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The Case of the People
against
The Lawyers and the Courts

Interviews with an
Outdoor Philosopher
Reported by Frank Cramer

Shakespeare : The first thing we do, let's kill all the lawyers.
—II Henry VI, Act IV, sc. 2.

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PREFACE

IF THE WORDS of my desert Philosopher fail to produce effect, read the admissions of a great lawyer and statesman, once a secretary of state and now a United States senator. In a careful address before the American Bar Association in October 1914 Elihu Root summed up the feelings of the people toward lawyers and courts, sought to minimize the more violent opinions, and then acknowledged as true nearly every serious charge that has been made against American judicial methods.

He said that it is difficult to induce even the bar associations to assist in the improvement of legal procedure; that the laws are crude and slovenly, and that lawyers probably make up a majority of every legislative body in the United States; that there has been and is now a steady drift toward more complicated and technical judicial procedure; that the simplest rules are sufficient, and that in highly complex international disputes simplicity of method is characteristic; that complexity of method tends to bring about a denial of justice; that the complex rules of evidence are merely a bad habit; and that lawyers, instead of seeking simple justice, are apt to turn the search into a delightful game of chance or chess.

THE REPORTER.

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The Case of the People
against
The Lawyers and the Courts

I

Hog-Tight Fences and Fence-Running Lawyers

I had been deputed to interview the descendants of sundry great ones on the question, "What is the matter with things in general?" My plans for doing this were very complete, but I got no results except some filtered, whey-like ideas from stragglers on the outskirts of gentility. All sources of valuable second-hand thought were closed to me either by pride or by the multitude of experts already on the ground. I was learning the amateur's hard lesson: "From him that hath not shall be taken even that which he thinketh that he hath." I went out into the desert to brood upon my general incapacity; and there, where I was seeking nothing but emptiness for the expansion of my unhappiness, I unwittingly hit upon a great thing.

On a bright and frosty morning, high in the desert mountains, I stopped well up on the side of a cañon to rest and study the scenery. Across the cañon and a hundred feet higher than I, on a narrow shelf of a black cliff, with more black cliff towering behind and above him, stood an Ass, watching me intently with his ears. He looked as steady as if I had been the subject of eternal contemplation with him. I am sure that he had not for an instant lost touch with me during all the time I

had been there. I felt a vague kinship with him; but his mental steadiness became oppressive to me, and increased my own tendency to be fussy about something, no matter what. I crossed over and climbed the rattling shale to a point near his pedestal; and although I felt a growing sense of intellectual disadvantage, went ahead, merely to save the shreds of my self-respect.

He was statuesquely gracious, and I approached him with a few prepared commonplaces such as I thought best suited to the mind of a donkey. Out of this constrained effort to get acquainted there suddenly popped the tremendous fact that he was the many-times grandson of the soothsayer's ass. Here in the great loneliness I had come upon a direct descendant of one of the earth's Great Ones, and I was suitably overcome. A great flood of intellectual light, such as I had never suspected myself able to sustain, came upon me. Baalam's ass had recognized the Sword of the Lord when her owner was fumbling the facts for money, and kings and messengers misunderstood. And here before me was her distant offspring brooding on the ways of men. If he would but express even casual opinions about minor matters I should not have climbed the toe of this mountain spur in vain. I even hoped that since he was of a species somewhat different from our own he might utter wisdom from a new angle.

I assumed that it would be proper to broach any subject to an ass with oriental slowness and indirection; and when he reached down to bite off the only wad of bunch-grass in sight it seemed like the culmination of an hour of deep thought. But his mental ways were very simple. He was reluctant to reveal his personal tastes and habits, but yielded to my solicitation. He said

that he had been warming his tail in the morning sun for two hours. He acknowledged that the saddle scars on his back were caused by men who knew less about packing than he did himself. His tastes were simple. His general preference was for bunch-grass, the higher up and the farther away from water it grew, the better. But he did not reject delicacies. He had once eaten up a kettleful of boiled prunes while his master was not looking, and got a merciless mauling for it; but that was the immemorial fate of the ass. He had eaten delicious pieces of bacon rind, and grocery bags smeared with molasses; and had devoured much current literature in the shape of magazines. But he expressed the conviction that this last would have been much better every way if it had been left in its original state of wood pulp. The reputed intellectual seasoning spoiled it, for it was but hogwash.

As soon as we had reached a basis of intellectual friendliness I bethought me of America's greatest moral problem and asked him his opinion of our lawyers. There was a long silence, as if a thought were slowly unwinding itself; but when speech at last came forth there came with it a string of oriental pearls in slow and even discourse. He said:

"In ancient Rome the law gave a father life-long power over his son; he could even sell him. But to mitigate inhumanity another rule provided that when a father had sold his son three times his jurisdiction ceased. This rule was used by friendly fathers to emancipate their sons. Another law forbade a citizen to own more than five hundred jugera of land. And then there came an avaricious citizen who pitted the two laws against each other. He emancipated his son by selling

him three times so that he, too, might take five hundred jugera and thereby double the family's allowance. But that old Roman suddenly found that the moral purpose of the nation was against him. He lived in the crude and early days; and his gruff old fellow-citizens not only refused to let him have the land, but imposed a crushing fine for his impudence. They did not see the moral advisability of rewarding him for putting his nose through an unintentional gap in the legal network.

"But by all the rules of practice that have for a generation governed your greatest American lawyers this shrewd old Roman was within his rights. Both law and logic were on his side; he was technically correct. And if this thing had happened here in 1900 A. D., he would have taken each step under the advice of some lawyer of high repute, would have paid him a big fee, would have got the land, and been hailed as a Captain of Industry.

"My mind is somewhat slow and has a tendency to dabble with the unintentional results of human activity. A short fifteen years ago those words, 'Captain of Industry,' were in everybody's mouth, the sign of American success; and now the definition of them has been re-written in the minds of men and drags with it an odor of moral contempt. And your Captain of Industry and his lawyer have brought this upon themselves.

"My family have been immemorial observers of human doings, and the steady word has been passed down to me that there has never yet been a hog-tight legal system. Before that can be brought about the moral strain becomes so great that something unexpected happens. Because leghorn hens are good flyers the wire fences for them have to be very high. But now and then one of them learns to climb the netting with her

wings and feet, and nothing but a roof of wire netting over the chicken yard will stop her. The problem has become so serious that the emphasis slowly shifts from the fence to the flopping hen. The rules of sound economic doctrine do the rest. The cost of so much wire is out of all proportion to the value of the hen, and the problem is solved by cutting off her head. The simplicity of the solution is startling to all the parties involved because there is no loss at all. The hen's climbing tendency while alive has no deleterious effect on her market value when she is dead, and a less ambitious hen can fill her place. There are not even any regrets, for the time of her own regretting has gone by.

"The opportunities for legitimate American enterprise have been the marvel of the world, but the greatest talent of the nation seemed to busy itself with the processes of evasion. The Captain of Industry, who wanted to get through the fence, hired the lawyer to be the midwife of crookedness. The average old board fence, rail fence or brush fence was good enough for all the cattle except the breachy steer, and no kind of fence was surely proof against his *genius*. Instead of feeding he walked and walked, seeking the weak places, and always found them. His skill in opening fences fairly crawled with consequences, because he not only went into the corn himself; he led all the other cattle through, made them morally restless and taught a general contempt for fences. Then there was an economic revolt; the cost of repression was too great. And so it came about that the breachy steer never served honorably under the yoke, because he died young, usually at the age of four years.

"You have labored long to make a hog-tight network

of your laws. But your fence-running lawyers, with their breachy instincts highly trained, have made a tangle of them. The truth is, all fence-runners are public enemies; and because the normal defenses against them are always inadequate, contempt and wrath must in the end come to the rescue. During the last ten years you have shown some curiosity, and your attention has slowly shifted from the fences to the cattle. There has been much scolding and threatening, the acts of many of your eminent business men are recognized as common crimes; but so few of them are in jail that they take on the solemn interest of museum specimens.

"A rush was made toward the breachy cattle, and now you are going through a period of comic pathos. The argument is made that if the fence-runners are not allowed to break through into the corn the common herd of stockholders will starve to death. There is the still funnier fact that your lawyers are immune. First they are paid to get their horns through the legal network, and then they are paid to help keep their breachy clients out of jail."

I had not broken into the Philosopher's train of thought, but now I said, "It does seem asinine to tolerate a system under which the lawyers always win, whether heads or tails come up." He retorted, "I resent the use of the word asinine in this connection. An ass who should try to do among us what your lawyers do to your institutions would get his splint-bones kicked out of his shins." With that he moved slowly down the mountain to get a drink. But he stopped long enough at one of the kinks in the zigzag trail to say, "And the most of you do not know how the lawyer does this to you, any more than the amateur knows how the expert gambler always gets the money."

II

A Criminal Makes a Monkey of the Law

After the sarcastic reference to our stupidity I followed the donkey down, and last saw him soaking his lips in a preliminary way before taking the long postponed drink. It was that slow dignity, which not even his thirst could break through, that oppressed me most heavily, even more than the blows of his argument. The sting of the Burro's last remark rankled and gave rise to sudden fits of desire to seek further explanations or even pick a quarrel. But the facts of life had been thoroughly displaced by daydreams, and I began to feel too inefficient to carry on even a debate. One morning I laid myself out on a little patch of crumbling shale that sloped eastward on a hogback. A slight rise of the ground served as a pillow, and I had selected my couch so that the sun would warm me through as it rose higher, and by the time that was done and it began to grow hot a small mountain mahogany would swing its soothing shade athwart my whole body. By this forethought I had expected to secure permanent physical comfort for at least half a day without further effort.

With great preliminary satisfaction I stretched myself out to receive the soothing warm rays of the sun, and soon the old butterfly visions of my lazy mind were parading before my attention. They came more and more slowly with the increasing warmth and brought with them a delightful half-conscious state, just pre-

ceding gentle slumber. When I was about to abandon the last faint effort to stay awake enough to enjoy the indulgence of a peculiarly attractive day-dream, there was a sudden snap of wings and a world-wakening caw. *Kar'r'r.* A nutcracker of the mountains had apparently from pure wantonness dived out of the upper sky on his way to water. I felt that nothing but malice could have furnished that tremendous impulse; it must have some personal relation to the disturbing of my comfort. At any rate it wakened me. It was no use to raise my head to see what particular culprit had thus violated my comfort, for all nutcrackers looked alike to me; and by the time I could lift my head this particular one would be half a mile away in the depths below.

After a little I got up, stretched the wrinkles out of myself, and zigzagged slowly downward. My way lay past a little willow. It stood alone in the hot sun, defiant rather than drooping, but with a shrunken look, as if it had grown old while its youth was still upon it. Near it was Lone Willow Spring, strangely out of place on the hot hillside. There was only a little bit of water, just enough to make the scarcity of it heart-breaking. The ground around it, once wet, was hard and caked where it had been puddled by the feet of thirsty burros. The tracks were deep and dry, and around their edges there was a delicate tracery of the imprints of the feet of little birds who had come there to drink with wings and bills agape.

And here was the Talking Jackass. He gave no sign of life except a feeble swing of the tail as a protest against a band of flies; but from his lower lip a drop of water fell at intervals, and there must have been deep inward brooding. After a long while he put his head

down and held his mouth in the little saucer-like hole with its pitiful few spoonfuls of water. I watched his throat, but there was no sign of gulping. Slowly he sucked all the water into his mouth, and after he had lifted his head there was a gulp, followed by another little one, like a faint afterthought. Then the drops fell slowly from his lower lip again while he waited for more to ooze out of the dying spring. There was no hurry. Time was so abundant there, and even the smallest results had to wait so long upon it, that life itself seemed to creep but slowly over its vast stretches. I sat on a rock and waited until he took no further interest in the water. Taking a drink up there was a solemn service. As soon as he moved away into the shade of a cliff I re-opened the discussion.

"Is it possible," I said, "to analyze the situation and get hold of the separate elements that make up a process in which the lawyers play with loaded dice and the people are always the losers?"

He answered, "The mental attitude of the American people toward their judicial system has for many years been a curiosity. Theoretically proud of it, they have yet recognized their inability to extract a reasonably good quality of justice from its workings. They will not admit that the nature of the system gives rise to the infinite variety of bad results. They accuse the judges or the jury, they seek to tinker the details, but get nowhere. When they raise a nearly unanimous chorus of criticism there is little or nothing in the way of constructive suggestion. Such attempts as are made to secure a better quality of justice are for the most part attempts to eliminate, to sidetrack, or cripple the judicial system in the interest of more informal rules of fair play."

In the hope of getting more specific criticism I asked the wise old burro to sketch the defects of the system for me. He gazed across the cañon, as if studying the complexion of the porphyry cliffs beyond, and then took up his parable. "Consider some cases. You know your lawyers and judges are forever studying cases to find out what to do next. You and I can profitably consider actual experience in order to draw out the reasons for the general situation. Practically all the work of your courts could be used for criticism. The number of cases that justify the worst criticisms could be run up to tens of thousands. They are not sporadic or unusual. Some are typical of common experience and some are what may be called the choice fruit of the system when it does its perfect work.

"A San Francisco lawyer in the prime of life left his wife and children, went to Chicago with a young woman and married her; and within a few weeks returned to San Francisco and resumed his legal practice. He was arrested for bigamy, and after a long and tiresome preliminary struggle was brought to trial. His wife proved her claims on him by her own testimony and that of her children, by their neighbors and by several physicians, by the marriage certificate, by the priest that married them and by the witnesses to the ceremony. He calmly denied that he ever married her; and claimed that it was her sister whom he had married and who had died before the trouble began. With this dream-like defense he kept the courts busy and the newspapers alert for a long while. Very near the close of the long trial there was a postponement of the case for two or three days. Well aware that there was absolutely no merit in his defense, he took advantage of the lull in the case and

slipped away to British Columbia with the young woman. It cost several months' time, about $15,000 in money, and a good deal of effort on the part of the state of California, the province of British Columbia, the federal government at Washington, and the Dominion government at Ottawa to get him back. Fearing that they might not be able to prove actual bigamous relations against him, the local authorities brought him to trial on a new issue.

"His lawful wife had sued him for maintenance; and in his defense he had sworn that she was not his wife. On this ground he was arrested and tried on a charge of perjury. Another long trial bristling with technicalities, of which he is a past master, ended in a disagreement of the jury. The jury was out for thirty hours and voted nine for conviction and three for acquittal from start to finish. He had had an opportunity to see these three men while the jury was being chosen; and the rest of the jury did not hesitate to express the conviction that something besides the evidence had determined the vote of the three.

"In order to have a still more perfect ground for prosecution, if such a thing were possible, the district attorney, instead of having him re-tried on the old perjury charge, brought him to trial on a new charge of having perjured himself again at the perjury trial. There was another long, hard fight, and in the end the jury found the defendant guilty. The city had at least twelve superior judges of its own but he compelled them to call in judges from the outside to preside at the last two trials. The presiding judge at the last trial sentenced him to prison for fourteen years, the longest sentence that could be imposed. Then many months elapsed, dur-

ing which he repeatedly appeared before different superior judges of the city, the state Court of Appeals, the state Supreme Court, and the federal courts, with his various pleas and appeals. The great earthquake destroyed all the records in the cases and as soon as the judges began to do business again he began to apply to the courts for various kinds of relief.

"About a year after the earthquake he was still successfully resisting the attempt to get him into the penitentiary. But they did get him there. That is the only flaw in the case. And even after he was committed, he continued to file pleas in the various courts.

"Tens of thousands of common cases could be cited to illustrate the various phases of American judicial inefficiency; this case is remarkable only in the fact that it illustrates so many of the possibilities at one time. It shows what one lawyer can do single-handed to bring the law and the courts into contempt when his case is one of coarse and brazen crime, the proof of it such that a six-year-old child would know its significance, his defense absolutely without merit, and his weapon nothing but the network of technicality that your judicial methods place in the hands of the criminal. He was not even rich; and had to conduct most of his defense himself. He showed what pluck, and intelligence of a not very high order but shot through with cunning and braced with years of experience as a shyster, could accomplish."

I suggested that perhaps the judges and lawyers had lived and practiced in an atmosphere of technicality and so contributed unnecessarily to the general foolishness. But he replied, "It happened that the judges and lawyers were capable men who did their utmost to serve the state; and the case was not complicated by public ex-

citement, partisanship or political motives of any sort. It was a contest between a strictly private, unprivileged citizen without social or other public influence and a great state. And the case occurred, not in a new or backward state, where judicial practice might still have been unsettled, but in a state peculiarly rich in legal experience on account of its rapid development and the variety of its moral, commercial and political interests. The more elaborate cases in your judicial history, like this one, merely show the shameful possibilities of civic humiliation."

III

Pickpockets and State Constitutions

I had gone away to consider the situation, but fell asleep at once in the shade of a crooked little mountain pine. When I awoke a buzzard was sailing in great perfect circles far up in the gray hot sky. There was such a restful certainty about his movements that I could close my eyes and time his return to a given point. Now and then he moved farther out as if his motion had been perturbed by some distant interest; but he always came back. There was no rush or sign of fretting. He seemed in league with endless Time. This was all very comfortable because it started no sudden impulses to do anything, and required no physical exertion except a slight motion of the eyelids and a little rolling of the eyeballs. After a while, however, those very elements of ease and certainty took on an ominous significance. That buzzard had his eye on me. His large and sweeping patience took on the aspect of a visible doom. What stood between me and the ravenous activity of that buzzard? And others were coming to see what he was looking at. I sat up and they all went away.

I went back, and found my friend the Ass only a few rods from where I had left him. His mind seemed to have stopped working as soon as he had uttered the last word, and now it started at the place where it had quit. "In a Chicago case of conspiracy seven men were put on trial and finally found guilty. But the court spent

fourteen days, and three hundred and seventy-two men were examined before the first juryman was secured; and it took eleven weeks and the examination of one thousand nine hundred and thirty-one men to get twelve jurymen. The case cost Chicago about $35,000; and it was only a plain case of cold-blooded slugging. The victim was badly hurt and left exposed in the snow, where he contracted pneumonia, from which he died later. To the common sense of the people the case was plain and easy; but to the criminal court it was an all but insoluble problem, and all because the rules made it so. There was one gleam of common sense in the fog of technicality. After the first juror had been secured the prosecuting attorney declared that he would ask the state legislature to change the law relating to the selection of jurors. No matter at what point the system is touched, it breaks down under a real test."

I called attention to the fact that in this case public excitement and partisanship had handicapped the processes of the court. The Donkey solemnly admitted it and waxed sarcastic over a system which at its best does not perform well the functions for which it is designed, and breaks down every time any external strain is put upon it.

"But the two cases hitherto considered were criminal cases," I said; "one in a far western state, the other in a great city where the elements of civic danger lie close to the surface and are easily stirred. They might without a great stretch of feeling be regarded as unfair tests; in the field of civil justice it might be found that the processes work satisfactorily."

"Very well," answered the long-eared Philosopher, "let us take the state of Iowa, where there are no big

cities, where the population is mostly native American, where the social and political sentiment and the modes of public behavior are typically American, and where even the forms of local government are of the middle type, blending the best of New England with the best of the forms further south. And let us choose a civil case, one that concerned the whole people and the final decision concerning which would affect the life of the state.

"Some years ago the liquor amendment to the Iowa state constitution passed both houses of two successive legislatures, was submitted to the people, was carried by a large majority of the votes of the state, was proclaimed by the governor, and went into effect. The people were as patient as the passing years while they carefully met the requirements of the constitution at every step. But a careless clerk, backed by a judicial system that gave more weight to a slip of the pen than to the definitely expressed purpose of a sovereign people, was stronger than two legislatures, the governor and the state itself. One house of the first legislature that passed on the proposed amendment failed, through the carelessness of the clerk, to spread the amendment in full on its journal. When a liquor case under this amendment was brought before the state supreme court, that court held that the amendment had not been passed and was wholly void. The fact that the legislature had actually passed on the amendment was notorious. In this case the state supreme court served no purpose except to destroy the work and will of the people. It crawled among the dead leaves and found a bug, but never saw the general landscape.

"Listen: if an ordinary ass should do, in the course

of his asinine duties, anything like what was done in that case, he would be hobbled, tied to a telephone pole with a double rope, and beaten from his ears to his tail with a fence stake until exhaustion overcame the beater. Your system has developed in such a way that error is the most prominent feature of court procedure. Error haunts the thought from the filing of the complaint to the uttermost act in the drama, until terror of it hovers over every judicial act.

"It does not matter whether the question at issue is great or small, the same intellectual fog has prevented the courts from looking over the tops of their law books at real life. In St. Louis, Missouri, as late as 1914, a man who had already been tried three times on the same charge was convicted of picking another man's pocket, and sentenced to two years in the penitentiary. He was granted a new trial because one word was wrong in the court's instructions to the jury. The instruction defined larceny as 'wrongful or fraudulent stealing, taking or carrying away.' The upper court held that 'and' should have been used instead of 'or'."

"I admit," said I, "that unimportant errors have been used to overthrow the work of the trial courts, and that this has made the work of those courts slow and uncertain. But in the long run the upper courts have laid down the lines of safety and if the lower courts will follow them there need not ordinarily be any fear of reversal. A substantial body of sound opinion has come to serve as an anchorage."

"Oh yes." The Burro made another of those admissions that so often proved fatal to my point of view. "Sometimes that has been true; but even that accumulation of so-called sound opinion of the courts of appeal

has been upset often enough by those courts themselves to destroy its value and to remove the last shadow of certainty. Some years ago a young man murdered two girls in succession in a church in San Francisco. Every known device was used by skilful lawyers to delay the trial and defeat justice. It took three years to try the man and dispose of his appeals to the Supreme Court of California and of the United States. Until after he was hanged there always seemed some chance that he might escape; and no one dreamed that anything had been left undone to save his wicked neck.

"One of the ablest judges on the Coast presided at the trial and gave the charge to the jury. He had guarded the long and dangerous process of the trial with the utmost care against the possibility of error, and there were no flaws that the ablest lawyers could discover. Because this judge's charge to the jury had stood the fiery test of state and federal appeal, other judges, in several later important murder trials, used the same language in framing their charges to the juries. In one of these later cases an appeal was taken to the state Supreme Court, and the murderer was granted a new trial on the ground that the judge, in his charge to the jury, had said things which under the law he should not have said. Several other murderers who had appeals pending were given new trials, because in all the charges to the juries the same well tested language had been used. Among them was a faithless woman who sent poisoned candy across the continent and killed a faithful wife. Five years after the murder she had been convicted twice, but was still lingering in a cosy corner room of the county jail, awaiting sentence on her last conviction. Is it any wonder that trial

judges are at a loss about their own positions and handle their cases under the constant dread of reversal?"

In the hope that I might blunt the edge of this illustration by which he sought to prove that the trial courts are kept under an insufferable moral strain and that I might even destroy his whole argument, I said, "This is another case from California and I have a suspicion that technicality may have run riot out there and that elsewhere in the Union saner conditions may prevail. In California at least this subject is no longer a matter for argument; for an amendment has been added to the state constitution forbidding the courts of appeal to set aside judgments or grant new trials because of technical errors unless after examination of the whole record it is found that there has been an actual miscarriage of justice."

"You got closer to a clear statement of the real situation just then than you seem to realize," softly replied this Professor of Procedure, apparently with the intention of throwing another hammer. "If you were running your birch canoe through the rapids and stove a hole as big as your head in the bottom of it on a sunken rock, which would you do first, bale out water with your hat or jerk off your coat and plug up the hole with it? The amendment to the California constitution is like cutting off the lower six inches of an athlete's trouser legs to give him more liberty of action. There is in many parts of the Union and in the federal courts a slow movement in the direction toward snipping some of the threads of complexity, but hitherto the chief value of these little attempts has lain in the astounding fact that even the smallest changes are valuable, and that nobody is hurt. The chief problem is not merely to reduce the chances

of reversal but to cut off largely the privilege of appeal in order to give a reasonable degree of certainty to the work of the trial courts.

"A man in Milwaukee committed the crime of bribery. The grand jury indicted him and every plea and process known to their legal system was invoked to delay the trial of the real issue—the guilt or innocence of the defendant. By desperate efforts the district attorney secured a trial and conviction. An appeal was taken to the state Supreme Court, which granted a new trial. Not only was the verdict set aside, but the court went out of its way to rebuke the trial judge for the language that he used in his charge to the jury.

"The language used by the judges throughout the state and frequently approved by the Supreme Court is as follows: 'In determining the credibility of witnesses you may consider his or her interest in the result of the trial in connection with all the testimony and circumstances surrounding the alleged commission of the crime.' The following is the language that the trial judge used in his charge to the jury and for which he was rebuked by the highest court in the state: 'A wise rule which jurors may adopt for their guidance where there is a conflict of testimony between witnesses, is to give credence to the testimony of the witness or witnesses who have least inducement through interest or other motives to testify falsely.'

"Outside of judicial circles this variation in language cannot even be classed as error. The only crime the trial judge committed was to make easily understood what the law intended should be done with conflicting testimony, and what every juror of experience would do without any instructions at all. If such a thing must

be regarded as an error it is only one more proof that the system is so intricate that in all human probability error will be committed in every trial, and then it is allowed to affect the result fatally. Chronic inefficiency has taken hold of your courts, not because you are not morally strong enough to deal out justice vigorously and promptly, but because you have tangled yourselves up to such an extent in the meshes of method that the primitive power to draw manly conclusions and produce results can no longer exercise itself."

"But if the higher courts did not bridle liberty of expression on the part of trial judges, where," I asked, "would the general confusion end?"

The Ass replied, "The trial judge, having heard the testimony and watched the actions of the witnesses, and having kept in close touch with the jury, so that he knows just what difficulties the jury in each case has to deal with, is better qualified to determine what form the instructions should take than any court of appeal.

"And it is not merely by interfering with the trial courts that the higher courts lay heavy burdens on the community. There is neither legal nor moral necessity for leaving the constitutionality of a law in doubt when once a case under it has been presented to the highest court in the state. But it is a not uncommon practice to decide a given case on a minor technicality and dodge the main issue.

"The city of Los Angeles had in its charter a provision which allowed the people to vote an undesirable official out of office at a special recall election. In 1904 the people of one of the city wards became convinced that their alderman had betrayed the public interest, petitioned for an election, voted him out of office and

elected another man in his place. The ousted councilman brought mandamus proceedings against the city auditor, after the latter had refused to draw a warrant for his salary after his removal from office. It was the first case that had been taken to the courts, and the constitutionality of the recall provision was assailed before the state Supreme Court. Since that time the recall has proved a powerful weapon in the efforts of the people to control the conduct of their officials. But the Supreme Court calmly ignored that part of the appeal which questioned the validity of the recall provision, and declared the man's removal from office illegal because the city clerk, in his certificate, had made a purely technical error in the use of words. Other cities and towns were greatly interested in the Los Angeles recall provision and would have adopted it if it had been pronounced constitutional. But this wholesome possibility was brought to nought by the action of the court in leaving the vital point undecided and seizing on a petty detail for the disposal of the case. When the fate of the law itself lies in the lap of the highest court even an ass like me would see to it that the question of constitutionality was not dodged."

I suggested that it was a great economy of effort to base the decision in the case at issue on a detail that was considered important enough for the purpose. Why have the court increase its labors unnecessarily? But the Old Fellow again sought to outflank me. He went on: "You raise the whole question of the spirit of the upper courts. They have two great functions: to determine whether individual cases have been tried in accordance with the laws and the constitution—such decisions affect at most a few individuals; and to determine the

constitutionality of the laws themselves—and here the interests of the whole community are affected. With those courts it is usually merely a matter of choice whether they will deal promptly with the great interests of the people or leave them hanging in a doubtful balance."

I suggested that such instances are not so numerous as to indicate that it is a conspicuous practice on the part of courts of last resort to shy at decisions concerning the constitutionality of laws when that question is placed definitely before them. The old Burro gave a vicious stamp with one front foot; I could not be sure whether it was an expression of anger or only an attempt to intimidate a fly. But I had only succeeded in eliciting the destruction of my own opinion. He said:

"As if all things had been working together to prove you wrong, the Supreme Court of the United States has just now, in 1914, furnished an example of the same practice. The State of Oklahoma had passed a law forbidding railroads to furnish dining or sleeping accommodations to anyone except whites. When the case came up on appeal, the question of the constitutionality of the law was brought squarely before the United States Supreme Court. This tribunal, instead of facing the issue, did not deal with it at all because there was no record that a negro had actually demanded accommodations and been refused. The decision not to decide squarely on the main question will leave the validity of the law hanging in the air for years to come. It was only a question of procedure that thus turned a serious matter into a farce. The judges were apparently interested enough in the main question to inspire a majority of the court to hint that the law is unconstitutional.

Wasn't it a great triumph of intellectual and moral sense to leave the question undecided because the record did not include proof that some one negro had tried to get accommodations, when the law itself was proof that all the negroes in Oklahoma were deprived of the chance of getting it?"

The warmth of the discussion could not keep off the mountain chill; and I think we both felt that he had opened a subject too vast to be dealt with in the night. I left him and crawled into my sleeping-bag to brood over the general unwillingness of an ass to accept any practices as useful merely because they were habitual. I felt certain that there would be a great tearing of cloth before we got through, for neither of us was averse to pursuing the subject to the end.

IV

Solemn Farces

Before I found the Open-Air Philosopher again he had drifted several miles down the cañon. Although he could get along comfortably by slowly sucking the bit of water out of his own tracks at Lone Willow Spring, he evidently dreamed of abundance, too. For now he was standing directly across the trail, half in shadow and half in the sun, where he could hear the pure mountain water gurgle in a great spring out of the base of a vertical cliff. It played its way into the sun and lost itself in the gravel below. By the water where he stood there were a few square rods of luxuriant life, a crowded little oasis of clematis, grapevines, goldenrod, willows, bees, beetles, sparrows, a quail. There was a faint suggestion of the hot moisture of a swamp. But a few feet above his tail in a crevice of the cliff, was the desert—a stunted, gray and sleepy sagebrush.

"No better book of jokes for the American people could be written," he said, "than a collection of legal errors on which appeals and reversals have been based. But even such intellectual folly could be tolerated if the effect of error were even-handed. If a man commits embezzlement or bribery, unless he is prosecuted within a given time the statute of limitations runs against his act, and thereafter he can be as independent as those who have behaved themselves. But if a board of school trustees issues bonds and anywhere in the complicated process commits a petty, unintentional error, that error has

perpetual force and may even deprive an honest investor of the money that he paid for the bonds. It is small comfort to know that such errors would have absolutely no effect and would in most cases never be known, if there were not a special class of men whose efforts were given over to nosing about for them.

"In the old marriage banns an opportunity was given to an objector to the marriage to 'forbid the banns or forever hold his peace.' The objector had his opportunity but by neglecting it he lost it. Only in your courts is opportunity perpetual, and even there only for the criminal and such as have some motive for blocking public intention. In a little town there was an ordinance against gambling with slot machines. Some cigar dealers were arrested under its provisions and one of them brought to trial. The prosecution was effective and the trial was more than half over when the defense, seeing that the day was going against them, suddenly sprang on the court the statement that the complaint was defective. On that ground the case was thrown out of court and the whole subject was dropped. The men who had collected the evidence were honorable and busy men and declined to trifle with the business any longer and merely make themselves the laughing-stock of petty criminals by trying to bring them to justice. The law-abiding citizen loses his opportunity by neglecting it. Why should not the man who is probably a criminal be compelled to raise all questions about the form of the complaint before the trial begins? It would deprive him of no rights and would prevent him from mocking at the solemn processes of the court."

"Do you really believe," said I, "that such instances are common enough to spoil the quality of justice? And

if the point was insignificant, why did not the trial justice rebuke the trick and go on with the case?"

"He did not dare to go on with it because he was afraid of his own shadow. He rightly calculated that the chances were against the triumph of common sense; he concluded that it would be better to start over again than take a chance with loaded dice. Such cases have been so common that they destroy one of the most essential elements of justice—certainty. Can there be any intellectual or moral defense for such a performance as this? A man in San Francisco committed petty larceny, was tried, found guilty, and sentenced to six months in the county jail. After he had served two months of his sentence someone found out that in writing out the commitment the clerk had left blank the space intended for the words 'six months in the county jail'; and for that reason the superior court released him on *habeas corpus* proceedings. It did not matter that he had committed the crime and a competent court *had* sentenced him to six months in jail. If a farmer had sold a wagon-load of potatoes, but decided that he could not collect pay for them because he had forgotten to write the amount down formally in his account book, he would be taken before the insanity commissioners for inspection; but judges, alas! they can do things to each other."

It was sultry between the vertical cañon walls, and the silence was so perfect that we heard the echo of a little bird's musical whistle. I was very drowsy, and he ceased talking; but a cool draught came from somewhere out of the sky. After he had stretched his lower jaw he opened a new attack.

"Once upon a time," he said, "one boy told another there was a cat around the corner of the barn. Proof

was demanded. He laboriously cut off some hair with a dull knife and brought it round the corner. When he was made to understand that hair was no proof of a live cat, he brought in turn the cat's whiskers, one ear, several toe nails, the end of the tail, and at last a few drops of warm blood. But these were all merely fragmentary proofs and each could be accounted for without a living cat. The mewing of the animal was only inferential evidence, and it could easily have been imitated by a skilful boy. Suddenly the one who had brought the proofs told the other boy to come around the corner of the barn and look. But he would not go and always insisted that the other had not proved what he said."

"Your parable," I said, "is more ridiculous than funny; what is its application? It is an earthly story, all right; but what is its heavenly meaning?"

"Yes," he said, "it is more ridiculous than funny; but not so bad as solemn court records. In San Francisco in 1904 a far-reaching conspiracy to stuff the ballot-boxes at the primary election was uncovered. The evidence of the crime was indisputable. The names of the perpetrators, the time, and other data had been carefully taken down in writing and the evidence was all corroborated. This treason against American citizenship was so bold and undeniable that it seemed to be only a matter of form to send the guilty to the penitentiary. Two were indicted for ballot stuffing, one for perjury and one for subornation of perjury, and the courts were asked to oust the board of election commissioners for malfeasance in office. Every available device was used to delay and upset the cases. When a trial was finally secured for the first man the whole of

the first three days was spent in an attempt to prove that a primary election had been held. At the end of a year or more two of the poor wretches were sent to prison, but all of the politicians involved went scot free. In a parable such performances look ridiculous. In a gang of boys they would be hooted and the perpetrators kicked to improve their intelligence."

"It seems incredible," said I, "that such conditions in the most important institution of the people would be tolerated at all; there is a lingering mistrust in my mind concerning the cogency of the cases you cite."

He replied, "Your moral depression would be even greater if you attended the courts and saw how these same elements work themselves out, first in one way and then in another, often causing slight delays and producing offensive situations, requiring tremendous energy to produce small results or none at all. Probably your greatest shock would come from the observation that practically all of the common methods of despatching business are carefully avoided in the interest of a theoretical perfection that coughs and chokes in the fumes of its own by-products."

"I cannot credit the evidence from sheer inability to believe that a highly civilized people would exhibit such asinine stupidity. Why is not the whole system overturned? Anarchy would not be much worse."

I was leaning back against the sheer wall of the cliff with my hands behind me, and the ass was facing me. He still wore an old shoe on his right hind foot, the relic of a long mountain trip. He wheeled around, using his front feet as a pivot. I had suddenly sensed the meaning of my own remark but had no time to correct it. Out of a horrified mental and physical confusion I saved

myself by the primeval instinct to leap from danger. His hind foot shot out like a flash of light and hit the rock wall two inches above where my knee had been. There was a brief smell of hell-fire, and the shape of the shoe was printed on the wall in pulverized rock. I groaned, even at the imaginary pain, and inwardly bade farewell to any further interviews with the Talking Jackass. But he did not even look angry. He only seemed to be overwhelmed with disgust at having missed his mark. After a careful look at the footprint on the rock he went on to answer my last question, as if all scores had been squared.

"It is one of the common features of human history that systems of thought and practice are elaborated until their usefulness is utterly destroyed; their grip on the public mind is very great, but performance becomes stupid and results ridiculous. The public mind sits in one place so long that its legs go to sleep; and then it cannot move at all. But in order that our personal relations with each other may remain pleasant, remember that the qualities of mind pertaining to a desert ass are altogether unsuitable for the making of figures of speech that reflect on the intelligence of your lawyers.

"The incredibility of what I have said about technicality in your courts troubles only those who have not examined the subject. As if a humorous fate could not refrain from making judicial processes utterly farcical, it dealt the final blow in the famous Ruef case. The history of the grafting in city business during the period of his ascendancy and the bitter pursuit and his final downfall, is filled with facts that are astounding, pathetic, incredible. He manipulated election after election, traded the votes of his supervisors as if they were

oxen, and did crooked business with the financial and social leaders of the city. During the long and dramatic pursuit there were confessions by the supervisors, and one by Ruef himself. There were many trials and jury disagreements and acquittals. The elite among the crooks escaped. Supervisor Coffey was convicted on a charge of taking a bribe that was given him in Ruef's behalf by Supervisor Gallagher. It was on Gallagher's testimony that Coffey was convicted. In all states the testimony of an accomplice is to be regarded with distrust by the jury, but in California the code itself provides that a defendant shall not be convicted on the testimony of an accomplice unless it is corroborated by other testimony. Ruef was convicted of giving a bribe to Supervisor Furey. The bribe was given to him by Supervisors Wilson and Gallagher in Ruef's behalf.

"Now what did the upper courts do with the situation? The Appellate Court upheld the conviction of Coffey on the ground that Gallagher was not his accomplice in the taking a bribe; Gallagher had committed a different crime—he had *given* a bribe. Ruef's conviction was similarly upheld. But when Coffey's case came before the Supreme Court of the state, that court ruled that Gallagher had been an accomplice of Coffey, and granted the latter a new trial. All this would have been humorous enough, because there was no question that the testimony was true and that Coffey was guilty, and in three-fourths of the states of the Union the conviction would have held good in the upper courts. It failed in California merely because California copied the code of New York when it adopted a code. But in the Ruef case the situation became farcical. Under the ruling of the Supreme Court, Ruef would without ques-

tion have been given a new trial. But by the sheerest formality which had not the slightest bearing on either the evidence or the law, he lost his final opportunity in the upper court. He went to the penitentiary under his fourteen-year sentence; his career of wrong-doing and all his hopes were cut off, not by the stern judgment of a trial court, but by an almost unbelievable freak of technicality. After all the farce and the tragedy, this was a ludicrous anti-climax. A system that can by any possibility produce such results has lost its grip on the prime object of its existence. It fails in every essential element that goes to make up practical justice."

We agreed to adjourn and meet next day somewhere in Woodpecker Cañon.

V

Fair Play, Time and Justice

In a general discussion there is always room for adverse comment. The trend of thought can be made to ramble and dodge obstructions. But the Donkey's constant appeal to pertinent specific cases left little room for speculative treatment of the subject; and I proposed to encourage a more general discussion of the subject.

When I had gone up Woodpecker Cañon only a short distance the cañon suddenly filled with a sound like the shout of a great army. The rocky walls were quarreling with the bray of a donkey, and the noise grew more voluminous until the cañon seemed unable to hold it any longer. I wandered on and searched the upper reaches incessantly, screening my eyes against the hot light. At last I saw a gray face move far up on the western side. A cool wind blew down from the Yellow Buttes at the head of the cañon, and I climbed up to the seat of judicial philosophy. I sat down on a little shelf and waited, Indian fashion, for the time of speech; but there was not even a sign of an inclination to begin. I went far back for a running start and said, "With all the eddies and cross currents and stagnant pools and quicksands that show themselves in practice, the American conception of justice or fair play is essentially sound. There is prompt and sufficient resentment at every spectacle of injustice; the average man's judgment would be a safe conclusion in any given case."

"It seems to be a steady characteristic of our interviews," said the Donkey, "that you should invariably touch the garment of the matter in issue without grasping the essential fact. It is a pathetic feature of the situation that the American people do have so fine a sense of justice. But justice may be merely the group of abstract principles by which actions are measured as right or wrong; or it may be the personal or community spirit of fair play; but in its governmental relations justice is the giving to every one what he deserves. The first of these is altogether theoretical; the second is the free play of the people's spirit, and while it enforces fair play outside the law, gives tone to conduct and moral satisfaction to those who cherish a sense of justice. But the justice with which we are concerned is the forcible, governmental giving to each man what he deserves. And here the results are in many ways an almost constant violation of the people's own sense of what is right."

"If we admit," I said, "that what you say is true is it not another example, on a large scale, of preaching one thing and practicing another? How is it possible that an admittedly right-minded community should bungle its most important work so sadly?"

A strange light came into his eyes; he looked at me and then at the high mountains as if seeking to draw thence the wisdom to deal adequately with the question. He slowly shifted each leg in turn, swung his tail a little, and draped his ears at a new angle, as if trying to rid himself of every little physical strain. When he began to speak his speech was even slower than usual, as if he were uttering things that could not be retracted.

"Time is of the very essence of justice. Abstract principles by themselves are of no more avail than the day-

dreams of a shiftless loafer. Nor is sound moral judgment of itself competent to enforce right in the world. In fact, when it is left altogether to its own resources, the correctness of its decisions is usually in inverse ratio to its ability to affect in any way the things it passes upon. It is a truism that the best moral judgment on past events is not reached until there is a long historical perspective through which to gaze at them. You pass a sounder judgment on the acts of Nero than his contemporaries could do; for one reason, because your moral views are less weighted down with social and political institutions founded on force and privilege. But your views of the acts of Nero have no effect on the facts themselves. Time has helped to form a better judgment, but meanwhile the victims perished, not even being aware of your fine moral views.

"If each man is to get what he deserves he must get it when he deserves it. Time constantly shifts the point of view, corrupts the facts, belittles them. The injured party suffers instead of the one who is in the wrong. In case of crime the community loses its interest with the lapse of time, not because the act becomes less a crime, but because other interests intervene. The most ancient as well as recent practice recognizes the fact that justice turns pale with time. The statutes of limitation, although they differ widely in different jurisdictions, all carry the same intent. The actual time limit is not founded on any inherent necessity; there is nothing scientific about it. The sole purpose is to set a 'reasonable' limit to the time within which the matter may be pursued. If a man commits a public wrong he must be prosecuted within a given time or the crime is outlawed and it can no longer be punished. This limitation is

fixed because time is an essential element in the forcible application of moral principles.

"If a carpenter works on a house and the contractor fails to pay him, he can file a lien on the property, and so hold the owner as well as the contractor responsible. But if he does not file the lien within a given time after the work is done he loses the privilege altogether. Why should the privilege be restricted to sixty days? Merely to give him the opportunity; if he neglects it he loses it. The rights of others begin to intervene with the lapse of time; and his little right would be constantly intruding upon new rights and new conditions that time is constantly injecting.

"In early Rome the legal processes for the transfer of property became in time so excessively ceremonious and cumbersome that there never could be any certainty that mistakes had been avoided. Consequently alongside the ancient elaborate methods of transfer others sprang up out of insignificance into permanent importance, and gradually displaced the modes of transfer that had become dangerous and uncertain. One of the devices resorted to was the rule that if a man believed that he was getting property lawfully and it had been actually transferred to him, no matter how defective the title was, merely occupying the property two years made the title perfect. Macaulay sums up the historical record with the statement that 'The laws of all nations have wisely established a time of limitation, after which titles, however illegitimate in their origin, cannot be questioned.' In other words, time can heal an imperfection that it did not cause. This is valid merely because time also removes the possibility of making the correction. There had to be an automatic safeguard to

avoid anarchy. No matter from what angle the matter is considered, the law itself provides many proofs that time is an essential element of justice and that the future shall not be permanently saddled with the burden of acts long done. If they are not rectified with reasonable promptness time itself is given the power to draw the sting. There is a practically universal recognition of the fact that time destroys both the right and the value of postponed proceedings."

I had certainly got what I had asked for, an analysis without concrete examples. I injected a suggestion. "Since the law itself gives full recognition to the doctrine you have urged, what more can be said or done? Even under ideal conditions accuracy and a high quality of justice seem to require time rather than swiftness of procedure. Perhaps the actual conditions under which governmental justice is administered are as reasonable as should be expected."

"The best answer to your suggestion," said the Donkey, "is not further speculative declarations but the judgment of your nation. It is one of the recognized and hopeless facts of your civilization that your judicial processes are cumbersome and ineffective, that the criminal is unduly protected, the community almost hopelessly handicapped in its efforts to punish, and that the innocent party in a civil suit suffers nearly if not fully as much as the one who committed the wrong. Your last two presidents damned in almost violent language the farcical complexity and delays of procedure. President Taft came near pronouncing a curse on the criminal processes of the federal courts; and these are recognized as vastly superior to most of the state courts.

"In 1905 President Roosevelt said to Congress: 'In

my last message I asked the attention of Congress to the urgent need of action to make our criminal laws more effective; and I most earnestly request that you may pay heed to the report of the Attorney-General on this subject. Centuries ago it was especially needful to throw every safeguard around the accused. The danger then was lest he be wronged by the state. The danger now is exactly the reverse. . . . . The delays of the criminal law no less than of the civil, now amount to a very great evil.' In the same message he said, 'The history of the cases litigated under the present commerce act shows that its efficacy has been to a great extent destroyed by the weapon of delay, almost the most formidable weapon in the hands of those whose purpose it is to violate the law.' This is the powerful plea of the man charged with the enforcement of the law. Twenty-one directors of the New York, New Haven and Hartford Railroad, the most powerful financial group in America, were charged with conspiracy to violate the Sherman anti-trust law. They filed a plea in abatement on the ground that the clerk of the court who selected the members of the federal grand jury that brought the indictments had his legal residence outside of the judicial district in which he is a court clerk. When the matter finally came up for argument they asked the court for consent to change their plea. They did not announce what the new plea would be and the court and lawyers solemnly went on with the argument on the old plea! The time has long passed when it was worth while to spend energy proving the pitiful ineffectiveness of your slow and complicated judicial processes. Concrete illustration, even, can do no more than merely freshen a national moral conviction that has grown stale.

"If that is the state of the federal household, what shall be said of the local courts? In cases where the conditions require prompt judicial action because of some specific time limit, the court processes degenerate into an absolute farce. In the city of San Francisco a man who had not been an elector in the city and county for the required five years, and was therefore not eligible to hold any office, received a majority of the votes for tax-collector. The defeated candidate, who happened to be the old tax-collector, refused to surrender the office on the ground that the new man could not legally hold it. The new man and his friends organized a mob, drove out the old collector and took possession. The old collector carried the matter into court and it decided that the majority had thrown away their votes on a man who was not eligible for the office, and that therefore the old collector, who had the next largest number of votes, was the rightful claimant.

"Instead of accepting the decision like a good citizen and surrendering the office, the man who held the office unlawfully appealed to the Supreme Court. There the case hung fire. After the illegal occupant had held the office during the whole term, drawn the salary and done the city's business as *de facto* tax-collector, the Supreme Court decided that he had no right to the office. But one great point had been gained. All the pharisaic rules had been obeyed and a decision had been given 'in accordance with the law.' Its effect was the same as if the court, sitting on the case of a man who had already been drowned, should hand down a decision to the effect that water has a tendency to stop the breath."

"But where is the fault?" said I. "The people make the laws. The constitution and the laws lay down a

great variety of rules and provide for the appeals, pleadings, demurrers, continuances, and the rest of the endless list of processes, and even specify how much time is to be allowed for each. It therefore becomes almost a simple arithmetical calculation to determine how long it will take to get a case through the courts. Of course there would be a wide variation in time between the shortest and the longest possible delay. It is only this intervening stretch of time that can be fairly charged against the habits of the courts and lawyers. And even this is largely accounted for by the relative stubbornness and pugnacity of the litigants. We may admit that the judicial system is as bad as you say it is; but let us put the blame where it belongs. Can not the people have any kind of a judicial system that they want?"

"Ah," replied the Donkey, twitching a fly off his ear, "you could have made several large kettles full of intellectual soup out of the meat in that paragraph. You have a genius for brevity. But it is even more true in the desert than it is in North and South Carolina that it is a long time between drinks. It is time to go after one. I will meet you tomorrow at the graves in Sour Dough Cañon." It was evident when he said that he would meet me in Sour Dough he meant that I would find him there; that the effort would be all on my part. For with the first move he made I was sure that he was already headed for the place he had named. He merely allowed me to know how far he would have gone by the next day.

VI

Constitutional Intentions

When I found my friend the Ass next day he was scratching his chin on one of the weather-worn pickets of the fence around a grave. There were only two graves, one on each side of the wash. But there had been a cloud-burst since the mining camp of Panamint had exploded by the bursting of its dreams of wealth; and maybe the rush of water had taken other dead men down the cañon into the little salt lake in Panamint Valley. He turned on me promptly.

"Taking up your condensed wisdom in detail, why should the stubbornness or pugnacity of a litigant play any considerable part at all in determining the length of time it should take for a case to go through the mill of justice? The definition of justice itself implies that this shall not be allowed to play a part. It may be difficult to assign to each factor its share of the responsibility; the builders of your judicial system and the voluntary habits of your judges and lawyers in court practice are the two great responsible parties. That a large part of the imperfections are easily curable is not difficult to prove. The contrast between your system and that of Great Britain has been so often emphasized that it has begun to irritate. From ex-President Taft down, the best thinkers deprecate the uncomfortable difference between the two methods of dealing out justice.

"Perhaps, however, no more stinging comparison has been made than between the practice and results on the two sides of the imaginary line between the United

States and Canada. Justice Middleton of Toronto said, 'We try our cases here before you people in the States get your juries.' Justice Riddle of the High Court of Justice tried four criminal and seven civil cases and was home again in Toronto before an American judge across the line had half of his jury in a murder case. Riddle said, 'In my thirty years' experience I never saw it take more than half an hour to get a jury. I have never known even a murder case—except one—to take more than four days.' There is no difference in moral standards or intellectual capacity or points of view or in the nature of their legal business between the province of Toronto and the states adjoining it—nothing but the fact that the American people have become tangled in a system which, if they were once rid of it, they would never dream of tolerating.

"The makers of constitutions and laws have in mind perfectly definite results which those constitutions and laws are expected to work out. But very often the collateral, unexpected results are more important—sometimes even disastrously important—than the direct intentional results. Some of the most far-reaching effects of your federal system of government were not even dreamed of at the time the constitution was adopted. The system has been and probably always will be a good system for the United States. In a great country like this, internal disturbances are bound to be local in their origin, and the federal system tends to keep them local. It is like an insurance company; it distributes the danger and quarantines it, too.

"But that same federal type of government is the foundation of your elaborate system of judicial appeal; and the spirit of the federal system has not only nursed to gigantic proportions your faith and belief in such a

judicial system but has been the cause of endless confusion. Each state is itself a federal system, so that all your political and governmental thought has twined itself on that trellis work. That many tremendous difficulties have owed their existence to the nature of the system is plain enough when they are considered. While the separate states controlled bankruptcy matters within their own jurisdictions there were endless chicanery, confusion, complexity and delay, often amounting to downright cruelty and all but absolute denial of justice. The situation became finally so unbearable that bankruptcy was taken from the control of the states and placed under the jurisdiction of the federal courts."

"I never had much sympathy for bankrupts anyhow," said I, "and can see no reason why his troubles should be reduced."

With a villainous irrelevance, which he emphasized by turning his head toward another part of the landscape, the Burro said, "I have often wondered why it would not be appropriate to apply the expression 'half-witted' to people who always insist on considering only half of the facts relating to an issue. You are ready to dismiss the whole matter because you take no interest in the bankrupt. But it happens that under the old system practically all the wrong was suffered not by the bankrupt but by his creditors. As usual, it was those who had rights to enforce that were severely punished by the failure of the system to do its proper work.

"During the past generation the increasing evils of divorce have worried the whole nation. Part of the trouble is due to the changing character of the people, but the nature of the political system has greatly encouraged it. There has for many years been a strong demand that divorce like bankruptcy be made uniform by

taking it from the jurisdiction of the states and placing it under control of a federal law.

"And so the fundamental political doctrines, even that of state rights itself, are perpetually in the caldron. The moral efforts of the nation in connection with bankruptcy and divorce show how your people seek to escape the legal and moral confusion inherent in the federal system by removing their most serious problems to national control, centralizing them, and to that extent overthrowing the federal theory. An interesting evidence of the gravity of the problems is the interstate conferences of governors and other officials held in recent years, the chief purpose of which has been to secure more uniform laws and methods."

"Even if all you have said is admitted," said I, "in the course of time the difficulties that were not foreseen by the founders of the federal system will be adjusted and then the governmental flexibility of that system will appear greater even than now. And anyhow, the questions you are discussing are legal rather than judicial. The courts will follow the progress made by the law."

"It is not only the difficulties inherent in the nature of the federal system that have caused trouble," said the Burro. "The country is now not only far greater than the founders ever dreamed it could be, but it is now a different kind of nation from what it was at the start. The system was constructed to suit the needs of governmental units largely independent of each other in practical life. When the constitution was adopted the thirteen states were not nearly so closely associated commercially, socially and politically as the forty-eight states of the Union are now. The instruments of communication, of which the founders had no foreknowledge, have given to nearly every phase of life an interstate character.

"When every man raised his own strawberries or his children picked wild ones among the pine stumps, and the butcher bought cattle from the farmers of his own county these things were not subjects of interstate discussion. But now that the whole nation eats strawberries from the south, beef from the corn and grazing states and melons and cantaloupes from Imperial Valley, the railroads, the beef trust and the refrigerator car lines have become national problems with all sorts of local implications. If a state seeks to control the railroads or the liquor business or epidemic disease or the sale of cigarettes to the children within its borders those who dislike such control take advantage of the federal system to hamstring the law, and often laugh the law of their own state to scorn. The process is double-acting; when a state seeks to deal with a question the interested parties drag it into the national arena, and when it is dealt with by the national government they seek cover again under the protective sovereignty of the state. In a thousand ways judicial process has been made complex and slow by a written constitution that was imposed upon the nation a hundred and twenty-five years ago by a vote of perhaps 250,000 men—about half as many as Roosevelt's Republican majority in Pennsylvania in 1904.

"The system has lent itself too readily to the corrupt law-breaker. It is in its nature an obstacle to cheap and efficient justice. It has been the artful dodger's paradise, the fruitful cause of the triumph of technicality and evasion."

He reached a pause in the flow of his political philosophy and I broke in. "Speculative wisdom is one thing and practical conduct another. Would you have the American people overthrow their system of government in the interest of cheaper and more efficient justice?"

He answered, "I and my whole race have always refused to take advice from anyone; witness the refusal of my great ancestress to do as she was told, even under physical compulsion; and we never give advice to others. But your people might, by searching, find some very simple remedies for the worst of their troubles. The question is not whether the system shall be overthrown, but whether because of its great worth in other ways it shall be retained and the difficulties overcome by some simple changes.

"If the people's modes of thought have changed enormously in a hundred years shall the judges restrain the people's purpose by saying that the old constitution forbids it? A very sharp attack might be made against the sacred doctrine that an old constitution can override the new wants of a nation. But that is not necessary. In all ages constitutions and laws have been made to say, not what dead men thought they said, but what living men wanted them to say. Even great moral laws have been bent to suit the present purposes of men. The meaning of a general legal principle is at any given time a matter of interpretation in connection with a given set of facts. Interpretation of laws is the great field in which the moral desires and psychological processes of large groups of men are worked out. It varies all the way from a strict and literal adherence to the letter of the law without any regard to its general purpose, through conservative confidence that the law is all-wise, to liberal stretching of its meaning to cover new things that were not dreamed of when it was made, and even to the most consummate casuistry that by intellectual gymnastics turns truth into falsehood and then makes the falsehood pander to low moral desires."

VII

Progress by Evasion

After a long pause, during which he seemed to be gathering himself up for a still greater effort, my friend, the Talking Jackass, went on:

"In all those human societies which have helped to make modern civilization—Hebrew, Greek, Roman, Teutonic—there have been long and slow but sure and fateful changes, like the invisible drift of the solar system; and the changes were usually made only by the utmost ingenuity and often at the price of great suffering. A growing crab has to molt its hard old shell at the cost of both fear and pain. The shell that hardened to protect its owner becomes by that very hardening a clamp on its owner's life. The shell must be cast or the crab will sicken and die. So a rule of action that had once been the guide and safety of a people's life sometimes became an iron girdle that threatened to clamp the nation's higher development. But to cast off the girdles of ancient practice took time and ingenuity and pain.

"One of the most interesting features in the history of progressive peoples is the constant effort to overcome the old, once useful but outworn views and methods in public affairs without formally doing away with them. The old things are retained as if they seemed to be necessities, but are set at nought by legal fiction, technicality and evasion. When the struggle is between two sections of the community there is a tug of war; but when a whole community has changed its mind, the old view has to be jockeyed into harmlessness.

"The conflict between what is and has been and what ought to be—the growing pains of nations—is nowhere in the history of the world better illustrated than in the records of ancient Rome. The city grew from a village to be mistress of the world. Her laws and customs, fitted for the life of a few people of simple habits and uniform wants, had to be stretched to reach across centuries of struggle, and to suit the wants of a great variety of racial characters. Roman jurisprudence sought to perform the task, and its weapons were often evasion of the ancient purpose of the law, legal fiction and the laying of stress on technicalities until the technicalities became the foundation of new and powerful legal processes. Repeated efforts were made to adapt the ancient systems of law to the new, undreamed of, large concerns of the growing empire; but its rapid development always left the formal legal system lagging behind the wants of the nation, and there constantly sprang up these supplementary devices.

"When once a way of doing a thing has been adopted it tends to become more and more complex. The jury, which has been regarded as the bulwark of Anglo-Saxon liberty, has by its own development become in some respects a serious nuisance and a cumbersome instrument of justice. The system of appeals has grown so elaborate that justice is nearly out of reach of all but the rich because no case can be brought to an end. The growing complexity of such institutions is always perfectly normal and logical, but there are always two grave results. Trying to make justice perfectly exact ends in making it impossible. In the field of law the growth of such conditions makes technicality almost a science by itself; and casuistry in its worst sense be-

comes a part of the necessary equipment of the modern lawyer. In the end there always arises a struggle between logic, which seeks to develop every institution in its own peculiar direction, and common sense, which seeks to give the people what they need in the most direct way. So that while logic has gone on consistently with its task, common sense has had to take refuge in evasion and other devices to overcome the elaborate burden of logic."

Here I broke into the stream of his thought. "You have devoted several days to convince me that evasion, technicality and so on, are the roots of all the evil in our judicial system. And now you draw from history elaborate proof that these devices are necessary to rescue common sense from the snares of logic. It seems to me you have boxed the compass."

He seemed prepared for this attack, for he turned on me promptly. "Who shall be the judge of what is good and what is bad in these matters of technicality and evasion? When Athens recalled Demosthenes from exile the fine against him was still due. But Plutarch explains that 'they found a method to evade the law while seeming to comply with it. It was the custom, in the sacrifices to Jupiter the Preserver, to pay the persons who prepared and adorned the altars. They therefore appointed Demosthenes to this charge; and ordered that he should have fifty talents for his trouble, which was the sum his fine amounted to.' The Spartans had no naval commander like Lysander; but he had been admiral once and the law forbade that the same man should hold the position twice. A national necessity arose and the nation evaded its own law by making Aracus the figurehead admiral and choosing Lysander vice-

admiral with all the real power of command. Thus did Sparta gently bleed the ancient law instead of crushing in its skull for the safety of the nation.

"In the course of events the United States decided to build the Panama canal. Congress passed the necessary law and created a commission of seven men to be appointed by the President. After a year or more of investigation and preparation the commission proved to be a seven-headed institution. There was too much red tape, consultation and delay. The President asked Congress to reduce the commission to three. Congress considered the suggestion, but for reasons of its own failed to carry it out. The President got by indirection what Congress had unwisely neglected to give him. By twisting the law he made over the commission into a tool competent to carry out the intent of the law itself. He did by executive order what Congress refused to do by legislative process, and when he got through a good many Congressmen were astonished at what had been accomplished. Roosevelt lived up to the letter of the law, but gave it such a powerful wrench by interpretation as to make practically a new law out of it. He did even more technical things than this in the course of his career as President. Such acts always raised public discussion but in the end the judgment of the people went with him, because the use of technicality accomplished what needed to be done for the public good.

"But when the House of Representatives tried to use technicality for the private benefit of its members the people took an entirely different view. In the fall of 1904 the House adjourned its special session and met in regular session on the same day. In the important matter of the appointment of officers Roosevelt made the

assumption that the few minutes between the special and the regular session was a recess. The people approved Roosevelt's act. But when the House did the same thing in order to act on the theory that its members were entitled to the mileage from their homes to the seat of government for the new session there was a storm. The House, in one of its bills, included an appropriation of $190,000 to pay the members of Congress the mileage for an imaginary recess. But the attempt to get public money on a technicality raised such a storm of criticism that the Senate promptly struck the item out of the bill. Some of the newspapers were even frank enough to call the Representatives pickpockets.

"There is a radical difference between a nation's use of technicality to get results by the shortest and surest way and an individual's tricky use of technicality and evasion to gain some private end. Analysis shows that the use of technicality, legal fiction and evasion for general public purposes is in its nature an effort to give expression to the will of the people, and therefore to all moral intents is the most recent expression of that will. However informal and indirect the process may be such acts have morally the effect of sound law. The use of the same methods by an individual for his own purposes is regarded as an attempt to escape the consequences of the law, the sign of a dishonest purpose. Inflexibility of the fundamental law leads naturally to devices for escaping its injurious consequences, and many times in history the necessary flexibility has been secured in this way. But it has to be admitted that there are always grave dangers involved in the business of making national progress by indirection; and for this reason there is real danger in inflexible governmental methods."

"It seems to me," said I, "that you are running very far afield. You have drifted away from the processes of the American courts and even from the laws which underlie them, and are now dealing with questions about the moral views of the people. Although that is a fascinating subject a too informal consideration of it is likely to become confusing."

For a moment the Burro paid no attention to me. He was intensely absorbed in the doings of a wasp. But he apparently subdued his real feelings and went on: "You are quite right," he said, stealing my thunder again, "and the more deeply the matter is studied the more clearly it will appear that judicial systems and rules of procedure are not an end in themselves but are intended to give safe and steady expression to the moral views of the people, the consideration of which you seem to be afraid of. The worst charge that can be brought against the courts is that they are not readily amenable to the needs and wishes of the community.

"There are several ways in which maladjustment arises between a system of procedure and the purposes of the people whom the system is intended to serve. The system itself, after it is established, may develop by its own logical momentum and the impelling power of those who feed upon it, in a direction opposed to the interest of the people. Or there may be a secular change in the conditions of life, making the system out of date; or a secular change in the ideals of the people, so that things that once seemed worthy become objects of amusement or contempt. When Fabricius refused the Pyrrhic bribes, and it could be said of many Romans as it was said of him,

'thou didst virtue choose
with poverty, before great wealth with vice,'

when 'hunger made acorns tasteful,' and when 'the women of old Rome were satisfied with water for their beverage,' conduct was underlaid with moral purpose and power. In later Roman days those old ways were subjects for private laughter and contempt. The relation of conduct to public interest had undergone a complete change; appeals could no longer be made to personal character to secure public ends. Such secular changes of moral mood are more easily recognized long afterwards than at the time they are taking place. Within your own generation, within a period of ten years in your own country, there has been a recognizable swing of the moral pendulum away from cynicism toward a more powerful public moral purpose."

"What," said I, "has all this to do with the main point at issue?"

"The judges of your higher courts," said the Burro, "have for their main task the interpretation of the constitution and the laws in their bearing on current events. And the vital question concerning them is whether they will keep abreast of public sentiment and interpret the laws in harmony with that sentiment or stickle to enforce the naked letter of the law upon the people's thought. Vast consequences depend on what the judges happen to be thinking about when they are making their decisions. It is as true now as it was two thousand years ago that 'the letter killeth, but the spirit giveth life.'

"Right now the air is full of the feeling that the chief business of the upper courts is to keep the meaning of the laws within speaking distance of the new needs

of the people. United States Attorney-General McReynolds had vigorously prosecuted some of the big trusts, and there was some question whether his spirit was sufficiently judicial to harmonize with the standards of the United States Supreme Court. After President Wilson had appointed him as a member of the court one of the great weeklies of this country touched upon the change that had in recent years come over the decisions of the Supreme Court. It said, 'The Supreme Court has recently shown itself so fully abreast of modern sentiment that the appointment of Attorney-General McReynolds will be welcomed by the court itself.'

"In the fall of 1914 when there was a prospect of the election of Justice Seabury to the New York Court of Appeals the same great weekly was pleased at the prospect of having this judge of progressive proclivities placed on the highest bench in the state. Why? Because 'for fifty years the court has been obsessed by the most rigid convictions upon constitutional questions.' One of the most notorious examples of that court's indifference to modern sentiment was the Ives decision, in which it declared the state Workmen's Compensation Law unconstitutional on the ground that it took property without due process of law. It was the old cry that had served the cause of so many appeals; and after all, in the case of the Compensation Act it was only a matter of interpretation. It depended entirely on the social point of view. Nearly every civilized country had already adopted such a law, and some of the other states already had very complete and effective compensation laws. These latter had no trouble in flourishing under the old bugaboo clause about taking property without due process of law.

"There is a very broad twilight land in which court decisions hang entirely on the point of view of the judges. About twelve years ago a child was killed in a street railway accident. In a suit for the recovery of damages for the child's death the New Jersey judge held that a baby was a liability and not an asset, and therefore awarded damages of only $1. And now, after twelve years, in 1914, the same judge, in a similar case, held that $1500 was a reasonable award. We need not assume that the value of babies had increased; the New Jersey judge was merely thinking different thoughts. When men cease to be interested in old views the new ones can easily find a nest in the old constitution. Court opinions, like public opinion in general, change, not merely by argument, but largely by the death of the elders. Old opinions merely lose force in the general shifting of human interest."

"If what you have said is true," I remarked, "why have a permanent system like ours at all? Why not let judicial procedure and sentiment take their form and color at any time altogether from the passing interests of the hour?"

"Because," said he, "there will always be a sharp difference between the permanent principles of justice and the momentary interests of any given time." Nothing was said for a while; and then he moved away as if his going had been decreed when the world was made. There was no explanation or excuse, no hurry; only an atmosphere of the inevitable. And he was going up hill. That meant that if I wanted to see him again soon I would have to climb, too.

VIII

Priestcraft and Progress

The Talking Jackass had after his fashion backed me away from every position I had taken. But I was still unsatisfied and hoped to make him explain how a great system of judicial principles and procedure could develop logically and finally grow out of harmony with the requirements of justice as they are embodied in the moral needs and desires of a great, progressive nation.

Early the next morning I sought him in the higher reaches of the North Fork. After two hours of strenuous climbing and eye-strain I heard the growl of a piece of rock working its way down the side of the mountain in the distance above me. Then all was as still again as if nature were slowly getting ready for another hot and silent day. By great effort I was able to separate the form of the Burro from the high shelf on which he stood and from the rocks and little trees around him. He had evidently seen me for a long time. When I had seated myself in front of him, wiped the sweat from my forehead, and composed my heaving breath, I said, "Will you indicate how our judicial system has developed logically until it is so largely out of harmony with the moral purpose of the people?"

For a while he held the steady, far-away look that I had come to accept as a sign that some great thought was unwinding itself in his mind. So I waited with great patience for something important; and it came abruptly. His first remark seemed altogether irrelevant,

but before he had time to develop its meaning my own mind began to trot ahead of his unfolding thought like a little dog ahead of a horse.

"Even as late as 1914, when there were in all ninety-six members of the United States Senate, sixty-nine of them were lawyers, and some of the others had at some time or other either practiced or at least studied law. Does that have any significance for you? It would not be hard to make an actual count of the lawyers who have acted as federal and state legislators and get their relative numerical strength in legislative halls. But their influence on legislation bearing on the judicial system has been one of those boundless, insinuating, indefinable elements which can be measured only by an intimate study of the institutions they have helped to shape.

"Whenever in the history of a nation the legislation has been controlled in a large measure by one class of the population, whose influence, superiority or power rested on that legislation, the secular drift of the laws has always been one-sided. While the patricians maintained themselves as masters of the Roman law, what did the law do for the plebeians? The plebeians got their rights by pouting, seceding and fighting. The patricians yielded to fear at last; but as long as they were able to do it they hedged themselves within a mountainous wall of special legal, judicial and military privileges. It was a self-sustaining, self-dependent organization.

"The constitution of the United States prescribed the mode of electing the federal senators. The intention was that they should be the elder statesmen. Their election was not to be entrusted to the fickle populace, but to the wisdom of the state legislatures. In practice the system worked all sorts of public wrong. The ground-work of the election of a United States Senator

was often laid in the nominations of candidates for the state legislatures. State welfare was secondary to the political desires of senatorial candidates. In many instances there were deadlocks lasting many months in state legislatures over the choice of a United States senator; and the vast legislative interests of the state were sacrificed. The situation often became a stench in the public nostrils.

"The system of selection at last produced its own type of senator. Except for some able, experienced senators who were repeatedly re-elected by their states, the rest were practically all the kind of men one would expect to succeed under the system—political bosses or creatures of the bosses, representatives of great special interests which for their own advantage could afford to meddle persistently with the selection of legislators. For a long while after the situation had become offensive to the best political sense of the people that type of senator was immune because any change in method of selecting senators would first have to be approved by the Senate itself. There could be no hope of improvement from the beneficiaries of an evil system. The blow came from the outside.

"Some of the states provided by law for the nomination of senatorial candidates by a popular vote of the electors of the state. The worst that could happen came to pass. In the state of Oregon the people nominated a Democrat as candidate for the United States senatorship, but elected a Republican legislature. The individual legislators, when running as candidates, had pledged themselves to confirm the choice of the people. Now the Republican legislators had to break their promises or elect a Democrat. There was much condemnation of the scheme and great uncertainty. All the cunning cas-

uistry of crooked politics and partisan feeling was applied to prove that Republicans did not have to keep a promise if it meant the election of a Democrat.

"But the moral power of Oregon, backed by the moral approval of an on-looking nation, forced for once the keeping of political promises. A Democratic United States senator, the choice of his people, was elected by a reluctant Republican legislature. And on that day was tolled the deep-toned knell of the old system and all its undesirable consequences. And thereupon the doom of the system stalked into the senate itself. Suddenly the system crumbled when the individual senators, in a spirit, not of righteousness but of self-preservation so far as that might still be possible, deemed it advisable to let the people rule. In March 1911 the senate came within four votes of submitting an amendment to have senators elected by popular vote. At the second session of the sixty-second congress the house and senate passed the concurrent resolution relating to the XVIIth amendment concerning the popular election of senators. The fire had been burning very long, and the final crashing of the timbers was spectacular. By the fifteenth of April 1913 thirty-six states had adopted the amendment and it became a part of the constitution.

"This short and simple tale reveals a number of remarkable things. It shows how a senate built up under an undesirable method of selection was itself the greatest obstacle to improvement. Another important consideration is the fact that the people used the baldest kind of legislative evasion to accomplish indirectly what they could not accomplish directly. As often before in the long course of history, legislative evasion became a moral necessity in order to give expression to the wish of

the people. You were somewhat shocked when I enforced that doctrine with historical examples."

There was a long silence. I shoved a loose stone off the edge of the rocky shelf with my foot and listened while it worried its way down the mountain. Even the Ass leaned his ears forward to catch the fading sounds. I re-opened the talk with an assertion. "It is true that when a special class dominates legislation that legislation sometimes tends to run to a peak. But in a great and active nation so many elements of a coercive nature, social, religious, political, economic, enter into the activities of legislators, so many cross purposes play upon the situation, that no one of them can finally and completely dominate."

He seized upon the concession that I had made, and while seeming to agree with me went on to enforce his doctrine. Then he proceeded: "The germs that smite man with dangerous disease may in the end undo themselves. By their own activity they develop poisons that resist the further activity of the germs themselves. In the same way the by-products of every intellectual movement accumulate until they poison it. Even scientific theories are not immune from this dangerous tendency. Von Baer, the father of embryology, remarked impatiently on the fact that every step of real progress in a science results in pushing the new principle to the limit of folly.

"My race has been the same since man first began to use and abuse it. We have been able to stand by and with a steady mind observe the turmoil of men. We know that each human institution seeks to develop itself logically, without serious reference to the changes that are taking place in other social factors; and after a while it finds itself out of harmony with the general sit-

uation. It is not an uncommon thing in human progress to find an institution that has gone on developing along its own lines until the great purpose for which it was created has become a secondary consideration.

"The laws of Moses about personal and religious purity had underlying them the common sense born of experience. But these rules had been elaborated and made more and more the end of religious service until at last, in the hands of the later Pharisees, they had become a stench in the nostrils of pure religion. The system of rules was harmonious and logically they fulfilled the letter of the law. But in practice they smothered the spirit of pure religion. The rules themselves made men immune against true religion. The Pharisees devoured widows' houses and for a pretence made long prayer. They compassed sea and land to make one proselyte and then made him more than ever a child of hell; they paid tithe of mint and anise and cummin, and omitted the weightier matters of the law, judgment, mercy and faith; they strained at a gnat and swallowed a camel; they made clean the outside of the cup and of the platter, but within they were full of extortion and excess; they were whited sepulchers, beautiful without but within full of dead men's bones and all uncleanness. And yet the historic development of the rules was systematic and logical.

But I protested, "There were noble Pharisees; Nicodemus and Simon and Gamaliel were noble men. There are evil men in every system. It is also a great truth that hypocrites swarm around every noble system of thought and seek by false pretense to profit by its protection."

"Yes," conceded the Ass once more, "The moral splendor of worthy men only makes the contrast great-

er. But no system of thought or action that has run away at a tangent from human need ever seems to work out its own cure and salvation. There is no healthy element left with vitality enough to work itself to the top and re-create the system. The Pharisaic method perished and the most prominent of its historic features are the curses that Jesus pronounced upon it. The Flower of the Spirit, which was to fill the world with fragrance, bloomed in Nazareth, the by-word of culture, whence no man thought any good could come. And out of the historic gloom there came to meet it the barbaric hordes whom the Romans looked upon as the destroyers of civilization. There was a new faith, a new life, a new civilization. The new life came out of the dark earth.

"There are already many signs that the American people will not forever let their pharisaic judicial system smother its sense of justice. If you would but look with unclouded eyes you would find the unheard-of new things sprouting in unexpected places. No vigorous national life will let itself be choked by ancient girdles. Somewhere a rebellious spirit breaks forth and with smooth or violent temper undermines and wrecks the institution. I have my asinine doubts whether the scribes and Pharisees and lawyers who build up and feed upon your judicial system are fully aware of what is being done to it by indirection."

The land was growing weary with the heat, and he slowly moved away into the shadow of a great rock. I knew there would be nothing more; but he had hinted at great things and I resolved to draw him into an explanation of the things that were being slyly done to our judicial system by indirection. Later in the day I saw him thoughtfully zigzagging his way down over the shale toward running water.

IX

Truth Forever on the Scaffold

Just before night I sought my friend again. The level sunbeams barely grazed the slope. The yellow of the high peak was a richer yellow; the hard porphyry wall in the east glowed pink and looked as soft as lamb's wool. The Ass stood gazing westward as if he expected the coming sunset to be beautiful. He forestalled me by commenting briefly on the historical position of lawyers, their reputations, their standing in their communities. The sunset must have stirred his poetic impulses, for he went back to the Bible and Shakespeare and the quaint old More of Utopian fame; and seemed more interested in them personally than in the views he was quoting from them. He was very personal toward the lawyers; not patient enough with them to admit that they were the victims of a system, the dupes of the work they have to do.

"Do you realize the extent to which the lawyer in your own day is regarded as a public enemy, a stickler for rules, a spoiler of good sense, an expert at making the truth look like falsehood and falsehood like the truth? In Utopia 'they utterlie exclude and banishe all attorneis, proctours, and sergeantes of the law; whiche craftelye handell matters and subtelly dispute of the lawes.' If you should modernize the spelling you would think old Thomas More was speaking the mind of the common man today. It is not necessary to consider the lawyer a special form of humanity. His opportunities

for mischief are unlimited; and opportunity is the gate of guilt. It is an undeniable fact that in practice the lawyer is a laborious casuist. He habitually twists facts out of their proper relations to gain an advantage; and deliberately cultivates the art of lying.

"Take the trouble to examine the complaint and the answer in an average civil suit. I have in mind a case in which a Christian lawyer filed an answer for his Christian client. The latter swore to its truthfulness; and both of them knew that the assertions and denials of the answer were unqualified falsehoods. The defendant had performed repeated business acts and outlined certain plans in careful correspondence. In the affidavit this was all deliberately denied under oath. If this were an unusual case it would lose its significance; but to such an extent has the legal mind come to consider everything from a technical point of view that truth itself and falsehood are coolly treated as technicalities; so that a Christian lawyer with a Christian client can file an affidavit swarming with deliberate falsehoods, merely to secure an advantage of technical position in a fight based on technicality.

"If a man has committed a crime and lies to shield himself, his act is humanly comprehensible; even if a man lies in a civil case to get something that does not belong to him, that also is morally comprehensible on the theory that he is crooked. But when the system of procedure tolerates as an habitual practice cool, deliberate falsehoods in official documents, which everybody concerned knows will be exposed when the case comes to trial, the moral boundaries are removed. Practices are tolerated which, among honorable men in the ordinary walks of life, would be hooted for their indecency.

"When the charges are made in this way they seem bald, crude, exaggerated. But the moral degeneration exhibited in many parts of court practice is a legitimate product of the system. If the trial court were the seat of the people's power, to which both parties were required to bring without excuse or delay all the facts for a real decision, trickery, delay, falsehood, all the bad elements based on technicality, would be eliminated or reduced to a minimum. They would become dangerous to the party using them. They are always characteristic of a system steeped in a spirit of hypocrisy, of mock morality.

"Hundreds of the ablest judges have complained of the situation and have indicated in various ways what is the matter and how it might be cured. Judge Frank Dunne, a bright, able, experienced superior judge, who distinguishes sharply between habitual criminals and decent fellows gone wrong, said, in a careful public address, 'The administration of justice in this country has degenerated into a game. The attorney for the defence is one player, the district attorney is the other; the defendant is the pawn and the judge is the umpire. An appeal is decided not on the guilt or innocence of the prisoner, but upon whether or not one of the rules of the game has been violated. Justice has become obscured in a cloud of technicality.' There have been numberless declarations, from trial judges to Presidents of the United States, to the effect that so far as the primary purpose of the courts is concerned, your courts are a failure and a disgrace.

"But the farcical nature of judicial performance is abundantly attested in civil as well as criminal cases; and not only in the state, but in the more important and

dignified federal courts. Judge Maurice T. Dooling of the United States District Court said, in dealing with the involuntary bankruptcy proceedings brought against the Realty Syndicate of Oakland, California, 'It has been my experience since handling bankruptcy matters, that when an enterprise lands on the rocks of bankruptcy marshal's fees, attorney's fees and other expenses eat up the assets and there is nothing left for the creditors.' And again, 'But I feel that it is a big enterprise, and throwing it into bankruptcy should be avoided if possible.' And he refused to let the company be crowded to the wall.

"Now if a great enterprise involving millions, with a very substantial foundation of high grade property could not be allowed to go through the bankruptcy court without at the same time letting the various processes of the court itself suck the life-blood of the enterprise and beat the owners and creditors out of their natural rights, is it any wonder that the common man has lost faith in and respect for the courts? Is it any wonder that the average litigant realizes that after he has won one law suit he was himself really the loser; that by the time he has won two law suits he is hard up, and when he has won three he is financially broken?

"In August 1914 one of the great American weeklies had this heavy but short and pithy editorial: 'Andrew Carnegie, a successful business man of Pittsburgh, recently gave out four rather ordinary precepts under the heading: "My rules for manufacturers." The final clause of the second rule deserves attention: "Avoid resort to law; compromise." Remember that this comes from the long experience of a man of wealth and power who was able to enlist for himself litigation's every pos-

sible advantage. *There is nothing in it.* As applied to business the whole apparatus of law, lawyers and courts is slow, expensive, inefficient. We would like to hear some lawyers explain Mr. Carnegie's precept in terms reflecting credit on the dignity and social service of the legal profession. Can it be done?' In the face of such testimony and criticism it is almost unseemly for a desert Ass to comment at length on a situation that is practically undenied and undeniable.

"The difficulty about the judicial system is that its victims have no means of bringing about a change. The dominating power in law making has been the lawyers themselves. The rules of procedure are their handiwork; the commentaries on court practice and decisions are written by them; litigants, the moment they place their cases in the hands of the lawyers, have practically nothing more to say about the conduct of the cases. And all the time the lawyers feed upon the system they themselves have built up.

"The outcome is quite sure to be akin to the results worked out by a strongly intrenched priestcraft of any sort. When a priesthood has made the laws and the rules and enforced them, and fed upon their success, what can be the outcome? In ancient Egypt the ripe fruit of the process was a heavy burden of practice and belief loaded upon the people by a priesthood that knew the falsity of the system and for themselves secretly held entirely different conceptions."

I asked him this question: "If the judicial system is so heavily burdened with frivolous subtleties is there no part of the system for which some one can be held responsible?"

"The power," he said, "lies with the appellate judges.

The twining dodder of technicality has smothered the tips and sucked the sap out of the stem of the judicial system. The trial judge is bound up in a snarl of leafless yellow threads. What greater absurdity could there be than this? The trial judge cannot help select the jury. In practice he has to bend largely to the wishes of the struggling parties. And yet, after he has been compelled to sit helpless in the choice of the jury, after all the cost of time and money wasted in a trial, he may set aside a verdict if it does not suit him. In practice a suit at law is like the trouble between two tom-cats who fill half the night with inharmonious noise; but the fight itself as a rule lasts less than five seconds.

"But there are apparent contradictions of what I have said. Judge R. M. Wanamaker of the Ohio Supreme Court holds the trial judge primarily responsible, instead of the lawyers, for the judicial delays. He goes so far as to urge that the judge shall select the jury, and says in support of this suggestion, that in most states there are no statutes to prevent it. But this only emphasizes the extent to which in practice the powers of the trial judge have become latent. This has been brought about almost entirely through fear of the higher courts. It is necessary for him to exercise particular care to observe all the formalities lest some higher court might hold that he had prejudiced the rights of one of the parties. Hence also the far-spreading convenience of the lawyer. Under the ridiculous assumption that he is looking after his client's interest continuance after continuance is granted merely because the lawyer is not ready. If the trial judge showed signs of becoming peremptory and an appeal were taken there would be a ready affidavit, likely false in substance, to prove that

somebody's interests had been sacrificed. The key to the whole situation is the trial judge's lack of control at any point in the game. If the judge should suddenly become a real power in his own court and be bent on expediting the people's business, compelling lawyers to be ready, what a rattling of dry bones there would be."

Night was falling. The cold gray walls of the opposite cliffs turned ashy and then slowly darker. A little crimson cloud hung briefly over the eastern wall; then it too turned ashy gray. A belated crow flapped his somber way along the rim of the cliff and cawed an ominous warning of the coming darkness. Night perched on the eastern ridge like a vulture, waiting patiently for the death of its victim, Day. The Seven Stars came early over the rim out of Death Valley, and I left the philosopher, wondering whither I would next be driven by his battering methods of conversation.

X

Medical Science and Legal Casuistry

When I drifted into the desert I had no purpose at all; but the Ass had now given me one. And like other men with only one intention, I pursued it constantly. I was anxious to find him again, but for days he had eluded me. I made a systematic search and concluded that he must have left the country. There were other burros in the hills and the only sign by which I could distinguish his tracks from those of the others was the old shoe that still clung to his foot. He must have wrenched it between two rocks since the famous thrust at my knee, for its track was at a curious angle to the direction in which he travelled. There was no sign of the old shoe on the trail over the pass into Hungry Bill's Cañon, nor on the trail over the ridge on the south. He must have gone down and out at the mouth of Surprise Cañon.

I picked up his track a mile below camp. For some distance it indicated a rambling disposition, for he had been feeding indifferently, and had slid into the wash for a drink. But farther on there was a directness in his course that was a sure sign that he had something definite in mind. The track of another burro joined his; then another. At the mouth of the cañon there were the tracks of four, and their trail swung north into the stage road. The Talking Jackass had left me. I followed them along the eastern edge of Panamint Valley, east of the little salt lake, across the little stream that comes

out of Hall's Valley; and stopped to ask Panamint Charlie, the old Indian, whether he had seen any burros. "Yes, four: one white, black nose; one black, white nose; one gray, white face; one big dark one, old; he was the leader. They went by two days ago. Drank a little at the creek; stood around for several hours on the ridge in the distance on the north. They have gone to Wild Rose Cañon." That was the Indian's judgment.

I went the long hot way; saw where they had stood about and rolled; where they had meandered along, each one half forgetful of the fact that he was a member of a travelling party, while he sought food in slender mouthfuls. I met the desert stage coming down the grade, but the driver had not seen that particular bunch of burros. We were both lonesome and chatted desert commonplaces and the somewhat elderly news from the outside. In the cañon I passed the stage station; it was a tent with a man, two cats and a dog; the stable was a bit of overhanging cliff. Farther up was the establishment of Kennedy, the squaw man, who was raising a brood of halfbreeds and a few vegetables near the springs, and traded with occasional passersby. Shoshone Indians were camping near and they said that the burros had gone up Wild Rose Cañon along with a band of theirs.

I went up to the old charcoal kilns, where years before the meager pines had been cut and the charcoal burned and packed across Panamint desert to the Modoc mine in the Argus range. The burros were feeding close together and I had to wait for a better time; for my Philosopher never considered me in the presence of others. Next morning, after he had warmed his tail in the sun for an hour and sauntered about another two

hours picking his breakfast, I accosted him among the rocks. He showed a slow eagerness that boded well, and seating myself on a rock while he adjusted his feet among the stones, I said: "Suppose that all the difficulties that you have emphasized are as serious as you have pictured them. In every age, in every nation, wherever there has been progress there has always been strain between existing institutions and the changing wants of the people. Instead of being a sign of weakness or corruption or hypocrisy, it is everywhere the sign of vigorous growth. Will not the healthy activities of public life eliminate the ineffective machinery and substitute a better?"

"Oh, yes," said he, with a quick forward movement of the ears; "but what we are now interested in are the intellectual and moral activities of the class of men who have made the machinery of justice ineffective. There are nearly as many judges, justices and lawyers in this country as there are soldiers and sailors in the army and navy of the United States. The nation devotes some of its best educational efforts to training them. In their own profession there has been no lack of models worthy to b imitated. But———" He never finished the sentence; after a lull he started in a new place.

"If the medical profession had clung to blood-sucking as the fundamental principle of medical practice, and had developed a luxuriant system of subsidiary rules to bolster up an essentially obsolete practice, the doctor would still be a leech and his profession would have to face hatred and contempt. But the modern doctor has become a highly trained scientific man. He is ready to sweep aside old methods altogether in the interest of efficiency and good health. Thousands used to die of 'in-

flammation of the bowels'; but instead of developing an elaborate therapeutic system of treatment on the principle of the hot compress for the patient, supplemented with a systematic, thoughtful scratching of the head for the doctor, the surgeon now opens the patient, cuts off the appendix and sews him up again. Most of the victims recover, and when one does die they know what was the matter.

"The progress of medicine has been such that one woud not need to blush even at the claim that a divinity had guided the doctors and their associate scientists in their hopes and labors. The greatest and best part of the doctor's work now actually consists in helping the people avoid disease, in exposing the causes and conquering them. In recent years the work along scientific medical lines has been morally as well as intellectually magnificent. There is more than enough hypocrisy, charlatanry, and false pretence, but the forms under which these things appear are themselves a tribute to the power of right thinking and great principles. And as always in the history of the world when men have been under the spell of great principles, there is the quality of sacrifice and martyrdom. Witness the men who calmly risked and gave their lives that yellow fever might be conquered. In the medical profession not only have details been perfected but the very fundamentals of both principle and practice have been modified when progress required it, with the result that medicine now rests on a thoroughly scientific basis and in its intellectual quality ranks high among the sciences. It is only by comparison with such professional vigor that the stale and unprofitable quality of American judicial methods can be appreciated."

"It seems to me," said I, "that you confuse two radically different things. Medicine in all its bearings is a physical science and is susceptible of exactness both in definition of principle and in practice. Judicial practice and the principles of jurisprudence fall among the moral sciences, which cannot be subjected to exactness of definition or practice without doing violence to human nature. The latter must always depend for their actual substance upon the current condition of the nation, its social and material outlook and its stage of development."

The Burro replied: "Your criticism is based on the assumption that I hold the underlying principles of your judicial system unsound. But it is because what you say is true that the system has run out of harmony with this stage of civilization. What was good and necessary at the outset may be a real handicap now. There are excellent examples from among your so-called moral sciences that help to understand how a system of thought may develop itself out of harmony with its surroundings by a consistent pursuit of principles that in themselves are not false. The forms of thought are right; but when you begin to pour into them the infinite and incessantly changing variety of human interest the trouble begins. This is especially true when great thoughts cease to interest the nation and the mind centers on petty advantage and convenience.

"The ancient Hebrew law was believed to be not only sacred and inviolable, but applicable to every conceivable situation that might arise. As soon as this thought came to be thoroughly accepted the old and simple meaning of the law was stretched and twisted to fit every kind of case, even such as could not have arisen at the

time the law was first made. This process grew into an elaborate system of casuistry that finds its record in the Talmud. But the continued application of great principles to little things to which they should never have been applied at all, the stress laid upon small matters to the neglect of the great, developed into a hard thick crust of petty, unnatural thought and practice. All through this system of casuistry there run threads of gold, profound thought, spiritual elevation, moral beauty; but these did not give their quality to its final form. The drift was wrong."

I said in answer to his argument, "Jesus dealt adequately with this question. He only condemned the false emphasis on little things."

"The results speak for themselves," he said. "The system smothered spiritual life and it never from within brought about a revival of spiritual growth. But there is a still more degrading cause for the growth of casuistry. When a people has lost the desire to obey 'the law which it once held supreme, and ceased to find obedience tolerable, yet does not dare to deny its authority,' then it wants the law explained away, and casuistry is the ready servant to do it.

"The practice of casuistry in its morally healthy sense developed naturally out of the necessities of the confessional; and it was doubtless a useful instrument in the task of laying ecclesiastical penalties upon the misconduct of men. But the degrading form in which it was developed by the Jesuits in the sixteenth century had its roots in the desire to keep within the pale of the church a generation of men and women who yielded only a nominal obedience to the law of Christian morals, and in practice obeyed the dictates of their passions. The

general method consisted in stating the moral obligation of a precept in terms that were above criticism and then tearing away all its real force by exceptions and qualifications. The general result of the method was to find excuses for nearly every kind of human weakness.

"Here again a method, useful in its nature, and used upon a set of principles that were entirely sound, and for a purpose which in its origin must appeal to the best of men, ran wild because the pressure from the outside gradually twisted it out of its proper course. Doubtless many of the men who applied the method were rather the victims of an uncontrollable drift.

"When Christianity came it shattered the Pharisaic method by making a fresh appeal to great principles. When the Jesuitical system had run its ridiculous length Pascal gave it the death blow with his *Provincial Letters.*"

"It seems to me you have begun to drift," said I. "The historical examples are interesting, but what is their application to the matter in issue? There is nothing plainer in history than that a new social or political or religious principle runs its course of usefulness to an apex. The machinery for its application becomes more complicated and important until the main thought itself drops into the background. When a new start is made it is not from the place where activity ceased but from some entirely new point. But what has casuistry done to our judicial methods?"

The Burro looked across to the other slope of the cañon, where a young jack hurrying down hill was loosening stones enough to batter a city with. When he again concentrated his attention on me he answered my complaint thus: "In its youth a nation may believe that

it has been called of God to make the world better; and in the days of its maturity the people may forget everything except their private personal gain. Interpretation of the law and the people's attitude toward it are governed by the kind of thoughts that are running through their minds. When the old emotions have been overlaid with the slime of sordidness, when men no longer believe in their hearts the great things that they profess with their lips, when their thought is out of harmony with moral rules, evasion and casuistry are the weapons with which public morality is undone.

"Your elaborate system of seeking and executing justice tends to the exaggeration of its own faults even under the most favorable conditions of public morality. But in the end of the nineteenth and the beginning of the twentieth century the condition of commercial and political morality was such as to give a tremendous impetus to the unrighteous use of technicality, evasion and delay. This period and the attempts at law enforcement on a large scale reveal as well as anything in its history the weakness and lameness of your system. No factor in your national life has done more to bring into prominence the weak points of your judicial arrangements and to increase their disrepute than the lawlessness of the great corporations. It became the common understanding that they would pluck the public. Instances can be picked up in the records in every corner of the land, from the pine-covered hills of northern Maine to the cactus-covered deserts of southern California. With the best intentions the public could not protect itself.

"As fast as legislation was perfected new devices of evasion were invented. By the time the tortoise-footed courts were ready to deal seriously with a case the aver-

age monopoly was ready to violate the purpose of the law in some other way. When evasion failed to accomplish the desired end, the law was directly broken in the assurance that with the assistance of the 'best lawyers' and the endless legal devices for cheating the law itself the punishments of the law could be nullified and the people worn out.

"Under your system of determining, by endless appeals, whether a law is really a law or not, the great business interests will not admit, until compelled to do so, that any of the laws affecting them are just, and they will not voluntarily obey them. This is one of the traits of the brigand and pirate; but the system itself encourages the lawless to fight instead of yielding. The ingenuity of wrong-doing can triumph because it can take all the time it needs for its purpose. Evasion can keep ahead of legislation and technicality and delay can hogtie the efforts to enforce the law until time has minimized its importance. Whatever improvement may be made will be due not to those who profit by the present conditions, but to the anger of the people."

XI

Legal Verbosity

"I HAD HOPED," said I, "that you would make such a declaration. The final responsibility rests with the people."

"Certainly," replied the Ass. "The kind of laws, the methods of procedure, the kind of judges and the quality of their judgments depend in the end on the people. But they expect their institutions to accomplish the work without perpetual tinkering to undo the wrongs created by interested parties."

"Let us consider specifications," said I. "When the changes come what will be the most important ones?"

The wise old Burro chewed a mouthful of food very slowly and then flapped his lower lip gently, as if the itching of it were to him the most important thing in the world. "I think," he said, "that the most attractive change would be a reduction of the verbosity of legal documents. The language used in them typifies as well as anything else the intellectual attitude of the legal world. The hope of perfection is placed in verbosity. Every rat-hole of expression is carefully stuffed with mediæval words; and then each rat-hole and the nature of the stuffing is carefully described.

"I might say to you that last night just before the moon went down, a coyote murdered a jack-rabbit on the broad gravel flat near the mouth of Wild Rose Cañon. You would understand the time, place and nature of the act. A lawyer would say the same thing in

an indictment about like this: 'that a coyote, known vulgarly as a dog-like burrowing animal or prairie wolf, and in scientific terms called *Canis ochropus estor,* being then and there a carnivorous or flesh-eating animal, and having in his possession, with felonious intent, a complete set of biting, crunching and cutting teeth set in a pair of interacting jaws equipped with powerful muscles, did, at about the hour of fifteen minutes past three a.m. (ante meridian), on the gravel flat at or near the wide, flat lower end of a mountain cañon known and spoken of as Wild Rose Cañon, in full moonlight, wilfully, feloniously, with murderous intent and malice aforethought, attack, set upon, assault, kill, murder and do to death a full grown jack-rabbit, said jack-rabbit being then and there a male rodent of the genus and species *Lepus californicus deserticola;* that the said coyote did thus set upon, assault, kill, slay and murder the said jack-rabbit at the aforementioned time and place, by feloniously and with malice aforethought seizing the said jack-rabbit by the rump and then and there breaking his back and his neck and then and there tearing, rending, chewing and eating up the said jack-rabbit, hair and all; all of which is contrary to the law for such cases made and provided and against the peace and dignity of the species *Lepus californicus deserticola;* and to the great harm and destruction of the said rodent.' All the redundancy is a clumsy attempt to define the coyote, the rabbit and the act of murder. There has been no enlightenment, no additional information."

"Your effort," said I, "is mildly humorous, but it has all the ear-marks of gross caricature. It is more reasonable to suppose that the careful attention to detail is the result of long experience in court practice, and necessary

in order to avoid trouble later in the prosecution of the case."

"I admit," said the Burro, "that it is a gross caricature of the reasonable methods of sane men; but that caricature can be duplicated from the solemn court records. The worst thing about it is that it shows how any attempt to attain perfection at the expense of simplicity and directness defeats itself. The only proof needed to show that such methods of expression are unnecessary is the fact that at least in recent English practice and in some states an indictment now states the simple fact. But all through the field of legal documents the same characteristic runs. And the language of the documents is only the written part of the mental processes characteristic of lawyers and the courts. The intent is everywhere apparently to shut out the ordinary play of human intelligence by definition, objection, repetition.

"No matter what part of the system is examined this same desire to perfect definition, to subdivide to make minute specifications, ends in the inevitable result, worship of words and forms at the expense of judgment and discretion. Not only does all this in practice infinitely multiply the dangers of error, but often the subdivisions of classification are so minute that no one can tell in what pigeon-hole a given thing shall be put.

"When a crooked clerk has taken money by manipulating a check, has he committed larceny, embezzlement, forged a check or issued a fictitious check? If it is merely a question of the check, has he forged a check or issued a fictitious one? Suppose he is charged with the latter. He proceeds to show that there is a man living with the name he used, and so on. Sometimes neither court nor jury, after they have heard the evidence and

are sure that the man is guilty, can decide exactly what ought to be done because of the minute subdivisions made by the law and appellate decisions. It all reminds me of the problem of the Yellowhammer. In the East he is the Golden-winged Woodpecker; but in the West his wings are red. Maybe they are different species or not. It depends in part on what you call a species and in part on the particular bird you happen to be looking at. I once saw one of these flickers with one wing scarlet and the other yellow. If I were a judge or a juryman I would have to give it up as a bad job. I would not dare to convict the bird of being anything. But being only a common Ass, I know that he was a competent woodpecker, guilty of both the red and yellow.

"If this process of verbal elaboration at the expense of sound thought and action," said I, "is itself one of the normal processes of human development, it is hardly a matter to scold about but a thing to be studied for its own intrinsic interest."

The Ass replied, "As an academic subject of study it has great intrinsic interest; but in practical life things that seem of small significance are often fatal. The struggle is tense, and small handicaps often destroy all chances of success. They act like a strong brake that clutches the hind wheels of a heavy load. The four mules at the front of the wagon know that they are working hard; and everywhere from the ears of the leaders to the king-bolt there is much action, but the load does not move."

XII

The Unanimous Jury

I made a suggestion. "Suppose we consider some one line along which there has been unwholesome development. There is bound to be friction in the application of any set of principles, and this would be especially true where the nature of the matters dealt with requires exactness."

Said the Ass, "Let us take the most sacred institution in Anglo-Saxon history, the bulwark of personal liberty, the strong guard of the helpless, the hope of the innocent—the Jury. What is the feeling of the American people toward the jury? Is it not the settled conviction of the people that the jury is the last and best bulwark of the wrong-doer? In practice the innocent are often willing to leave their fate to the judge, while the guilty, if they fight at all, invariably demand a jury trial. Likewise in civil cases the man with justice on his side is willing to go to trial without a jury. And among sensible men there is an intense dislike for jury service. It is merely another way of stating the universal unwillingness to be subjected to frivolous, searching, irrelevant questions in jury selection, the unnecessarily long and tiresome trial stage and the final crucial contest of intelligence against stupidity or even crookedness in the jury room. Not alone the laymen condemn it. The most hostile judgment comes from men high in the legal profession.

"It is out of harmony with the needs of the time;

and this lack of harmony is due, not alone to any recent changes in the jury, but to the fact that it has long in many ways remained unchanged while nearly all other social and political institutions have undergone profound changes. There can be no historical argument against changing the method of selecting the jury because in its early history it underwent many radical changes. Not more than six hundred years ago the twelve men that formed the jury were sworn witnesses. At one time, if the twelve could not agree on the facts, others were added until there were twelve that did agree. From that simple, effective and flexible method of getting a decision has developed the slow, uncertain jury system of today. Now the juryman must not only not have been a witness to the facts, but he must not have formed a definite opinion on the merits of the case. The net result of the changes that have come over Anglo-Saxon civilization is that the jury has become a very expensive means of dealing out justice in small cases and a very uncertain and dangerous one in important cases.

"When the juryman was a witness he was selected from the neighborhood of the action. Now he must still be from the general neighborhood, and the men best fitted for the service are all likely to be familiar with the facts. This makes the selection of a jury in important cases a matter of extreme delicacy and difficulty. Certain whole classes of men, all of them specially qualified to weigh evidence, are exempt from jury service. The judge can excuse from service those who can give good excuses; and one only needs to watch the line of citizens who make successful excuses to realize that the most effective men get off most often. In many states either side may reject a juror if he is not on the

assessment roll. Under present conditions what earthly relation has this to a juror's efficiency? The fact is ignored in practice and is used only to get rid of a man toward whom one side or the other holds objections too vague to be otherwise enforced.

"Under the present trying conditions the best men will do anything except commit perjury to escape jury service. Almost the only man who does not protest against serving is the professional juryman, the Jack-in-the-Jury-Box, who is perforce a man without a regular calling, a floater on the sea of circumstance, the least certain of all men in his moral convictions and most susceptible to influences of an improper kind. Out in the world he only clings to the hem of civilized society, but in the jury room he cannot be overridden. Where the jury's verdict has to be unanimous he is equal in strength to his eleven colleagues together. If he has any moral defects or mental twists or evil purposes he cannot be coerced. He does not even have to give any reasons for his attitude if he does not wish to do so.

"In the struggle to get a jury there is a constant procession of capable men out of the jury-box and tremendous effort to prevent the dismissal of unworthy men. By the time a jury is selected weariness and disgust are already sitting in the box with the jury. It is not uncommon, even in a justice court, and in civil cases involving not more than $100, that the court uses up a day and the time of a roomful of men to get a jury. To one familiar with the practice in the United States the declaration of an eminent Canadian judge that he never saw it take more than half an hour to select a jury is so startling as to be practically incredible. All this tremendous waste of energy has no relation to the quality of

justice; it is necessary only because the rules make it so.

"But the most serious factor of the jury system is the moral uncertainty and strain due to the unanimous verdict. In some states there has been a belated recognition of this difficulty and, as in California, three-fourths of the jury can render a verdict in civil cases. The very fact that jury service calls for intelligence and good judgment and integrity should of itself be fatal to the doctrine of the unanimous verdict. Even twelve reasonable men are likely to disagree, and the verdict is very commonly brought about by breaking down the judgment of one or more of the jurors. But under the present rules for the selection of the jury there is a very great likelihood that one or more will prove themselves incompetent after the jury is locked up. The compromise judgments in civil cases and the recommendations to the extreme mercy of the court in criminal cases are quite commonly due to the necessity of placating some juryman, who first after they are locked up reveals his prejudice or inefficiency or his unwillingness to abide by the instructions of the court.

"The unanimous verdict makes it almost impossible to enforce laws against which there is any sort of opposition. The clumsiness of jury selection, its delay and cost, and the great uncertainty of its decisions make the jury as an institution almost a complete protection to criminals in certain classes of crimes. When the police in large cities make raids on gambling and disorderly houses and capture large numbers of persons who have violated the law it is a well recognized practice for every one of them to demand a jury trial, with the result that the courts are clogged with the cases. The uncertainty of securing convictions coupled with the Herculean la-

bors compels the court to compromise with the criminals and agree to inflict very light punishment in the form of a nominal fine if they will plead guilty. This in turn reacts by creating contempt for law among criminals and a feeling on the part of police officers that it is not worth while to make arrests."

I reminded my friend the Ass that jury action was specially intended to eliminate all doubtful cases, and for that reason a unanimous verdict of twelve men with different points of view, training and experience seemed an ideal method of separating justice from cruelty and caprice. But he promptly attacked the whole theory of unanimity, slipping in another illustration as an argument. He said:

"A more nearly unanimous vote can be secured when men are swayed by their emotions than when they are governed by their reason, because the feelings are more surely touched than the reason can be convinced. In August, 1905, the Norwegian people voted on the question whether they should remain in the Union with Sweden or become entirely independent of the Swedes and the house of Bernadotte. Out of a vote of over 321,000 only 161 were cast against independence. The majority was 2,000 to 1 in favor of freedom.

"Had they been asked to decide by vote whether or not their country is cold, there would have been far greater disagreement, because it would be a question of evidence. Most of them might vote that it is cold; but when the snow goes off and the ice goes out of the fiords and the sheep and cattle move into the mountains and the country is sun-kissed above almost any other land on earth, who then among them would vote that his country is cold? The evidence of their own senses would be

against them. A reliable judgment would require the weighing of evidence, the balancing of facts against each other, and a general knowledge of world conditions. Tens of thousands would vote their conviction that Norway is an ideal country, and cold only to the thin-blooded, frost-bitten weaklings of other countries.

In other affairs of men a majority of two thirds is regarded as striking proof that the facts are plain and the arguments convincing; and that the minority is actuated by reasons and motives that have no direct bearing on the principal issue. When the question at issue is one of great importance, the small minority is largely composed of a residuum of voters, doubtless honest, but either prejudiced, or unfit by nature or training to form independent judgments, or of vacillating minds that cannot keep a steady course but veer with every breath of opinion. As you approach unanimity the little minority more and more clearly takes on this special character of an irreducible element that is insoluble in normal reason and feeling.

"There is an interesting discussion of the principle of unanimity in the *Federalist*. Hamilton voiced the recent and bitter experience through which the Confederation had gone. When he came to the old rule that required the vote of nine of the thirteen colonies to carry any important matter he said, 'A rule destructive of vigor, consistency or expedition . . . must always make the spirit of government a spirit of compromise and expedience, rather than of system and energy.' In another place he said, 'the necessity of unanimity in public bodies or of something approaching towards it, has been founded upon a supposition that it would contribute toward security,' but he showed that the results are the reverse of what was expected."

I interrupted him to say that Hamilton was dealing with questions of future public policy, in which there is always legitimate difference of opinion; while the jury is expected to deal only with thoroughly established historical facts.

"Evidence," he replied, "even as it is presented to juries, is not the simple thing it is supposed to be, but involves the same qualities of probability as the facts on which men in the outside world base their judgments. What Hamilton said of the principle of unanimity in political history is true as it is applied to the jury. 'The history of every political establishment in which the principle has prevailed is a history of impotence, perplexity and disorder.'

"There is a curiously false assumption in the supposition that present methods of selecting the jury eliminate the usual elements of moral and intellectual uncertainty. The chances of securing a mistrial or a compromise verdict are so great that as one who is himself a great jurist said, 'lawyers almost invariably seek jury trials in causes which they regard as doubtful, and shun them in causes which they regard as strong.' One of the most nearly indefinable and yet one of the most powerful circumstances that brings undesirable elements into the jury in spite of the most careful application of formal rules of selection, is the fact that the ordinary mind is under severe constraint while undergoing examination for fitness as a juror. He does not need to be dishonest to deceive both himself and his examiners as to what he will do about evidence that he has not yet heard. This constraint in a large measure continues through the trial. When he enters the jury room, especially after a long, hard trial, there is a tremendous reaction of wilful-

ness. For the first time he is at liberty to break loose mentally; and whether it is pleasant to consider or not, it is an unfavorable time for the exercise of calm judgment. For very many men, it is the time when individual peculiarities of mind and opinion, instead of being subdued, break out almost resentfully. This, while not true of all men is true of so many that the unanimous verdict is one sure way to avoid justice. But being only a common ass, I merely recommend the mind of the juryman to the practical psychologists as a most interesting subject for practical study.

"Ex-President Taft, who was himself a federal judge before he was President, in an address to the graduating class of the Yale Law School in June 1905 summed up in a few simple, stinging sentences the condition of your judicial procedure. He said, 'It is by no means clear that in our jurisprudence trial by jury in civil cases is an unmixed good. . . . I grieve for my country to say that the administration of criminal law in all the states of the Union (there may be one or two exceptions), is a disgrace to our civilization.' He explained that the difference in efficiency between this country and England is due to the fact that in England the judge is a real judge, who has complete control of the case; and after the conviction there is no appeal in criminal cases unless the judge himself wants certain questions of law passed upon by the higher court. He said further, 'The institution of trial by jury has come to be regarded as a fetish to such an extent that state legislatures have exalted the power of the jury and diminished the power of the court in the hearing of criminal cases. The function of the judge is limited to that of the moderator in a religious assembly. The counsel for the defense, relying on the

diminished power of the court, creates by dramatic art and harping on the importance of unimportant details, a false atmosphere in the court room which the judge is powerless to dispel and under the hypnotic influence of which the counsel is able to lead the jurors to vote as jurors for a verdict which, after all the excitement of the trial has passed away, they are unable to support as men.' Taft believed that the enormous increase in crime is traceable to the inefficiency of criminal procedure, and said, 'Murder is on the increase and so are all offenses of the felony class, and there can be no doubt that they will continue to increase unless the criminal laws are enforced with more certainty, more uniformity, more severity than they are now.' Did you know that there were nearly 132,000 murders and homicides in the United States in the twenty years 1885-1905? If the slaughter, instead of being indiscriminate, had been confined to lawyers, there would not be a lawyer left in the country."

We agreed to adjourn with the understanding that His Highness would receive me later in the day if I chose to seek him out, and if he had nothing more important on his mind.

XIII

Jury Stories

I found him late in the afternoon at a little spring, where he and another burro were delicately nipping each other on the shoulders. I sought to have him devise changes in the jury system that would do away with the objections which he and Taft had raised against it. But his mind had become too playful to work so hard, and he began to tell stories about the performances of juries. Among the tales he told were the following:

"A juror in Kalispell, Montana, accepted a bribe to influence his action in a murder case. He stood out alone against the other eleven and forced a disagreement. But he bragged about it to his wife. Even that would have caused him no trouble because a wife cannot testify against her husband in a criminal action. But she got a divorce from him; and that made her a competent witness. She testified against him and he was undone; he was found guilty and sent to the penitentiary for two years for taking a bribe. But for every juror that brags and then is divorced there are a good many that hold their tongues. All the public ever knows is that there has been a disagreement and that the unanimous verdict is a serious matter.

"In 1905 a jury in Oakand, California, after seven hours of deliberation, brought in a verdict of 'not guilty' in the case of a man charged with embezzlement of his employer's funds. The public has no right to know what goes on in the jury room, but even American good na-

ture sometimes revolts, and after the trial it transpired that the jury had stood eleven for conviction and one for acquittal. The twelfth man could not understand a point of law and the other eleven spent the seven hours explaining it to him. He would not yield, so they, being sensible men, and knowing that a disagreement of the jury would mean a new trial and a heavy burden on the public treasury without any assurance of a better result, settled the matter for good by bringing in a verdict of acquittal.

"In Reno, Nevada, after being out sixty-four hours and standing eleven for conviction of murder in the second degree and one for acquittal, a jury was discharged from custody. The twelfth man claimed that he had learned by inspiration from God that the defendant was innocent."

"Your cases," said I, "are all from the wild West. Perhaps east of the Rockies the juries are less freakish."

"Very well," said the desert Burro, "I speak so much of the West because I love it over much. The air is dry and there is a fine spirit of fair play that one would think is the best foundation for a sound system of justice. But let us take Minnesota. It is cold enough there to make the blood bound freely. The people are all of cold temperate origin, not given to violence of feeling, but gifted with the power to act together. The population is greatly mixed, so that there has been a great grinding of ideas and a steady forward look.

"Mayor Albert A. Ames of Minneapolis had during his term of office corrupted men high and low in city politics, violated every rule of honor by which decent men control themselves and judge their fellow-men, and debased his beautiful city to a condition of moral un-

cleanness that made her an object of derision to her sisters in the Mississippi Valley. The worm turned at last. He was driven out of office, brought to trial for corruption, and convicted. He appealed the case and the Supreme Court of the state reversed the lower court on a technicality. Then began a famous legal chase for results. He had in all five trials. Once he ran away to Vermont. The question of his sanity was raised.

"Convicted at the first trial, the Supreme Court granted a new trial. The second trial ended in a disagreement of the jury; the third trial also ended in a disagreement. In this third trial the defendant owed the result to one juror, who stood by him for sixty-nine hours and refused to let the eleven other men vote Ames into the penitentiary. Those eleven had voted for conviction from the first. The fourth and fifth trials ended in disagreements. Then the test of endurance was completed. The county attorney moved that all the indictments against the defendant for bribery and corruption be dismissed, and the district judge granted the motion. Exhaustion, not justice, had triumphed. Ames was a free man; and the record of his public career will be a purple blotch on the city's fame for years to come."

I was attracted by the human interest of his stories, but suggested that it is generally admitted that the state courts are less effective than the federal courts and that perhaps federal juries might well be imitated by the state juries. The suggestion roused my friend the Ass.

"Oh, yes," he said, "they are just enough better to show clearly how much they both need improving. During 1904 and 1905 enormous frauds in connection with the private acquisition of public lands were unearthed in several of the western states, notably in California,

Oregon and Montana. Among those prosecuted was a man who had tried to bribe a former United States district attorney to hush up the land fraud cases in Oregon. The trial was a long and very careful one; but the jury, after being out a long while reported that it could not reach an agreement. They stood ten for conviction and two for acquittal. When the presiding United States district judge dismissed the jury he stated the merits of the case and called the attention of the prosecuting attorney to the fact that the jury had disagreed in the face of evidence that warranted but one verdict, and that was conviction. He urged the district attorney to summon the members of the jury before the federal grand jury in order that a thorough investigation might be made. Two of the jurors were friends of the defendant.

"Several other important trials were held in Oregon in connection with the same series of land frauds. A jury did convict one man, a United States senator, but recommended him to the mercy of the court. He had celebrated his seventieth birthday during the trial, and out of consideration for his great age the presiding judge imposed the light penalty of $1,000 fine and six months imprisonment. He appealed the case to the Supreme Court of the United States, went on drawing his salary as senator, and died without serving any part of the sentence or paying the fine.

"A representative in Congress, and his partner in the sheep business, and a United States land commissioner were put on trial for subornation of perjury in the same series of frauds. The trial lasted two weeks. The jury was out forty-six hours and took forty-two ballots, and stood ten for conviction and two for acquittal. The two stubborn jurymen who voted so persistently against

conviction offered to vote the other two defendants guilty if the rest of the jury would vote for the acquittal of the Congressman. Stop long enough to consider carefully this proposition in all its bearings. The case was tried three times. The Oregon Congressman was found guilty; but he appealed the case, and the stars alone can tell what finally became of it.

"A calm analysis of the results in this series of cases puts in a pitiable light the desperate efforts of the government of the United States to convict a crowd of thieves whose guilt was patent to all the rest of the world. At one stage of the work, after many months of the most strenuous effort on the part of many capable public servants, and the expenditure of tens of thousands of dollars, the record showed the conviction of one old man, with a petty sentence hanging over him which the law of probability indicated beforehand would never be executed. In this series the cases were all important, the evidence was good, the prosecution was vigorous, the judges were as able as any in the country, and the conditions in the government land business at that time required drastic measures to set matters right. There was no special reason why the results should have been what they were except that the defense was able and powerful, and fought hard.

"Many other important prosecutions were undertaken by the general government against individuals and corporations at about this time and as a rule the trials revealed the same general characteristics as those I have been talking about. They show what a great and powerful government cannot do—bring guilty men to prompt and adequate punishment when those men are in a position to make a vigorous fight to prevent it."

I asked, "Why are you so greatly interested in cases? They are interesting, but difficulties in detail are bound to occur in so great a system."

He looked at me with a smile of sympathy and flavored his words with a tone of sarcasm. Why should not an Ass make a careful study of cases in order to decide what to do next? Lawyers do it, judges do it. In fact the whole system of judicial philosophy is now laboring under an endlessly increasing collection of cases. Because not all jury cases reveal the traits that I have described is no argument against my position. The comparatively few jury cases that are commendable only make the general darkness visible.

"The cases I have given fairly typify the workings of the jury system. But the most grievous thing about it all is, not that now and then the results are so foolish as to startle the public, but that the products of the system as a whole constitute so poor a quality of performance. In my asinine opinion the gravest result is not the large number of miscarriages of justice and the enormous friction, cost and delay, but the general conclusion about justice which the American people have arrived at. Both the increase of crime and the growing indifference to the enforcement of law have doubtless been due to the feeling that law cannot be enforced. And in its present form the jury contributes largely to the demoralizing result."

"But do you not think," said I, "that there is a faint light on the horizon? In some states the law now provides for verdicts by four-fifths or five-sixths of the jury. What have these slight changes accomplished?"

"Wonders," said the Burro. "The interests of justice have been fully protected, the baneful power of a

single unjust juror has been crushed, the chances of successful bribery have been greatly diminished, and the tendency to unanimous agreement has actually been increased. This last result is due to the fact that men of weak or warped or ill-trained intellect, when honest, do not wish to be left out in the cold, and more readily join their comrades in a verdict. When the unanimous verdict is forever done away in the interest of common sense, it will be possible for the jury to express the sentiment of the community without first bowing the knee to the forces of evil and stupidity."

The last interviews left me in á state of depression. Dynamiting at the foundations of one's convictions, sweeping assaults on forms and principles to which the mind has been accustomed from childhood and to which it always reverts in times of distress, are likely to create mental anxiety. The Anglo-Saxon method of dealing out justice, of giving every man what is coming to him, seemed to me the best that could be devised, even with all its admissible faults, because it had been worked out in a long struggle for personal rights, by a people gifted with practical sense, and with infinite care. The more theoretical and complete the criticism, the less likely, it seemed to me, would it stand up under the test of practice. But instead of devising a counter-attack, I retired from the scene.

XIV

A Successful Revolt in California

Next morning long before the sun began to warm the western slopes, I climbed out of the cañon to the top of the Panamint Range. The spiritual pulse bounds vigorously when the legs are doing uphill work; and I strongly recommend, as a result of my experience, that the defeated, mentally exhausted, spiritually dejected, let their minds alone and work their legs uphill a mile or two skyward. This flanking movement will rout the most stubborn depression. By the time I had reached the broad area north of Baldy the warm October sun had prepared a time for sleep. I lay for an hour, dozing and brooding lightly on the general futility of human institutions. The God-made things, the peaks with their snow-caps, Death Valley with its quivering heat, the trickling water and the burning sand, the cloudbursts in the mountains and the dust clouds in the deserts, these help to set new standards of value. None of these ever submit kindly to criticism, but are great feeders of contemplation. The critic's place in nature looked pitifully small from up there. Both spiritual and physical weariness oozed out of my legs while I lolled in sleepy comfort; and took in great courage through the lungs. I wondered why it might not just as well be everlasting.

I rose and stretched myself, and climbed to the top of Telescope Peak. On my left was the deadly heat of Death Valley and on my right the deadly cold of Mount Whitney, both within easy range of the eyes. I felt equal

to it all. Here I plotted the undoing of the Ass. I would seek him again and ask him to furnish the specifications for some constructive plan by which the American people could get prompt, cheap, and effective justice.

After an hour of world-gazing from the top of Telescope, I ploughed southward through the sliding shale on the southern slope of that desert chief. Growling shale, laborious snow-fields, clinking plates and thundering blocks of rock, and contentious mountain shrubs all gave me work to do on the long southward drop into old, deserted Panamint.

After a day's rest I gathered up my scant equipment and put it on the little black burro, which made no complaint about her burdens and cared nothing for our intellectual doings. I was going to leave the desert. When I got back to Wild Rose I learned from the Indians that when last seen the band of burros was headed north, gathering numbers as it went. I assumed that Emigrant Springs would be their next stamping ground; and that night I found them at the iron water trough at the lower Emigrant Spring, munching stray bits of straw and picking up scattered barley kernels that some hard-working burro had not had time to finish before his pack was put on.

I finally came upon the Ass the next morning high up on the flank of Pinto Peak. He gave me a look of friendly interest, mixed with a mild wonder at my persistence in pursuing so one-sided a contest. I told him that I had spent a good deal of thought on his contentions, and then went on: "Assuming that all the criticisms you have levelled at the judicial methods of this country are sound, it is still true that the system is the product of a long historical development based on elementary prin-

ciples of justice which no one disputes. It is no violent assumption that an instinctively practical people worked out one of their most important institutions by applying those principles to the problems of life. What safer method can there be? What imaginable substitute, founded either on experience or sound principle can you suggest?"

"I have already pointed out," said the Ass, "how a consistent development of an institution, in the hands of a special class of men who control all phases of that development and at the same time feed upon the proceeds of the system, may land the whole process in the bogs of shallowness, formality, and ineffectiveness. As for a substitute, history again shows the direction from which relief always comes. Practical necessity devises a way to accomplish the necessary business. The new way is usually destructive of the old one merely by shouldering it to one side. It is always simple and direct, relatively swift in action, and effective. And more often than not, those most interested in preserving the old system are unconscious of the fatal blow that has been struck at their Beloved until it is too late. Commonly the blow comes from an under-water torpedo."

I interrupted him to say, "I had hoped that without further reference to historical principles and data you might be able to furnish a key to the present problem."

"That is unnecessary," he replied. "The fatal suggestion has already been made and is working itself out. Did you ever hear of the Public Utilities Act of the state of California? It covers more than fifty closely printed pages, and is apparently long enough to lose its purpose in endless flounderings in an ocean of verbosity. But if the lawyers of the state should study that law and its ultimate significance as that has been worked out in the

decisions that have been made under it, they might recognize the fact that, instead of being one more mess of legal complexity, it is a torpedo of highly explosive gun-cotton, directed as straight as an arrow by the gyroscope of public intention, at the very vitals of the whole complex system of judicial procedure. In its every aspect it violates the most sacred judicial tenets, and tumbles into confusion all the legal thimble-rigging, delay, cost, and complexity on which the financial support of the legal profession so largely depends. It has solved the problem of cheap, swift and effective justice of a very high quality.

"The first and mortal sin of that law is that the machinery for its enforcement is as simple as a buzz-saw, and just as effective. It constitutes the Railroad Commission of five members appointed by the governor for six-year terms, provides for a secretary, and authorizes the commission to hire whatever professional experts and employes it may need, gives it control of all the public utilities in the state outside of incorporated cities, removes practically all the so-called reasonable limits to its power, and religiously fences off the judicial powers of the state from interfering with the work of the commission. But in 1914 the people of the state adopted an amendment to the constitution placing all utilities, both in and out of incorporated towns, under the jurisdiction of the commission.

"In its field of activity the commission exercises legislative, administrative and judicial powers. It exercises the powers of superior courts, including judge and jury, the superior courts are forbidden to interfere with the commission, but the law compels them to enforce the decrees of the commission. The theory of the jury is shat-

tered to atoms. The people of the state first adopted an amendment to the state constitution establishing the power of the Railroad Commission over public utilities, and giving the legislature authority to grant to the Commission any additional similar or different powers not inconsistent with those already granted in the amendment itself. They first put their general intention into the constitution, where the courts cannot touch it, and then give the legislature plenary power to make any laws it pleases on the subject, and practically notify the Supreme Court of the state in advance that any such laws which the legislature may pass will be in harmony with the constitution and beyond the scope of the court.

"All through the plan there runs the spirit of a special dispensation relieving the commission from the force of restrictive rules, and, as it were, unbinding and turning loose the old, instinctive spirit of Anglo-Saxon justice. The powers of the commission are so great that even the political parties in their platforms admit that it ranks second only to the Supreme Court; and its effectiveness has proved so great that in the political campaign of 1914 no one who valued his political life dared to advocate openly the abolition of any of its powers."

"The qualifications of the commissioners," I remarked, "are doubtless such that only judicial experts can be appointed."

"Oh no," replied the Ass, after rubbing his nose on his leg, "those qualifications are also a seven days' wonder. With such tremendous powers, traversing the whole field of court and jury, law and equity, a commissioner does not have to be a judge or even a lawyer, nothing more than a plain, qualified elector of the state. Actually, most of the members of the new commission

were lawyers, two of them young men, and none of them had ever served on the bench, even as a justice of the peace. In many phases of its work, such as determining the value of public utilities for condemnation purposes, it assumes the powers of a jury, but it curiously ignores the unanimous rule. The act of a majority of the commission is an act of the commission; worse still, any investigation, inquiry or hearing which the commission has power to undertake may be taken by a single commissioner designated by the commission, and every finding, order or decision made by that commissioner, when approved and confirmed by the commission, is the finding, order or decision of the whole commission.

"'The railroad commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.' The commission may do all these things upon complaint of some one else; but it may also do them of its own motion. To this end it has power to administer oaths, subpoena witnesses, order the production of books, papers, or any other material evidence bearing on the matter at issue, enter the premises of a public utility to make its investigations, and commit for contempt. In addition, the courts of record are required to do these things for the commission when called upon to do so; but these same courts are forbidden to interfere in any way with the work of the commission.

"All the hearings and investigations of the commission are governed by the provisions of the public utilities act and by such rules of practice and procedure as the commission itself may adopt; and in the conduct of their

investigations and hearings neither the commission nor any commissioner is bound by the technical rules of evidence. When the commission first began active work the lawyers representing the parties busied themselves raising objections to the introduction or exclusion of evidence, and in general conducted themselves as they were accustomed to do in the courts. The commission waved them aside, and not only let witnesses tell their stories in their own way, but often when a witness got tangled up, the commission helped him get started again. The parties to an investigation shall be heard; but the commission may and does investigate the facts independently and it has the power to consider every fact that does or may have a bearing on the issue. No informality of procedure or in the manner of taking testimony can invalidate the orders or decisions of the commission. Let us both be content with the suspicion that this brutal overthrow of the technical rules of evidence is intended to increase efficiency. All matters upon which a complaint may be founded may be joined in one hearing, and there can be no motion against the complaint on the ground of misjoinder of causes of action or misjoinder or non-joinder of parties.

"The commission has power to ascertain the value of the property of every public utility in the state and every fact which in its judgment may or does have any bearing on such value. Any city, town, county or water district may initiate condemnation proceedings in a court of competent jurisdiction to take over a utility at the value set upon it by the commission. This finding of value on the part of the commission is conclusive as between the parties. If after the money has been paid the public utility fails to execute a deed the commission may execute the deed as the trustee of the public utility.

"Parties affected by the orders and decisions of the commission may ask for a re-hearing. If it is denied, or if it is granted, within thirty days after the decision at a re-hearing, the parties may ask the Supreme Court for a writ of review for the purpose of having the lawfulness of the commission's decision inquired into and determined. The commission's record is certified to the court and the cause is heard on that record. No new evidence may go before the court. Thirty days are given for the return of the writ and the cause must be heard on the return day unless good reason is shown for a continuation. All actions and proceedings in court under the public utilities act have precedence over all civil cases except election cases, irrespective of their position on the calendar.

" 'The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the state of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review.'

"No court in the state (except the Supreme Court, and that only to the extent specified), has any jurisdiction to review, reverse, correct or annul any order or decision of the commission, or to suspend or delay the execution or operation of such an order or decision, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *'provided,* that the writ of mandamus shall lie from the supreme court to the commission in all proper cases.' Ah, that delicate, satanic touch. Even the Supreme Court may only com-

pel the commission to act if it proves unwilling, but cannot stop it when it is started.

"The pendency of a writ of review does not of itself stay or suspend the acts of the commission; that must be done by direct order of the court. And such an order cannot be issued casually as a mere formality to block the work of the commission until the court finds it convenient to look the matter over. If an order or decision of the commission is suspended the court's order must contain a specific finding based upon evidence submitted to the court 'that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage.'"

XV

The Railroad Commission at Work

THE FIRST writ of review under the public utilities law was issued by the Supreme Court in the case of the Pacific Telephone and Telegraph Company against Eshleman (president of the Railroad Commission). In its opinion the Supreme Court, with apparent bitterness of spirit, acknowledged the validity of the law and pointed out its remarkable peculiarities. Among other things of great interest it said, 'In this consideration the first established fact is that section 67 of the public utilities act does, in violation of all precedent and decision, seek to enlarge the purview of the writ of review. . . . The second fact, which cannot be blinked and must be faced, is that the legislature has with deliberation restricted and curtailed the jurisdiction vested in the superior courts of this state by the constitution.' The court went on to say further, 'In view of these considerations we regard the conclusion as irresistible that the constitution of this state has in unmistakable language created a commission having control of the public utilities of the state, and has authorized the legislature to confer upon that commission such powers as it may see fit, even to the destruction of the safeguards, privileges and immunities guaranteed by the constitution to all other kinds of property and its owners. And while under our republican form of government . . . it is perhaps the first instance where a constitution itself has declared that a legislative enactment shall be su-

preme over all constitutional provisions, nevertheless this is but a reversion to the English form of government, which makes an act of Parliament the supreme law of the land. . . . So here the State of California has decreed that in all matters touching public utilities the voice of the legislature shall be the supreme law of the land. This constitutional decree is, of course, binding upon this court, and under it, it becomes the duty of this court to lend its aid in giving effect to every power and prerogative with which the legislature may vest or clothe the railroad commission. This, however, is subject to one all-important limitation. There is still the constitution of the United States.'

"Could there be a more complete wrecking of an elaborate system of judicial procedure?" In answer I suggested that probably the powers granted the railroad commission were after all greater than were really intended. But the Ass replied: "The Supreme Court itself emphasizes the deliberation which the people and the legislature exercised. And no one can read the law itself without coming away with the impression that not only was all this done deliberately, but with the definite purpose of making the commission so powerful that nothing could stop it from accomplishing results. Apparently careful attention was given to every device by which the independence of the commission could be strengthened. As the court itself pointed out, the commission exercises all three functions of government; it has legislative, administrative, and great judicial powers."

I asked, "Why was there such a jumble of powers? The very foundations of our state and federal governments rest on the principle that the three great divisions

of government shall not only be exercised separately, by distinct departments and individuals, but that there shall be a system of checks and balances, an interlocking dependence of each on the others. It is hardly to be wondered at that the Supreme Court of California spoke with some energy when it discussed the utilities law."

The Ass gazed for a long time in the direction of Emigrant Wash, as if he were expecting intellectual reinforcements, and then replied: "The purpose to give these great powers to the commission could not have been made plainer if it had been written down in words. It was evidently done to destroy those very checks and balances which have practically destroyed the efficiency of the system. What has hitherto always happened when an administrative board issued orders or rendered decisions which a corporation did not want to obey? All that was needed was an injunction. That was the first step in a long and usually futile legal contest; futile because it suspended the power of the board; and even if the board won the victory, that victory was often too late to be of any value."

I said that I had once suggested fewer illustrations and more general analysis, but now I wanted him to give cases that would actually prove the superior worth of the new California way. He appropriately chose the case of the city of Palo Alto because it was the first municipality to commit the control of its public utilities to the hands of the state railroad commission. He said, "The Palo Alto Gas Company bought its gas at wholesale from the big Pacific Gas and Electric Company, and charged $1.50 a thousand feet. The outrageous price was tolerated for several years, but after a while the city council started an investigation with a view to fixing a

gas rate. Its efforts to secure information from the company about the distribution of gas pipes, value of plant and other items was truly pathetic; but still typical of what always happened in such cases. The company turned the investigation into a farce; but the council, after securing such facts as it could, set the gas rate at $1.25. The company promptly got a writ of injunction from the superior court and the case promised to run the usual endless course. The rate could easily be held up for a year, the company meanwhile collecting what it chose; at the end of the year the rate would have to be fixed anew, and would be subject to a fresh injunction.

"But the community adopted a brilliant course. While the injunction was hanging fire in the court, the town, by a vote of thirteen to one, decided to give over the control of its public utilities to the railroad commission, filed a complaint about the price of gas and asked for a hearing. It was as if some one had broken a plate glass window. The commission ordered a hearing. It came promptly and was held by a single commissioner. *All the evidence* was promptly forthcoming. It was serio-comic, the grace and kindness with which lawyers and gas officials submitted to control. There were no technical rules to interfere. In a remarkably short time the one commissioner who conducted the investigation had heard all the evidence that either side wanted to introduce; the commission's experts had made a thoroughgoing independent investigation of the facts; the hearing was adjourned to the city of San Francisco and the big producing gas company had to submit to an investigation which included the value of its plant; and there was a prompt decision. The city council had been will-

ing to let the company collect $1.25 a thousand feet, but the company blocked proceedings with an injunction. The commission set the rate at only $1.20 and the rate went into effect without any ado when the commission said it should. Was not that whole performance a judicial curiosity? That, I fancy, was what the people of California had in mind when they tied the hands of the courts and gave the railroad commission practically unlimited authority to deal out prompt, cheap and effective justice."

I admitted that the case was a curiosity, and predicted that in the long run there would be the usual and inevitable and justifiable delay and struggle. But the Ass appealed to the record of the commission's work for proof of his general contention and the wisdom of the people. He said:

"In about two and a half years from the time it began its work the California Railroad Commission dealt with more than 1500 formal cases and more than 3600 informal matters. Many of these cases were of the most vital and far-reaching importance, involving elaborate investigations of rates, unfair practices, discrimination, the value of great public utilities and their financial methods and needs. It has been fairly claimed that the commission has saved each year to the people of the state at least $6,000,000; and it has forced better service, set higher standards, and done all this without real injury to the corporations. In fact, by forcing the water out of their securities it has done much to strengthen their value as investments.

"It is easy to calculate the rate at which decisions were made by the commission. After allowing for Sundays, holidays and legitimate vacations, it is generous to

say that the members of the commission could work effectively two hundred days in the year. Even the formal cases alone would furnish an average of six hundred a year, or three cases a day for five men to consider. This, to my mind, is one of the most astounding results of the disorderly public utilities law."

"Such speed," I observed, "will ultimately lead to premature decisions and confusion. The utilities law may turn out to be the mother of tumult." But he replied, "The effect of the enforcement of that law for less than three years has been such that the people of California regard their railroad commission as one of the most powerful and beneficent institutions in the whole nation. Its labors have not only rectified many specific wrongs, but have created an atmosphere in which it is no longer profitable for public utilities to pursue unfair practices. They are assured protection in all reasonable activities and there is a lessening desire to exploit their opportunities unfairly. After two years and a half, in a political campaign of great bitterness, there was not a political party, there was not a candidate, that dared to suggest openly that the commission ought to be hampered or hamstrung. And as if to set the seal of their highest approval on the work of the commission, the people of the state, in the general election of 1914, adopted two more constitutional amendments to extend and strengthen the powers of the commission."

I offered the opinion that the plunging activity of the commission would be steadied after a while by the decisions of the state supreme court and the federal courts in the cases that would be taken up on review. But he was ready with a reply.

"Of the more than 1500 formal decisions and orders

issued by the commission in the first two and a half years, only eight had been carried up to the supreme court of the state for review. Six of these had been acted upon. And there is nothing in the judicial history of the state that so plainly exposes the obstructive relation of your courts of appeal to the actual wants of the people and to the great drift of modern thought. The first case to go before the supreme court was that of the Pacific Telephone and Telegraph Company against Eshleman (president of the railroad commission). The local telephone companies of Glenn county and Tehama county petitioned that the Pacific Telephone and Telegraph Company be compelled to let them connect their systems with its long distance wires, so that their patrons might have the benefit of long distance service. They agreed to pay the cost of making the connections and that they would pay a reasonable rate for the long distance service.

"The commission ordered that the connections be made. The case was carried to the Supreme Court of California on a writ of review, and the court held that in effect the order amounted to a taking of property without compensation, contrary to the rights guaranteed by the state and federal constitutions. The order of the commission was annulled, and as the law did not provide that the commission itself might appeal to the federal courts, the annulment was final.

"But the laborious reasoning of the state Supreme Court ended where it began. The Supreme Court of the United States had frequently upheld state railroad commissions in forcing railroads to make physical connections with each other; but the California court held that there was some difference between the telephone case

and the railroad cases. But its laborious attempt to draw a distinction came to naught. In an Oregon case before three federal judges, Wolverton writing the decision, the same question came up in a case of the same telephone company. The company relied on the California decision in its argument before the federal court, but the federal court specifically rejected the view of the California court and the telephone company lost its appeal. The Supreme Court of Idaho likewise has refused to adopt the view of the California court. Thus was the very first decision of the California Supreme Court relating to the public utilities law discredited in both the federal courts and the courts of other states. And as if Fate itself had become malicious, on the very day that the California court rendered its decision, the Bell Telephone Company, the parent company of the Pacific Telephone and Telegraph Company, agreed with the federal government that it would make physical connections with other telephone companies without any pay other than its share of the tolls.

"In its effort to undo the work of the commission the California court had only done what commonly happens in the tangles of judicial interpretation; it merely blocked for a while a necessary, legitimate and inevitable step in the development of public utility practice. This time, at least, the decision of the court, so solemnly worked out, was utterly ineffective because time, progress and business sense were all opposed to it. This episode of the court's first decision is especially interesting because it enforces the doctrine that judicial service can never effectively conserve the interests of the people unless it interprets the principles of government in the light of present needs and future outlook."

XVI

Commission and Court: A Contrast

After a short rest my friend the Ass went on: "An unbiased examination of the few decisions which the Supreme Court of California has handed down in the cases that have come before it under the public utilities law might set not only the people but the lawyers to thinking seriously about the true relation of that court to actual conditions of life as they exist in California. In the case that we have examined the judgment of the railroad commission has been completely justified by time and the courts of the nation, and the judgment of the court has been utterly discredited. But the court had done only what had been done thousands of times before in the decisions of the appellate courts. There was merely an over-nice anxiety to preserve the letter of an ancient rule and a general disregard of the changes that have already taken place in the views of the people. The decision of the court is further interesting in that it has turned out to be, in spite of its labored solemnity, not a necessary judgment founded on sound principles, but merely an opinion which has been proved worthless both in theory and practice.

"In this case the great corporation used the courts to thwart the will of the people, and the argument that its property was being taken without due process of law was proved false by the act of its own parent company. It will be well to consider a railroad case that illustrates this serious assertion. The Southern Pacific Railroad

charged a rate of $1.20 a ton on lumber for the twenty-four mile haul from San Pedro to Los Angeles. A complaint was filed with the railroad commission, which, after a careful investigation, pronounced the rate unreasonable and fixed a new rate of $.80 a ton to become effective on a certain Monday afternoon at three o'clock. The commission was informed that the company would file a contest. The railroad officials suggested that the commission arrest the freight agent at San Pedro for disobeying the order of the commission. The commission replied that it was not arresting freight agents or any other subordinates; if the rate did not go into effect at the time set, the president of the road would be arrested and prosecuted.

"All the amenities of judicial contests between the state and the big corporations had been forgotten. Here was a coarse disregard of official dignity, precedent and decency. But the new rate went into effect at the appointed time. All this, however, was only the preliminary playfulness of heat-lightning. Much of the lumber came from Oregon and Washington; thus there was involved a question of interstate commerce, and the railroad took a case into the federal courts, making oath that the new rate was confiscatory. But the federal court was not impressed and upheld the state railroad commission.

"But that was not the worst thing that could happen. Sometimes a skilful hunter misses his mark because a little gnat flies into his eye and spoils his aim. The wagon road was good, and some private citizens decided that they could compete with the railroad by hauling lumber from the wharf directly to the jobs in Los Angeles on automobile trucks. And so it befell that very shortly after the railroad had filed its protest with

the commission and made its oath about confiscation in the ear of the federal court, that same railroad company appeared before the commission again, but this time with a request for permission to reduce the rate still further to $.60 a ton. Once more the stubborn commission refused to listen, and forbade the reduction on the vulgar ground that lumber could not be hauled at that rate without loss, and the commission would not give its consent to the practice of hauling freight at a loss in one place to crush competition, and then make up the loss by excessive charges somewhere else.

"In another case that went to the Supreme Court of California on a writ of review the commission had forbidden the Oro Electric Company to exercise the franchise which the city of Stockton had given it to build and operate an electric light system in addition to the one already furnishing light in the city. The commission did this on the ground that it was against public policy to let a light company invade territory already provided, because in the end the taxpayers are the ones who have to bear the burden of such duplicate systems. Practically every city in the nation has at some time or other been sweated by some corporation in its effort to get back the money it spent in buying out some rival, whose coming into the game at all was probably little more than gigantic blackmail. But the order of the commission was annulled on the ground that under the law the city retained control of its utilities in every respect until it voted control into the hands of the commission. The commission asked a re-hearing and proved that the Stockton charter, on the powers of which Judge Shaw relied when he annulled the order of the commission, had not gone into effect when the commission made its

order. The court thereupon vacated its own order of annullment.

"The commission had ordered a water company to lay pipe and furnish water to an outlying resident of Del Mar. The company carried the case up for review, claiming that it was not a public utility. Two judges of the Supreme Court handed down an opinion that the company was not a public utility, and four other judges hinted that the company was not a public utility but held that in any case the company was not under any obligation to serve the territory in question. The conditions under which this company operated were typical of more than half of the water companies in the state, and this annullment would have removed all of them from the jurisdiction of the commission. The commission asked for a re-hearing, and this time the court ruled that the original opinion that the company was not a public utility could not be used as a precedent, but again annulled this particular order because the commission itself had not proved that the company's water was dedicated to this particular territory.

"The two water companies of Glendale charged $15 for the installation of meters and service connections. The commission gave a decision that the companies must make the installations at their own expense, but with the understanding that consumers must pay such rates as would cover the investment. The companies appealed and the Supreme Court again annulled the order of the commission. It held that the order was reasonable, but that it should have been enforced by Glendale itself, because the order was not a service regulation but incidental to the fixing of rates. Justice Shaw, who wrote the decision, held that sec. 11, art. xi,

of the state constitution, conferring upon municipalities the power to enact police regulations, gave to the cities and towns of the state the state's entire power to supervise and regulate public utilities within their limits, including not merely power over rates but also service, extensions, finances, and the issue of securities. The ruling was unnecessary to the decision in the case, and is for that reason all the more significant. For the effect of it was to oust the railroad commission completely of any jurisdiction whatever within any incorporated city or town in the state.

"The commission asked for a re-hearing and showed that the ruling was contrary to the views of legal writers of authority, contrary to a unanimous line of decisions in other states, and that such an interpretation of that particular section of the constitution turned many other constitutional, statutory and charter provisions into surplusage, in violation of a fundamental principle of jurisprudence. The court denied the commission a rehearing, but at the same time struck out of its former opinion all that part relating to its construction of sec. 11, art. xi, of the constitution.

"Some property owners in Otay Valley asked the commission to compel the city of San Diego, as the successor of a private water company, to furnish them with water for their land. The commission denied the request on the general ground that the city and other actual consumers needed all the water that could be supplied, and under those conditions it would not require that additional consumers should be added. The commission was upheld by the Supreme Court.

"On complaint the commission undertook to regulate the passenger rates by water between San Pedro and

Avalon on Catalina Island. The Wilmington Transportation Company carried the case to the Supreme Court and argued that although both places were in Los Angeles county and the boats did not stop anywhere on the way, they were engaged in foreign commerce while passing over the twenty-one miles of intervening open sea, and that therefore Congress alone had jurisdiction over them. They had a judicial argument to support their position. Justice Fields, of California, then a member of the Supreme Court of the United States, and sitting in 1883 as presiding justice of the federal Circuit Court for the district of California, held that vessels of the Pacific Coast Steamship Company, because they went outside of the three-mile limit between the ports of San Francisco and Los Angeles, were under the exclusive jurisdiction of the federal government. The state Supreme Court upheld the order of the commission, and the case was appealed to the United States Supreme Court. Early in 1915 the United States Supreme Court rendered a decision sustaining the state railroad commission.

"Thus the state Supreme Court had acted on six cases that were taken up for the purpose of overthrowing the orders and decisions of the commission. In the telephone case the federal court and the courts of other states have repudiated the opinion of the California court, and the telephone authorities themselves have agreed with the federal government to do the thing that the commission had ordered them to do in California. The general doctrine which the commission sought to make effective has triumphed. In the Del Mar water case the court practically ousted the commission from jurisdiction over most of the water companies of the

state, and then repudiated its own doctrine. In the Oro Electric-Stockton case and the Glendale case the court went to great lengths to cut off entirely the jurisdiction of the commission within corporate limits, and then withdrew its own doctrine in both cases.

"The net result to date of the Supreme Court's exercise of jurisdiction over the railroad commission is that in the little town of Glendale, the town itself instead of the commission should enforce a rule which the commission laid down and which the court itself admits is reasonable; and that in the little town of Del Mar the man who wanted water connections lived too far out to make his desire enforceable. Did the mountain labor and bring forth a ridiculous mouse? The railroad commission has yet to meet its first definite defeat on any of the very important propositions and rules for the conduct of public utilities that it has promulgated. Its forward-looking doctrines have been endorsed by the federal courts and other state courts, by the best legal opinion, by the California court itself, by one of the great corporations that contested a case, and by Father Time himself. As if there were no depth of judicial humiliation from which the Supreme Court of the state should be exempt, the people of California have now adopted another constitutional amendment which gives the commission the same jurisdiction over public utilities within incorporated cities and towns that it already had elsewhere in the state, and thus removes the last question of the commission's authority. In this prolonged contest, with precedent, history, and the powers of a great judicial system against it, the commission has brought out more sharply than has ever been done before in the history of the state the fact that the courts are not serving the future and that the commission is. The commission

has made fewer errors than the Supreme Court. The latter repudiated in full or in part its own opinions in three out of the six cases.

"The people of California were not in a ruthless mood when they revolutionized the whole method of dealing with the utilities, the most law-defying elements in the state. The courts had proved themselves utterly 'incompetent'; the people went the rest of the way and made them 'irrelevant and immaterial.' The constitutional amendments and the utility law have broken down constitutional guarantees, shattered the powers of the courts, wiped out the rules of evidence, and removed the boundaries of trial by jury. They spared nothing. And it was all done so deliberately that no one in California is recorded to have lost a night's sleep over the changes. There has even been a kind of hallelujah spirit, like that of a man who sings 'Once I was blind, but now I can see'; a political fervor born of oppression and release.

"These radical changes of procedure were made because there was a present and desperate need. For more than a generation the state had been dominated by the corporations and the courts had been their handmaids. No amount of eloquence or historical precedents or political and judicial philosophy can carry as much conviction as the former and the present condition of affairs in the relations between the people and the public utilities. All the radical innovations of principle and procedure were intended to secure directness, speed and efficiency; and the results have justified the course pursued. The change in this field of the people's interests only makes more vivid the conditions of delay, cost, uncertainty and exasperation that accompany the old judicial forms of thought and procedure."

XVII

Virile Commissions and Impotent Courts

"Is it not likely," I asked, "that this California experiment, so unique, so out of line with the normal course of public thought in the nation, will in the end be smothered under the pressure of general opinion; the more so when the people of the state have had time to realize what has happened to their governmental forms?" The Burro replied, "It is too late in the day to call the performance unique. The state has merely perfected a thought that has found expression in a variety of ways in many of the states of the Union, and even in the federal government. A few years ago Congress established a Commerce Court to sit in watchful solicitude and pass upon the doings of the Interstate Commerce Commission. A short experience with the court and its backward-looking performances cured the nation of the desire for such a court and it was summarily abolished. Many of the states have laws similar to those of California. The movement has gathered such momentum that there can never be a reversion to the old way of leaving the settlement of problems affecting the whole public to the inefficient methods of the old judicial procedure.

"California herself has done other things involving the same revolutionary notions. The public utilities law deals only with corporations and persons which, by virtue of their services, have a general public interest. All questions affecting their relations to the people have been practically removed from the jurisdiction of the

courts in the interest of prompt and certain results, on the theory that justice, to be of any value, must be prompt, for meanwhile the victims die. But the image-breaking process has been applied, both in California and in other states, to the relations between private individuals and between individuals and corporations.

"The California Workmen's Compensation Act takes another large class of cases out of the jurisdiction of the courts and places them under the control of a commission of common men. Before its day there were cases of the death of workmen in which the employer was clearly responsible. The widow brought suit for damages while her children were little, and those same children were grown up and able to support themselves before the mother finally got what she was entitled to through the courts. Under the old system the injured and their dependents got nothing but the husks, they had to feed on theory; and if they recovered anything, a large part of it went as attorney's fees. On the other hand, employers were harassed by the most cruel uncertainty. When the doctrine of compensation first began to be enforced in California one of the great corporations of the country voluntarily placed itself under the jurisdiction of the law. It had been incessantly harassed by blackmailing lawyers who worked up damage cases; and when it insured itself against damage suits in indemnity companies, those companies made a practice, when there was a case of injury, of fighting the claim in the courts instead of paying it. The net result was a feeling of chronic bitterness among its employes. Under the new law, with the courts and their methods eliminated, the employes have been certain of compensation, the company has known what to provide against, and both it and

its employes have known that the money would not ultimately pass into the hands of the lawyers.

"The Compensation Act authorizes the commission to ignore judicial practice both as to procedure and evidence; and by a set of rules concerning character of injury and for fixing compensation, leaves the commission to ascertain the facts in its own way. Damage suits are eliminated, and certainty of compensation takes the place of suffering and bitterness or interminable law suits with the injured always at a fighting disadvantage. The commission acts as judge and jury under the majority rule. As if to add insult to the ousting of the courts from jurisdiction over this whole class of cases, the act declares invalid any lawyer's claim or agreement for legal services in excess of a reasonable amount; and then leaves it to the commission to decide what is a reasonable attorney's fee for legal service to an injured party.

"It seems like an uneasy dream, but this is how the commission exercises its authority. An injured employe entered into a contract agreement with a lawyer to give him twenty per cent of whatever compensation he might receive. The commission refused to recognize the contract, as the law provides it may do, and declared it invalid. It allowed the lawyer twenty dollars for his services, declared that sum a liberal allowance, and announced its intention to allow only ten or even five dollars. So simple are the formalities by which an employe may secure compensation that the commission has declared that there is no necessity for a lawyer at all to bring a case before it; and that it will itself recommend the employment of one when that is desirable for the consideration of points of law. Is it any wonder that out of far Nebraska came the report that when in 1914

the state sought to pass a constitutional amendment providing workmen's compensation, lawyers organized opposition to it because it would destroy a source of their income? See Acts 19, 24-28.

" 'For a certain man named Demetrius, a silversmith, which made silver shrines for Diana, brought no small gain to the craftsmen; whom he called together with the workmen of like occupation, and said, Sirs, ye know that by this craft we have our wealth. Moreover ye see and hear, that not alone in Ephesus, but almost throughout all Asia, this Paul hath persuaded and turned away much people, saying that they be no gods, which are made with hands: So that not only this our craft is in danger to be set at naught; but also that the temple of the great goddess Diana should be despised, and her magnificence should be destroyed, whom all Asia and the world worshippeth. And when they heard these sayings, they were full of wrath, and cried out, saying, Great is Diana of the Ephesians.' "

"But," said I, "the classes of cases that have been taken away from the courts and placed in the hands of commissions with plenary powers can be clearly defined. The utilities exercise functions in which all the people are interested. The industrial accidents also constitute a fairly distinct group, and doubtless the reason they are specially provided for is a social reason: sympathy toward the helpless and a desire to lend the strength of the community to the weakest. But these reasons cannot be fairly applied to judicial problems in general, even if it were possible to throw all cases into special groups and provide special arrangements for dealing with them."

My friend the Ass replied: "Is there any moral, social, political or financial reason why the same facilities of speed, economy and certainty that have been so bril-

liantly applied to public utilities and industrial accidents should not be applied to all other judicial problems? Now that an eminently satisfactory solution has been found for two classes of cases, does not the responsibility rest on the community to bring the same measure of relief to the average citizen in civil cases and to the community as a whole in criminal cases?

"Judicial procedure and the courts as they stand now are damned by their own records. Time cuts no figure in the courts. It is almost a criminal waste of energy to make an exhibit of the time it takes to get cases through the courts, but here is a summary for two volumes of Supreme Court Reports before the Appellate courts were established and for two volumes after they were established. Before the Appellate courts were organized it took from seven to nine months in the superior courts throughout the state to get a case to trial after the complaint was filed; from a year and four months to two years and two months to get a judgment in the superior court; and from three years and seven months to five years and six months from the filing of complaint in the superior court to final decision in the state Supreme Court. These cases remained in the Supreme Court itself from about a year and a half to nearly three years. It should be said that the data are taken from the reports of the Commonwealth Club of San Francisco, and that the extremes represent, not individual cases but groups of cases from San Francisco, Los Angeles and Alameda counties separately and from all the other counties in a single group. And the cases dealt with are only those that were sent up on appeal from the superior courts.

"After the Appellate courts were organized it took

from three years and five months to nearly six years from the filing of the complaint to the final decision in the Supreme Court. These cases remained in the Supreme Court itself from a year and a half to a year and nine months. The groups of cases dealt with naturally are the more important and hard-fought cases.

"Time cuts no figure in the courts, but in human life it is the great variable on which the sum of results almost entirely depends. As for cost—the cost of criminal cases to the community itself is nothing short of criminal, and in civil cases it is so serious that not infrequently, according to the testimony of Judge Wanamaker of the Ohio Supreme Court, it is greater than the amounts involved in the suits. And as for the interests of the litigants, the following remark should become a classic: 'Pardon me for mentioning the litigants. All procedure eliminates consideration of the litigants, but sometimes we have to think of them.'

"You expressed a doubt that any general measures of relief could be applied. Some insist that the elective judges are incompetent; that they are chosen upon every consideration except fitness. It is true that many judges are selected when better men are available, because they happen to be familiar with the trails to all saloons, or because they are socially active and keep themselves prominently before the people by devices that would be scorned by the best lawyers. Experience in England and this country proves beyond question that judges appointed by the proper authorities to serve during good behavior, thus relieving them of the necessity to do politics either to get the appointment or to keep the office afterwards, are far better judges than those who are elected. But the experience of England also

shows that the method of selecting the judges does not reach the root of the evil.

"There was a time when the English courts were as bad as the American courts are now. Their methods were ineffective, slow, expensive and uncertain. But the judges were appointed then as they are now. There is no material difference between the laws of the two countries; the courts of the two nations deal with practically the same material. But in the fateful year of 1873 the English completed the radical changes in their court procedure. The English judge is the master of his court. A competent American observer of the English courts has recorded the fact that 'the most important action can be tried, judgment given, appeal taken, argued and orally decided as counsel sit down, all in ninety days.' It is cruelty to compare this with the three and a half to six years which a case has to spend in the courts of California. The bare statement of the fact makes it ludicrous and incredible. But another phase of the matter is still more astonishing. In England, where no new trials are granted on technical grounds at all, 'the court of appeals, acting for 32,000,000 people, grants only about twelve new trials a year. In contrast to this, in one county alone in the United States, with a population of less than 100,000, there were thirty-eight appeals in one year, of which seventeen were reversed for technical errors.'

"It is interesting to compare the delicate, tentative efforts that have been made to secure simplicity, speed and certainty in the courts, with the violent and bone-crushing methods involved in the public utilities law of California. Amendments to the state constitution have been adopted in recent years providing that a verdict

may be reached by three-fourths of the jury in civil cases; and that in both civil and criminal cases a court of appeal shall not set a judgment aside or grant a new trial on account of misdirection of the jury or violation of the rules of evidence or for errors as to pleadings or procedure unless after examining the whole record, the court shall find that there has been a miscarriage of justice. But these are only straws; they have greatly improved the morals of the situation, but do not touch the root of the issue.

"At present the judge cannot exercise any important influence in the selection of the jury; even the instructions he gives to the jury are largely muddled by the partisan demands of the opposing sides, until as has been often said, even a jury of lawyers could not themselves understand the instructions. The judge, the only impartial expert in the court, can not analyze the evidence or point out its bearings and help the jury to understand it; but the very worst and most incompetent shyster that can get into court with a case has the privilege of advising the jury and befuddling the evidence.

"The people themselves have already put into action the principles upon which the changes will be based. All that is now left to do is to remove the inconsistency of doing business in an incompetent way in one part of the field and effectively in the rest of the field. Not a single new or untried rule of action need be introduced in the courts of California to accomplish the revolution. Would the powers given to the railroad commissioners be any more dangerous in the hands of experienced judges?

"Imagine the change that would come over the dreams of lawyers and litigants if a judge could control the presentation of evidence, calling out every fact that

may have a bearing on the issue and making the technical rules subordinate to efficiency; if he could force each side to lay its proofs on the table instead of allowing the lawyers to higgle and spar and play for position; if like a railroad commissioner he could even make an independent investigation of the facts without considering the partisanship of either litigant; if he had real power to exercise in the selection of a jury; if when the evidence is in, and he gives instructions to the jury, he could do the thing that every right-minded juror would appreciate greatly—make an analysis of the evidence, point out the bearings of the law on each phase of it, point out the indications of untrustworthiness; and then tell the jury the final decision rests with them. Most of the trouble in the jury rooms is made by men who have no really defensible positions of their own, but resent as partisanship and unfair pressure the efforts of the others; and would consider gravely the explanations of an impartial expert. What to them seemed an all-important matter would be relegated as a mere detail, and they could readily join their associates in a verdict without any loss of self-respect.

"If complete power to deal with facts and the details of procedure were placed in the hands of the trial judge as has already been done to such great advantage in the case of the railroad commissioners, and appeals were strictly limited, the hounding and snarling and petty conduct of the trial courts would disappear, as it has done in the public utility business. Instead of incessant attempts to trip and trick the court, respect for the power of the court would work in the direction of solid results."

The Burro rested from his labors and I dropped into the cañon to get a drink at the nearest little spring.

XVIII

The Power of the Judge

When I returned I said, "The same Judge Wanamaker whom you have quoted in other things charges a large part of the inefficiency of the courts against the trial judges instead of the lawyers, because they do not exercise all the powers which the laws and rules of procedure already give them."

He answered me with a question, "What would happen if a judge undertook to make himself master of his own court? In the atmosphere of uncertainty produced by the elaborate system of appeals, when a judge cannot be sure that any step he takes will not be used against him, when he is watched by both sides for such openings, when he has no ultimate authority whatever concerning either the law or the facts, and he is constantly open to attack, where will the power of control rest? With the lawyers who make the trouble. Just where the power is needed, where the facts, the witnesses, the litigants and the lawyers are handled, there the constant pressure of latent threat has taken away initiative, which always rests on mastery.

"You failed to touch the most interesting of the Ohio judge's suggestions. He declared that there are altogether too many trials; and that is woefully true. Just now the American people are more interested in trying to humanize justice than in perfecting their court machinery. In various parts of the country juvenile courts, courts of domestic relations and so on have been estab-

lished to deal with special classes of cases, and at the root of all these efforts lies the desire to ignore, to a greater or less extent, the old legal machinery, and give great power to the judge to deal out a mixture of justice, mercy, good sense and advice. The doctrine of probation before death has been set up. After the machinery of justice has rattled its utmost, the judge is given power to turn the victim loose on trial. He takes a promise instead of inflicting punishment; it is coming to be more clearly realized, but as yet only in isolated spots, that hand-made justice has a better quality than anything made by complex machinery.

"At the root of every lawsuit there lies hatred, or spite, or stubbornnesss, or selfishness or misunderstanding—all of them soluble in the *aqua regia* of common sense and sympathy. If the trial judge were master of his position a good many of the cases that come before him need never come to trial at all. As matters stand any preliminary attempt on his part to bring the parties together would endanger his position; he might disqualify himself to preside at the trial. With real control, his moral authority would in many instances bring the parties to a mutual understanding before the trial starts. That would be justice, with the great additional satisfaction that comes of the consent of both parties. And no man can measure the full meaning of such triumphs of the spirit in the cultivation of better human relations.

"At present people are at liberty to litter the courts with spitework and trickery by means of suits which they have no serious intention to press. Practically all suits of that nature could be eliminated entirely if the plaintiffs were forced to go into court when the suit is

filed. The innocent parties are made to suffer so seriously that the result is for them a practical denial of justice. Not only the judge whom you quoted but many of the ablest men in the legal profession believe that in many cases the judge or jury should be allowed by the law to add to the judgment a reasonable sum for attorney's fees. This would not only put at least a reasonable share of the punishment on the party responsible for the trouble, but what is far more important, would be a powerful deterrent to those itching with a desire to make trouble.

"After a case has been tried with all formality by a judge and jury, with the help of the litigants and their attorneys, and judgment has been handed down, why should either party to the suit be allowed to decide for himself whether the case shall be appealed? Here is a simple example, typical of thousands. A hard fought case for the payment of machinery occupied the court for fifteen days; both sides presented every shred of evidence available; the judge was extremely careful of the rights of both parties; the jury took unusual interest in the case, and at the end, after twenty-two hours of careful study of the evidence, brought in a verdict of about $10,000 for the plaintiff. The judge privately expressed the opinion that it was a just verdict. The attorney for the defendants was an able lawyer of long experience, and when the case was lost he refused to carry it to the higher court on appeal. But the defendants stubbornly employed another lawyer and carried the case up. A year after judgment in the trial court it had not even reached a hearing in the appellate court. Why should any lawyer working for a fee be allowed to decide the question of appeal at all after it has been heard

and determined in a superior court, any more than he could do it from the decision of a railroad commissioner? If appeals were no longer allowed at all on questions of fact and procedure, as is the case already in matters under the jurisdiction of the railroad commission, or were confined mostly to questions of law, why should not the right to send the case up be entrusted to the trial judge himself for his own information on points of law, or a litigant be compelled to go before the upper court and make a showing so that the case may be ordered up under a writ, as is now the practice in public utility cases?

"Backward-looking men have raised a political outcry against the multiplication of commissions. But these are devices for getting necessary work accomplished. When the courts, with their highly trained experts, are given the power already given to men who never even sat on a judicial bench, the great problem of the American courts will be solved. In a court with real power, the trickery and cunning of the immoral lawyer will be at a discount. Strong and capable men will seek instead of avoiding judgeships. Shysters cannot live in an intellectual atmosphere of that kind. Fewer lawyers, and those the ablest ones, would be called upon to do the heavy work in the trial courts. With the quickening sensitiveness of social justice the judicial system looms up more clearly than ever as a spiritless machine, that moves and creaks along on rusty rails toward the places of the dead, whence living men have long since departed. The need of a final decision before the exhaustion or death of the litigants is the driving throught. Watch curiously henceforth and see how the power and spirit of the public utilities law of California will affect the

people's purpose concerning their courts. Every doctrine needed is already embodied there."

"The words of the Desert Ass are ended."

The Talking Jackass came closer to me and rubbed his nose against my shoulder, the sign of both friendship and farewell. He turned his face up hill and slowly climbed the mountain, as if all time were his. I went down along the ridge, but did what we all do when a friend is going on a long journey. I stopped and looked back once more; he showed no sign that he had ever known me. I stayed a long while where I was, and he went farther and farther up. At sundown I saw him far up on Pinto Peak; and it seemed as if he were about to disappear in the great band of pale, softly glowing pink of the mountain wall behind him. As the level sunbeams swung up the mountain, touching its hard sides with infinite softness, I strained my eyes to keep him in sight. His outline slowly grew faint and fainter. He never moved, and a doubt came whether I saw him still, or was it only the persistence of his form in my tired eyes? There could be no doubt; he was gone. The mountain turned cold and gray. I went down to the water, and crawled into my sleeping-bag; but gazed long at the stars and wondered at the way in which human institutions change, while the instinctive human wants remain so much the same.