THE OPERATION OF THE RECALL IN OREGON

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The "final crowning act to complete the temple of popular government here" was the adoption of the "recall" by a constitutional amendment in June, 1908. This provision allows the recall of any elective public officer by the voters of the district from which he was elected. The recall is instituted by filing a petition demanding the recall, signed by twenty-five per cent of the number of electors who voted in the district at the preceding election for justice of the supreme court. The petition must set forth the reasons for the demand. The officer may avoid a recall election by resignation. If he does not resign within five days after the petition has been filed, a special election (in practice it may be called at the same time as the general election) is called to determine whether he shall continue in office. He is virtually a candidate for reëlection without nomination, since others may be nominated for the office, and the person receiving the highest number of votes cast at the election is declared elected, whether he is the person whose recall is demanded or another. No petition may be circulated against an officer until he has held office for six months except in the special case of a member of the legislature, where it may be filed within five days from the beginning of the first session after his election. After one recall election no additional recall petitions may be filed against the same officer during the same term unless the petitioners pay into the public treasury the amount of the expenses of the preceding recall election.

There has been some uncertainty as to whether or not the constitutional amendment is operative without additional

legislation;[1] and this has stopped recall movements in some cases, and has very probably prevented them entirely in others.

While the constitutional amendment was yet before the people for adoption, the recall of a member of the city council of Portland was discussed, to be attempted if the amendment should be adopted. But apparently the first serious attempt to recall an officer was made in Medford the next month after the amendment was adopted. This was blocked by a decision of the circuit court holding that the amendment is not operative without additional legislation. The next year the mayor of Junction City, and the mayor and all the councilmen of Estacada[2] were recalled. In the same year the recall of the mayor and three members of the city council of Union was prevented only by these officers' going "through a regular routine of resigning and electing themselves to other offices.[3] In 1910 the mayor of Ashland was subjected to a recall election, but the election resulted in his favor. In 1911 a member of the city council of Portland was recalled by the voters of his ward. Thus only four recall elections have actually been held, but in three of those the officers have been recalled. If the affair at Union

[1] One judge of the circuit court has held that the amendment is not operative without additional legislation, and another judge of that court has maintained the contrary view. The assistant attorney early held that the amendment is self-operative, but the attorney general later decided that additional legislation is required to allow its operation.

[2] This was the result according to the actual returns. But the canvassers—the recalled officers—denied the legality of the election (they and their followers generally had therefore not participated in the election), and refused to canvass the returns. The decision of the court in mandamus proceedings brought to compel such canvass was delayed until it became useless by the intervention of the regular municipal election. At that time all the recalled officers stood for reëlection and were all defeated.

[3] After the recall petition was filed the mayor resigned and was elected recorder by the council. One of the councilmen named in the recall petition resigned and was elected mayor by the council. The other two councilmen concerned resigned and were reëlected by the council. By this process a recall election at the time was avoided. And any further attack was prevented, because the date of the regular election came within the six months' exemption period which followed. "So you can see how easy it is to avoid the recall if the people interested will work together," said one of those who worked together in this case. At the regular election the whole ticket which these officers represented—some of them stood for reëlection—was defeated on the recall issue.

is included as practically a recall, the officers have been deposed in four out of five instances. All of the officers have been municipal officers. All of the municipalities except Portland are small, the largest containing about five thousand people, and the smallest about four hundred. Many more or less serious attempts have been made in other cases to recall officers, including mayors, members of city councils, a member of a board of education, an assessor, county commissioners,[4] a district attorney, a circuit judge, a municipal judge—the list is necessarily incomplete; but for one reason or another elections in these cases have not resulted. Further, mere threats are often made to recall officers, which nobody takes seriously.

"The judiciary is not so intimately associated with the daily life of the average voter as is the municipal administration. . . . The public usually is less interested in court decisions than it is in the acts of governors, legislators, mayors and city councilmen. The recall club is shaken over minor officers every few days. . . . Experience teaches that if anyone needs protection from the abuse of the recall it is the short term servant of the people whose acts are more intimately within the knowledge of the people than the acts of the judiciary."

Neither in the cases in which the officers were recalled nor in that in which the officer was sustained in the election do the reasons for the demand as stated in the recall petitions disclose all the motives nor always the chief motive for the demand. In one case where it was charged in the petition that the officer was inefficient, immoral, untruthful, and arbitrary in the exercise of his authority, a motive which was influential at least to some extent was the hostility of certain property owners caused by the officer's action in opening streets which they had illegally closed. In one of the bitterest campaigns the petition asserted that the officials had managed the affairs of the city in an unsatisfactory manner, illegally diverted public funds, repudiated the city debt, etc. But the real cause of the recall movement was simply a factional fight waged by two banks and their

[4] County judges have been included with commissioners, but only in their administrative capacity.

respective supporters which had divided the city against itself ever since the second bank was organized, and which ceased later only with the merger of the two banks. When the petition charged a mayor with incompetency, improper expenditure for street improvements, unwarranted removal of a city employee, and favoritism in committee appointments, the real ground of the agitation seems to have been opposition to his progressive policy in regard to public improvements. Where the petition stated simply that a councilman did not "faithfully and efficiently represent" the interests of his ward and city, the motives behind the recall were various. The officer had been inconsiderate in dealing with some of his constituents who desired his influence in securing certain action by the council. He had fathered an ordinance deemed by the labor unions prejudicial to their interests, and he was opposed by their adherents on this account. Their candidate won in the recall election. Further, the councilman had advocated the location of a sewer outlet in a certain locality and had thus aroused the opposition of some property owners. One of these was a candidate at the recall election. The councilman had also incurred the enmity of a corporation attorney by charging the latter with an attempt to bribe him to drop some legislation detrimental to the interests of the company. The attorney was very active against the officer in the recall campaign. It was also claimed that several corporations which had suffered from legislation originating with this officer were partly responsible for his defeat. In another case where unsatisfactory administration, diversion of public funds, needless expenditures, abuse of the emergency clause in the enactment of ordinances, impairment of the public credit, etc., were alleged in the petition as the reasons for demanding the recall, the movement was really the outcome of a struggle between those who opposed and those who favored the stringent enforcement of the prohibition law. The officers attacked represented the "temperance" ticket which had won at the preceding election.

It appears that some of the charges stated in the petitions in these cases could be substantiated but that others could not.

On the whole it would seem that the recall action was not justified in more than one or two of the cases. However, it is going too far to conclude, as has been maintained here to some extent, that this experience with the recall has shown it to be merely an instrument of personal or factional spite.

The more or less serious recall movements which have begun but which have failed to result in elections—the evidence here is in most cases very fragmentary—have been based on a variety of grounds: against mayors, on charges of neglect of the interests of a particular district of a city, of an "open town" policy, of presence in a bar room after legal hours; of failure to enforce city ordinances against vice, extravagant expenditure of public funds without accounting therefor, etc.; a councilman, on charge of having ceased to reside in his ward, although the real cause was probably that he voted to license a hotel bar, and there was hope of electing as his successor one who would favor a "dry" town; another councilman, on the charge of incompetency, disregard of the wishes of his constituents, arbitrary and unreasonable action, personal interest in certain franchises, and having ceased to reside in his ward, although his activity in the removal of some officers really started the recall movement (one of the deposed officers aided in circulating the recall petition); another councilman, more than once, for refusal to aid some of his constituents in securing certain desired local improvements at the hands of the council; another, because of his official opposition to the widening and extension of a certain street; another, for voting for a public utility franchise in opposition to a demand for municipal ownership of that utility[5]; councilmen, for voting for a "blanket" franchise; on the charge of holding up certain improvements, delay in submitting a new charter, excessive taxation, etc.; a mayor and councilmen, for granting a certain franchise—"a record steal," it was charged; a member of a school board, because of his activity in locating a school building contrary to the desires of certain petitioners and in

[5] A councilman reports that an agent of a corporation *threatened* to circulate recall petitions against him with the aid of the many employees of the company unless he dropped certain proposed legislation hostile to the interests of the company.

retaining, also contrary to the desire of petitioners, a teacher who had dismissed some students for disorderly conduct (the father of one of these students managed the circulation of the recall petition); an assessor, on charges of incompetency, unequal assessment, and casting aspersions upon the motives of tax-payers protesting at a public meeting against his assessments and attempting to intimidate them (the assessor's strictness in the way of full valuation as required by law was apparently the first cause of the trouble); county commissioners, on charges of incompetence, ignoring the express choice of the majority of the tax-payers in the appointment of road supervisors, and squandering money in unscientific road construction, contrary to a plan submitted by tax-payers which would have reduced the tax levy (the increase of the county tax levy and the failure to care for certain roads seem to have been the greatest grievances); because their new organization of road construction took considerable authority from road supervisors, and perhaps because of enmity created by the removal of a supervisor; because residents of one district disapproved of the commissioners' improvement of roads in another; on charges of wasteful expenditure of public funds, failure to publish some claims allowed against the county, and giving county work in return for political favors, with an additional charge against one commissioner of buying supplies as a private dealer and selling them to the county at greatly increased prices, and forcing county employees to trade at his store (it is claimed that political enmity was back of the recall movement); a county commissioner, for accepting road improvements not coming up to the specifications of the contract (he was believed to be financially interested in the contract); a district attorney, on charges of unfitness for office, use of his office for personal and political ends, discrimination between rich and poor, protection of gambling houses and saloons in their violation of the law, etc.—apparently well founded. Here is a mixture of motives, good and bad.

Soon after the recall amendment was adopted there was some talk of recalling a circuit judge because of his decision sustain-

ing the legality of a provision of a city charter which allowed the sale of intoxicants. But no serious attempt to recall a judge was made until three years later, when a petition for the recall of a circuit judge was widely circulated, charging him with giving, in a notorious murder case, partial instructions which biased the jury in favor of the defendant. Later *lawyers* started a recall movement against a municipal judge upon the charges of bringing proceedings without complaints, of favoritism, of illegally releasing prisoners after sentencing them to long terms, of decisions contrary to the precedents of the court, including precedents set by himself.

What are the proper grounds for the recall of an official is a question upon which there must be much difference of opinion. It has been strongly urged here that an officer should never be recalled except upon charges of misfeasance or malfeasance in office. And the most ardent advocates of the recall recognize the fact that it should be used with caution. "The recall is a good weapon, but one to be sparingly used. . . . There should be but rare or occasional use of it, but the people would better keep it laid up in their toolhouse to use in case of emergency. . . . Frequent or foolish use of the recall would create sentiment against it, and might result in its abandonment. Its own friends would forsake it if by its overemployment it should keep communities in a state of turmoil and strife."

The subject of the proper grounds for a recall has been discussed by the press chiefly in connection with criticisms of the recent attempt to recall a circuit judge—the only recall movement in the state which has excited much general interest. The leading journal favorable to the institution has these comments:

"In reality it is not Judge Coke that the good people of Roseburg are after. Their real fury is against McClallen, but for the moment it is Judge Coke that is in sight.

"The public sympathizes with them in their indignation. McClallen shot down a highly esteemed citizen. He escaped punishment. The indignation of the Roseburg people is a natural sequence.

"But it was not Judge Coke that pulled the trigger of the

murderous revolver. McClallen did that. It was not Judge Coke that fixed the requirements of the jury instructions at the trial. It was the law of the land that did that. Parts of the very instructions used were the dictum of the Oregon supreme court in the Morey case.

"On sober second thought, the Roseburg people must realize that fury is being visited on the wrong man. It was McClallen that killed a citizen. In a Portland case where the instructions on vital points were the same as Judge Coke's, the jury convicted. Had the two cases been tried contemporaneously, would the friends in one instance have used the recall because one court convicted and used it in the other because there was an acquittal?"

"Under the recall the people would place Judge Coke on trial. They would also have to try the McClallen case in full. They would have to know all the facts in detail to pass an intelligent opinion. They would have to have the law points explained. They would have to hear the instructions. They would have to study the decisions and precedents.

"They would also have to try the supreme court of Oregon, for the supreme court, in the Morey case, affirmed, in effect, the vital instructions given by Judge Coke. They would have to pass on the question of whether the supreme court was right or wrong. In short, they would have to supersede the supreme court and perform the functions of super supreme justices. In exercising the recall in such an instance, the electors of the second district would, in effect, assume all the functions of one of the coördinate branches of the state government of Oregon, setting aside the judiciary for the moment and making each elector in the second district a super supreme judge, exercising power above the judiciary and above the constitution itself.

. . .

"The people are not in position to pass upon the legal questions involved in the instructions to a jury. They cannot be constituted and do not want to be constituted a super supreme court, superseding and setting aside the constitutional supreme court. They are sane and sound in their judgments on ordinary

issues, but they never have claimed nor never will claim that they are skilled in the law. . . .

"In the very nature of things, it is as the confusion of languages at the Tower of Babel for an electorate of laymen to attempt determination of whether a judge is right or wrong on a legal question. . . .

"If a judge goes on the bench in a state of intoxication; if a judge permits a railroad attorney to finance his campaign . . .; if a judge becomes a known corruptionist, a political trickster or dissolute in his habits, then he is within the scope of what prudent men accept as possible reason for invoking the recall."

A short time before this recall movement began, our leading conservative journal said:

"The presence in the Oregon constitution of the judicial recall for more than two years and the failure here to experience the dire results predicted by the eastern press is fairly conclusive of one of two things. Either judges are very rarely compelled, in deciding cases in accordance with the law and evidence, to ruffle public sentiment, or else the public is capable, even though ruffled, of discerning between a strict judicial duty and venality or incompetence. . . . But so far the recall has not been used . . . against the judiciary. True, we have never had a Schmitz liberated through sheerest technicalities nor the popular will grossly subverted. We believe, however, that if the courts declared some popular law unconstitutional, the people would not seek to recall the court in the absence of evidence of corruption, but would amend the constitution through the initiative. . . . Probably the recall will never be invoked in Oregon against a judge unless corruption is charged."

It might be contended that where the movement against a member of the judiciary is organized and guided by *lawyers*, as in the recent case of a municipal judge, there is possibly less danger that the "electorate of laymen" will go wrong in determining the question of recall.

It has been objected that the law does not limit the statement of reasons for the demand of recall to "justifiable" rea-

sons, and that it thus opens the way for grave abuse. Some change here might well enough be made, but how effective any such limitation as to reasons would be is doubtful, since, in practice, as has been observed, the real motives back of the recall movement may not be mentioned along with the "justifiable" reasons in the petition.

As a check upon the abuses of the recall, some of its leading advocates have considered that it might be well to amend the law to increase the percentage of signatures now required for the filing of petitions. But a more rational change would be to reform the methods now employed for securing the signatures. Although it is probably true that people do not sign recall petitions thrust before them on the streets and elsewhere as readily as they do some other kinds of petitions, nevertheless under the present system there is great probability that accommodating persons will by their signatures aid a movement for the merits of which they care nothing. For this reason, and also as a guard against fraud—forgery of signatures to recall petitions has been charged—it should be required that the petitions be left at some public office for signature. "The only possible excuse for the recall is that it should be spontaneous and that each signer should be sufficiently interested to go to some public office and sign the petition—not wait to have it shoved into his hand with a 'sign here' from a 5-cents-a-name getter."

The expenses of the recall elections—both to the public and to candidates—have doubtless had some effect in discouraging recall movements. The six months' exemption provision has been another check, and possibly some danger of action for libel—this was threatened in one case where the charges in the petition were very grave—has discouraged the circulation of petitions in some cases. Fear of the failure of a recall movement under the particular circumstances caused in one case a lack of suitable candidates against the official attacked, and further action was hence delayed. Where the offense has been a legislative act, the possibility of invoking the referendum has doubtless diminished the demands for recall to some extent. "The good

sense of the electors" is of course the chief reliance of the advocates of this instrument of government against any danger from its unwarranted use.

The management of recall movements has been undertaken either by organizations already in existence—labor unions and various kinds of civic-betterment clubs—or by temporary groups, large or small, formed for the specific purpose. Sometimes mass meetings have been called and committees appointed to conduct the campaign, or one member of a group has been designated for this purpose. In the case of the circuit judge, where the district covered a large area, an attorney was hired to take charge. The petitions are circulated either by paid circulators or gratuitously by persons sufficiently interested. They are circulated at a mass meeting, at a revival meeting (in one case), on the streets, etc. The expenses, if any, are paid by private subscription. In some cases counter-petitions have been circulated against the proposed recalls.

When an official is recalled at the election, it may be impossible to determine whether he was deposed upon the grounds, asserted or real, which caused the demand for the recall. For at the election he must at the same time justify his official conduct, compete with the political ambition of the other candidates, and face any personal opposition by the voters.

There "are represented as important factors in the recall . . . caprice of the public, immaterial and extraneous issues, politics, personal revenge and deliberate misrepresentation. . . . It is unjust, it is degrading, it is inimical to his independence, that he should be compelled to defend his acts or policies or decisions with one hand and combat political ambition and personal popularity of candidates who may oppose him with the other." This is the case especially when there are several candidates at the recall election. But in the elections so far held, only once has an official been compelled to stand against more than one competitor.

Of course no provision of law can entirely segregate the proper issue of the recall election, but something may be done in this direction by changing the law so that the election of

candidates will not be held until after the question of recall has been decided. "Divorce . . . can probably only come through making the recall a real impeachment by the people on specific charges of misconduct and on them alone, without the selection of a successor of the accused officer being involved in the proceeding." It is reported that an amendment to the law embodying this reform will be submitted to the voters next November. Further, it has strongly been urged that the successor to the officer recalled should be appointed rather than elected.

The substitution of some form of a majority vote for the plurality vote now allowed by law would aid, in cases where there are several candidates, toward making the recall election a more efficient means of deciding the issue properly involved. In the one case of that kind before mentioned the successful candidate received 1,185 out of a total of 4,237 votes, only twenty-two more than received by the deposed official.

Opinions widely differ as to the effects of the institution upon the conduct of officers. On the one hand it is maintained that the mere existence of the law holds a discreet official "to a definite sense of his responsibility and duty." On the other hand it is said that "the recall . . . exerts no corrective influence over officials that the laws against official corruption and the controlling power of public sentiment do not." In fact it seems that at least on a few occasions the serious threat of a recall has prevented or has helped to prevent some official "sins of commission"—granting an obnoxious franchise, establishing a "restricted district." It may be, of course, that much political corruption has been prevented by a deterrent influence of the recall law. But, on the other hand, the possibility of a recall has probably caused at least some "sins of omission." It is thought that the assessors in many instances have failed to enforce the law fully for fear of a recall.

Where the recall issue is a permanent one, as it has been in some cases, of course recall elections only furnish additional opportunities for the temporary settlement of that issue. Limited to such cases, this opinion is correct: "In a state where

there are frequent elections—for most officials the term is but two years—the 'recall' established by law is frequent enough. If the people are dissatisfied with the official they need not reëlect him."

But the terms of office in Oregon are now generally too short, and the adoption of the recall has opened the way for an increase in the length of terms—an important reform apparently otherwise impossible.

The discord apparent in recall movements, and the violence which was threatened in one of them and used in another cannot be justly charged as caused by the recall. The strife might have been worse in the absence of this method of settlement.

Our experience is yet too limited to justify any general conclusion as to the operation of the recall in Oregon. It is often denounced in strong terms by its critics, although there is no serious thought of abolishing it. It is as often extravagantly praised by its friends; but, whatever are its merits, the democratic nature of the recall has very much more to do with its popularity than any practical results which it may have thus far accomplished.

NOTES ON CURRENT LEGISLATION

EDITED BY HORACE E. FLACK

Ballot Legislation of 1911. Probably the most important feature of the ballot legislation enacted during the past year has been the marked trend away from the hitherto prevailing American system, under which special provision is made for straight-ticket voting, and toward the simple Australian system under which the straight-ticket voter and the split-ticket voter are placed on an absolute equality.

Two states, California and New Jersey, have adopted, together with these simpler rules for marking, their logical corollary—the "office-group" form of ballot. The California act [1] provides that the names of the candidates, instead of being printed in separate tickets under the several party emblems, shall be grouped under the title of each office—in the case of certain local offices alphabetically, but in the case of all other offices, voted for throughout larger districts, according to the system of rotation which a dozen or more states have already adopted for their official primary ballots. Each candidate's name—except in the case of candidates for judicial or school offices—is to be followed by his party designation, or by the word "Independent." Blank spaces for writing in names, as many as there are persons to be elected to any given office, are provided for under each office-group. The New Jersey law [2] provides for the alphabetical arrangement of the candidates' names under each office-group, without any provision for rotation. Each candidate's name is to be followed by his party designation. If nominated by two or more parties or independent groups, a candidate may determine in what order their designations shall follow his name, but if he fails to indicate any choice the decision is left to the officer charged with printing the ballots. The change from existing conditions represented by this New Jersey act is even greater than that accomplished in California, since New Jersey has never, up to the present time, adopted the blanket form of ballot, but has continued the earlier American system of separate ballots for each party, merely providing that these ballots should be printed by the state. Their distribution by the state was also provided for, but as a matter of fact,

[1] Ch. 225; March 20.

[2] The so-called Geran law, Ch. 183; April 19; §§ 53–64.