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TREMONT BUILDING,
BOSTON.

November 13, 1913.

Hon. George Sutherland,
United States Senate,
Washington, D. C.

My dear Senator Sutherland:

I have your letter of the 10th inst.

I apologize for the mistake in address – which arose from my misunderstanding of Mr. McCall over the telephone.

I appreciate the courtesy of your having taken the trouble to read my address and write me regarding it. I am glad that it has interested you and that it has your approval, even though in a modified degree.

I feel that the prevalent, deep-seated, popular dissatisfaction with our courts confronts our profession with a serious problem. I think the popular demand for recall as a remedy is most serious as a symptom of the intensity of this dissatisfaction. The people who clamor loudest against the courts say in substance – “The courts are not administering justice. The judges’ decisions are not in accordance with justice; the lawyers are a tricky and shady crowd, whose efforts are devoted rather to defeating than promoting justice. Therefore, let the people vote to turn out the offending judges or reverse the offending decisions.” Such a practical application is, of course, unthinkable. It would mean anarchy. It has little or no relation, however, to the theory of recall as a principle of political philosophy advocated by intelligent men.

The way for us to deal with this delicate and dangerous situation, as it seems to me, is to point out the actual causes of popular dissatisfaction, and perhaps some remedy that can be

swiftly and radically applied. My belief is that the fault does not lie with the judges, but with the system of procedure. A judge is not permitted to administer justice in accordance with his high-minded purposes and principles. He is bound and fettered by a lot of ancient rules and traditions unadapted to an enlightened age. Most of them originated at a time when the courts settled controversies in a manner but a step removed from the settlement of disputes by physical contest. The impression of a layman is that most of the evidence that would be convincing to a man in his daily affairs is excluded in court. In my judgment, the prevailing rules as to exclusion of evidence do more toward making the decisions of the courts unjust than almost any other factor. If these things were corrected, and corrected severely, I believe we would hear no more of the recall of judges or decisions – from anyone at least except certain dilettante political philosophers.

I have read with pleasure your very interesting and impressive address to the Bar Association on “The Courts and the Constitution.” I agree with most of your conclusions. Your argument is bound to impress any educated and intelligent man. It could not, however, in view of the character of the men you were addressing, reach the mind of the ordinary every day citizen and meet his feelings and views with regard to the failure of the courts to administer justice. The Constitution does not appeal very much to the average man. He feels that the courts are inefficient, and that justice is not being done. When you threaten him with the “Constitution,” he is inclined to say that if the Constitution protects judges and courts in maladministration, the sooner it is changed the better.

The misunderstanding arises from the fact that the theory of the political philosopher is quite a different thing from the grievance of the every day citizen. They are using the same language, perhaps, but they are talking about different things. The theory of recall of the average

citizen is a method of turning out unsatisfactory judges and reversing unsatisfactory decisions. To convince him of his error we must show him that the judges themselves are not at fault; that they are doing the best they can under the rules and traditions which govern them; that what we need is not any change in the Constitution, but the application of common sense to trials in court.

I hope I have not wearied you with this discourse. You are plainly interested in the subject, and in a position to accomplish much good. I have therefore ventured to accentuate my fundamental thought.

Sincerely yours,
Sherman Whipple

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