in political prosecutions, at least he would have the assurance that the intention of the framers of the bipartisan jury provision would be carried out. But this would be no more than insuring the accused against conviction. Or, a simple provision that a failure to observe the directions of the law in the selection of the jury should be ground for challenge without a showing of damage and that a jury of uniform political complexion should be *prima facie* evidence of a violation of the law, would give the accused this insurance. But the policy of having a crime on the statute book coupled with a provision practically depriving the statute of the law’s sanction is one that ought to be condemned. In my judgment it would be a great deal better
to repeal those sections of the Federal criminal code making election offenses in the States crimes against the United States, allowing all such offenses to be dealt with by the laws of the several States. Under all ordinary conditions State justice can be trusted to deal with such cases with firmness and wisdom. The objection to this is that in such a crisis as I have described, State prosecutions might be entirely one-sided. But it would be far better to allow the State authorities to fail to prosecute for political reasons than to see the United States officials packing juries, or persecuting with conviction practically barred—for prosecution without expectation of conviction becomes persecution. And should there ever be a threatened use of the machinery of the State courts to oppress political opponents, there will always be the ample protection now afforded to an accused of removing the trial of his case from the State to the Federal court.

The complications of modern life were undreamed of by our forefathers. Not only have social conditions changed amazingly since the jury was developed from a body of compurgators, but we now live in the shadow of a threatened vast social upheaval the premonitory symptoms of which are recurring with increased frequency. The champions of utterly divergent social ideas are surely organizing and marshalling their forces. As yet the outbreaks of these forces have been localized; but within the radius of their action, their effect in arousing class passions has been sufficiently marked to show what we may expect when a class sense of injustice shall produce an upheaval nation-wide in extent. They have also sufficiently proved the ease with which, in such times of moral stress, by a sinister control of the court machinery juries, may be secured whose verdicts can be depended on regardless of the evidence.

Please understand that I am not voicing a fear for the stability of any of our institutions, least of all for that of trial by jury. All that I wish to point out is that changing social conditions call for additional precautions just at the advance of science makes necessary additional precautions
against burglars. The jury system is the most stable of our institutions. It will weather social changes and outlast constitutions. But a wise man who owns a fine old mansion does not allow it to become defaced by the ravages of time; he does not allow its condition to become dangerous from lack of replacement of parts; nor does he leave the windows and doors open to the inroads of trespassers and thieves. Why should such a highly prized institution as the jury system be allowed to suffer from neglect?

Lawyers built the Temple of Justice; the lawyers are its natural guardians, its high priests, and the people look to them to keep the structure in the best of repair and to provide it with all the modern improvements that advancing intelligence indicates and changing social conditions demand. Unfortunately, too many lawyers forget that their professional responsibilities do not begin with retainer and end with honorarium—are not confined to the duties they owe directly to their clients. Their duties as guardians of the Temple they leave in great part to be performed by politicians, and the result is that the Temple is not as harmonious a structure as it ought to be.

There are certain reforms which ought to be made in order to bring the efficiency of the jury system up to present day requirements. All of these reforms can be brought about by an aroused sense of responsibility among the members of the Bar. The reforms are bound to follow.

In the first place it should be borne in mind that the increased diffusion of education, bringing a higher average of intelligence which has raised the quality of our juries, has developed the skill of those who, taking advantage of the general respect for the forms of law, stand ready to pervert these forms for their own sinister ends. The smaller the number from which juries are drawn, the easier it will be to obtain by devious methods juries which are not fairly representative. The social conditions of today have raised questions of portentous import which threaten at every moment to become acute, to arouse blind passion, and to array class against class. It is in such a crisis that un-
representative juries can be made the instruments of tyrannous oppression. Therefore, legislation should be directed toward enlarging the jury lists to the utmost practical extent and to placing in the box the full list of names except of those who are excusable by reason of service within a limited time.

In my judgment an example of vicious legislation in this regard, full of potential wrong-doing, is found in section 277 of the Act of Congress of March 3, 1911, which would permit United States District Court juries to be drawn from a single county of the district.

But more important still is it that jury drawings should become public functions in fact as well as in law. The only way to bring this about is for the lawyers to make it part of their business to attend and scrutinize the drawings. Why leave the officials designated by law to meet in an empty court room and make up their own record with no one to verify it? We do not allow election returns to be made up in that way. If the drawings were made from full lists and were in fact public we would get rid of the rounders who, in almost every county, appear on the panel term after term to the exclusion of more competent men who should be forced to serve.

I have only spoken of what seems to me a lack of preparedness of the jury system to meet a possible storm, the mutterings of which have come to us in louder and louder tones from Pennsylvania and Illinois and Idaho and Indiana and Massachusetts—a storm which, if it comes will bring wide spread danger to life, liberty and property. It remains for me to speak of an anomaly in our administration of justice whose baleful effect on the trial of issues of fact is becoming more and more obvious. I refer to a large part of the body of our so-called rules of evidence, and particularly to that rule which excludes hearsay testimony—a rule subject to several explicit, and in some cases, utterly arbitrary exceptions.

For the purpose of convicting one accused of homicide we admit the dying declaration of the alleged victim on the
theory that the declarant’s realization that he is about to die takes the place of the sanction of an oath, and we dispense with cross-examination from the necessity of the case. But with stolid inconsistency, we reject the theory and deny the necessity when the dying confession of another is offered to save the accused. To limit the admissibility of deathbed statements as to relevant or material facts, to what are technically called “dying declarations,” lacks, in these modern days, the merit of common sense.

The rule which excludes the self-serving declarations of a party to the suit unless they are a part of the res gestae, but admits his declarations against interest, conforms to the ordinary judgment of mankind; but that can not be said of the rule as to the declarations of a party not in interest, since deceased. Upon an issue of curtesy, we exclude the declaration of the accoucheur as to the birth of the child, if coupled with a charge entry for professional services, but admit it if coupled with a credit entry. Is there any sound reason why the admissibility of such evidence should be made to depend on the fact that the declaration was made against the pecuniary or property interest of the declarant? Men of sagacity do not frame their judgments in the most important affairs of life by any such arbitrary rule.

Forgetting that “rumor is a pipe blown by surmises,” we go to the other extreme in proving character and insist that it must be shown by reputation, denying that the opinion of a witness formed from personal acquaintance affords any legitimate basis from which the jury could draw a conclusion as to character.

We have some equally arbitrary and wholly artificial rules of exclusion in the matter of proving pedigree.

This is not a fair way to treat a twentieth century jury. We demand that a jury shall do justice by applying average human judgment to the issues; but at the same time we withhold from them facts essential to reach a judgmental conclusion, thereby, you may say, blinding them in one eye and depriving them of all sense of perspective.

The present day jury is no longer the body of presum-
ably ignorant men for whom, we are told, these rules of evidence were formulated by the judges centuries ago because their minds were so untrained that they were incapable of making nice discriminations as to the weight of testimony.\(^1\) This is to say that the rules of evidence have not kept pace with the development of the jury idea and with changing social-conditions. In early days these rules were mere rules of procedure and they still remain so, technically. But they have acquired all the force of substantive law, calling for legislative action, since we apply them in cases which do not require the intervention of a jury.

The conclusion of the whole matter is that while Bar Associations and legislative committees are giving heed to the demand for a reform in judicial procedure, they should also turn their attention to measures tending to safeguard jury trials, in view of impending social crises, and admitting that the intelligence of juries has kept pace with general social advancement.