EXTRACTS FROM REPORT OF THE RECEIVERSHIP SURVEY COMMITTEE OF THE ST. LOUIS BAR ASSOCIATION[1]

Your Committee realizes that the nature of equity is such as to render gravely inadvisable any thorough-going mechanizing of the law or procedure. There must be left to the chancellor, in the adjustment of his jurisprudence, to a wide range of varying circumstances, a very considerable discretion. In many cases, and subject to quite general rules, much must be left to the informed conscience and judgment of the just man—to the *arbitrium boni viri.* The quality of the jurisdiction demands men with a natural sense of justice, instinctive integrity, and considerable learning.

Speaking with complete generality, it is, in our judgment, out of the question to expect the mass of the people, with any consistency or regularity, to be able to choose and elect such men.

Under our system, we have made our judiciary intrinsically political. A candidate for the bench must procure his nomination at a primary election and at the hands of a party organization. It seems human and inevitable, that if chosen under such a system, the judge should at least feel inclined to help those who have helped him, and to be, to some extent, susceptible to suggestion and influence from that quarter. Appointments and other judicial favors, if any, will naturally tend to gravitate in that direction. Our judicial terms in the Circuit Court are too short, and the judges are too numerous, to enable any man, unless extraordinarily able and fortunate, to distinguish himself before the general public as a judge whose services ought to be preserved to the commonwealth. Even if he were able to do so, some of us feel that unless uniquely supported by the press and independent organizations, he would run little ahead of his party ticket, with which he is inextricably involved.

Moreover, a judge who has surrendered for a short time his

[1] The Committee was appointed in December, 1932, and consisted of the following members: Hon. Charles P. Williams (M. A., Vanderbilt, 1897), Chairman; H. Chouteau Dyer (LL.B., Harvard, 1896); Joseph H. Grand (LL.B., Washington U., '19); Daniel Bartlett (LL.B., Washington U., '20); and John Gilmore (LL.B., Washington U., '29). The Committee's report was read at a meeting of the St. Louis Bar Association on February 20, 1934.

business and clientele as a lawyer dreads the necessity of beginning afresh, burdened with the stigma of defeat, and is bound to realize that his best chance of re-nomination and re-election lies not with the unmindful public, but in the approval and friendship of political and party leaders, who control nominations and mold party sentiment. It is dangerous unnecessarily to offend them.

Under such circumstances, we say, without any personal reference whatsoever, that few men are sufficiently strong to remain absolutely and entirely impartial and uninfluenced, in the performance of their judicial duties.

The situation is apt to be peculiarly troublesome where receivership applications are before the court. The question of appointing a receiver, under the particular circumstances, is largely one of judicial discretion. It may sometimes happen that the application is made by or in behalf of those who have, or can command, strong political influence. It may sometimes happen that such influences recommend and suggest the persons to be appointed, and that such suggestions will be followed. The claims of family, friends, and the recognition of past personal obligations, we believe, are sometimes influential.

The Committee believes that not only the public but the bar is in the habit carefully of calculating and endeavoring to take advantage of this situation.

In one case, which was particularly examined by the Committee, it appeared that a firm of very high standing, having reached the conclusion that the solution of the client's difficulties lay in the appointment of a receiver, at least acquiesced in the selection and employment of another attorney (who was popularly supposed to be particularly close to the judge before whom the application would probably come) to file the petition for the appointment of a receiver. It seems clear that the employment of the new attorney was solely induced by his reputed relationship with the judge who was to pass upon the application.

In another case, which also came under particular scrutiny, your Committee was forced to infer that a particular attorney had been employed because of his real or supposed influence and relationship with the judge before whom the case was pending; and that thereupon the opposite side countered with the employment and association of an additional attorney (with those al-

ready employed), who was supposed to occupy a similar favorable situation and relationship.

While it is difficult for attorneys to resist suggestions of this sort, particularly when insisted upon by their clients, we believe that the practice of associating or employing before any court any lawyer for the sake of his presumed friendship or political influence with the judge is calculated to harm, in the last analysis, the public estimation both of the bar and of the bench.

The Committee realizes the difficulties involved in the whole situation, and believes that the best safeguard of all lies in a better system and greater care in the selection of the men who are to be invested with the extraordinary jurisdiction. The possibility of this seems to us to involve changes in selective method, which we fear in this state are beyond any immediate hope of realization.

As possible palliatives, we have the ideal of a vigilant, organized, and independent bar; the ultimate reliance upon an aroused and informed public opinion; and the present adoption of certain precautionary rules of practice that could be observed in the exercise of the jurisdiction, without substantially impairing the jurisdiction itself.

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We believe it is being generally realized that with respect to the bar, the principle of laissez-faire has broken down. The independence and esprit de corps of the bar, as a distinct estate devoted to the accomplishment of justice, had, until very recently, been steadily declining with a corresponding decline in authoritative public estimation. There is now, happily, in evidence a growing conviction, on the part of the bar, that it must justify by its works its social existence, in order to be preserved in a changing world. It has a part to play in the effectuation of justice and the prevention of injustice only less important than that of the judge, upon whom is cast the immediate responsibility of decision.

The judge has a right to expect of the lawyer that the latter will not distort the facts or misrepresent the law, but will fully present both to him, to the end that the court may arrive at a just and proper decision, and a righteous end put to human controversy.

On the other hand, as officers of the court, and as the immediate

representatives of the litigants, the bar is entitled, at the hands of the judge, to a full hearing, and to a decision that shall be utterly unmixed with friendship, gratitude, hope, or fear. The bar is likewise entitled to have the appointments made by the court, in the necessary exercise of its jurisdiction, untainted by any such considerations.

In the growing organization and crystallization of the bar, we suggest that there might well be created a standing committee or body, having for its purpose and function the investigation of complaints respecting the abuse or misuse of judicial authority.

It may be conceded at once that such committee or body would be vested with no sanctions, save that of the official disapproval and animadversion of the organized bar. This, in itself, would be no light thing.

The work and scope of such a committee would, of course, have to be carefully delimited. It could not be immediately preventive. The judicial act or acts to be examined must have been entirely completed. Only after such completion could a complaint be entertained, or an investigation made. Such a committee might make reports to the Association on such matters as it found to merit the attention of the Association, from time to time, or at fixed, or annual, intervals. Its existence, we believe, would tend to still random and unjustified criticism of the judges, who have no defense against a whispering campaign. On the other hand, its existence would give to the bar, in any gross case, a means of protest against judicial misconduct or imposition, against which it now has no available protection.

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We further feel that it is within the power of the judges to observe certain rules of administrative conduct in matters of receivership, which would not seriously impair their jurisdiction, but would standardize and regulate the practice, so as largely to obviate any reasonable occasion for criticism or complaint. Some of these proposed rules, for the guidance of administrative discretion, in the conduct of receivership proceedings, which have occurred to us (and to which experience or suggestion may add others) are as follows:

1. While it is, and ought to remain, within the power of the chancellor in an unusual emergency and necessity to appoint a

receiver without notice, no such power should be exercised, unless the complaint or petition set forth, under oath, specific facts showing the title or interest of the complainant, and his right to a receiver, and specific facts showing why notice of the application has not been given, and cannot be given, without irreparable injury to complainant or petitioner.

In no case, should a receiver be appointed without sworn testimony fully supporting the application.

In many conceivable cases, the appointment of a receiver without notice and hearing is tantamount to an attachment of defendant's property. An applicant to a court of equity for its peculiar relief submits himself, by his application, to the imposition of such reasonable conditions as to the court may seem just and equitable under the particular circumstances. We believe it to be entirely within the discretion of the court, applied to for the appointment of a receiver without notice or hearing, to require of the applicant as a condition precedent to the appointment, the filing of a bond with surety, in reasonable amount, to meet the possibility of injury or expense to the defendant, if the appointment turns out to be unjustified or improper.

2. Receivership is a *remedy;* and a very drastic remedy; and should never be granted, except in cases of necessity, when no other remedy appears to be reasonably adequate. It is never a matter of course.

3. The practice of appointing multiple receivers should be avoided; and care taken to appoint no more receivers than absolutely required for the conservation and administration of the property involved. In all ordinary cases, one should be enough, if chosen with regard to qualification.

4. The practice of appointing multiple attorneys for the receiver should likewise be avoided, unless absolutely indispensable in the particular case. The appointment of an attorney or attorneys for a receiver should not be regarded as an invariable consequence and incident of the appointment of a receiver, but should be made only upon the written petition of the receiver, stating the facts constituting the necessity for such appointment, and suggesting the attorney the receiver desires to employ.

5. The appointment of public officers or public employes ought to be avoided, in the absence of extraordinary reason, to be ex-

plained in the order of appointment. We believe this rule should extend to, and include, such quasi-officers as central committeemen.

6. In making appointments, nepotism, direct or indirect, ought to be avoided.

7. In making appointments, the courts should not be controlled by the agreements or stipulations of counsel. The appointees constitute the arm and agency of the court, and the responsibility of administration belongs to the court, and not to the attorneys.

8. In selecting receivers, a person should be chosen who is, to some extent at least, familiar with the handling or conduct of such property or business as is involved, except where competitive relations forbid. In many cases, the appointment of lawyers as receivers requires added expense to the estate, because of the need for additional and practical assistance.

9. It is the judgment of the Committee that, except under unusual circumstances, no attorney for the plaintiff seeking a receivership should be appointed receiver or attorney for the receiver; and it is likewise the feeling of the Committee that no attorney for a defendant in a receivership case should be appointed, except in unusual circumstances, to any office in the receivership.

10. It should be kept in mind that the courts in this state have not the general power to wind up and effectually dissolve a corporation through the process of receivership. Where such is the essential relief really sought, regardless of the action or acquiescence of counsel, the receivership should be denied, and the parties remitted to another forum.

In any event, in cases where the essential object appears to be the marshalling of liens and a reorganization of the defendant corporation, the court should satisfy itself at the earliest possible moment that it is not being called upon to deal with an utterly hopeless situation and a bankrupt concern.

In some jurisdictions, at least, we are advised that it is the practice of the courts, where a bill for receivership has been filed having for its apparent object the reorganization of a corporation, to require within a short time, for example, a week, that there be laid before the court a showing of the condition of the corporation which justifies belief in the feasibility of early reorganization.

11. Regular periodical reports should be required to be filed by all receivers, verified by oath, with accompanying vouchers for all expenditures and payments.

12. A competent clerk should be appointed or assigned, to be a sort of quasi-master, whose function and duty it should be to check and audit receivers' reports, and make written report thereon to the judge within a reasonably short time after their filing. In large matters, the employment of certified accountants may be advisable.

13. No fees should be allowed or paid to receivers or their attorneys, unless a petition for allowance be filed in court, verified by the oath of applicant, and stating, in detail, all the services for which compensation is sought; and further stating that the applicant has made or entered into no understanding or agreement as to sharing the compensation sought, or any part thereof, directly or indirectly, with any person or persons, except as set forth in said petition. Such petition should set forth the amount to which the applicant deems himself, in good faith, to be entitled for the services performed.

14. No fees ought to be allowed to the attorneys for the defendant in a receivership proceeding otherwise than as general creditors of the defendant, unless in rare and peculiar circumstances, where it has been made to appear that such attorneys have performed valuable services in the preservation and realization of the estate. Certainly, the attorney for a defendant whose services have consisted entirely of an attempt to defeat the appointment of a receiver ought not be be compensated out of the estate for his unsuccessful efforts, as a matter of course.

15. No petition for the allowance of fees to receivers or attorneys should be heard elsewhere than in open court, and all parties to the record, including creditors who have filed or proven their claims, should be notified, by postal card, of the proposed hearing and the amounts sought, which card should be mailed at least one week prior to the date of the hearing, and the fact of such mailing noted on the minutes or otherwise reported to the court.

16. In the allowance of fees, the responsibility is that of the court. They should never be allowed by consent. The court is presumably familiar, through long experience and observation,

with the value of legal services, and ought not to feel itself bound or unduly constrained by professional testimony put on by the claimants as to the value of the services. The allowance of fees disproportionate to the amount being administered, or to the length or quantum of service, and to many persons, tends gravely to destroy confidence in the courts and the bar, and to make all receiverships in the public mind a species of legal racket.

17. Where there has been a shift of judges, so that the application for fees comes before a judge who has not conducted the cause, or a portion thereof, he should, if practicable, request the other judge to sit with him at the hearing of the application, or, at least, seek his conference and consultation. Indeed, so far as practicable, the judge making the appointment ought to be held responsible for the fees and expenses which are the consequence of his action.

18. Where a petition in bankruptcy has been filed, it is improper for the receivership court to allow and order the payment of fees for its receivers and their attorneys.

19. The practice, which has occurred in several instances, of filing a receivership proceeding, and in connection therewith procuring the filing of a petition for involuntary bankruptcy, so as to control, temporarily at least, both angles of the situation, is improper and ought not to be pursued.

20. When an order has been made for the appointment of a receiver, and a motion is filed to revoke or modify, such motion should be heard and passed upon with the utmost expedition. Not to act promptly defers, and, in effect, denies in many cases, the statutory right of suspensive appeal.

21. When granted, receiverships should be administered with as much dispatch as the case admits of. To this end, all receiverships ought to be examined into at reasonable intervals, and their conclusion expedited.

22. It is improper for the court to suggest, directly or indirectly, a particular surety or insurance agent. Bonds of receivers should be checked, and reports made to the court at periodical intervals, so as to insure the sufficiency and solvency of the bond.