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Our Three-Fold Contract

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(Address of President A. M. Kvello, Annual Meeting of State Bar Association, Devils Lake, August 15-16, 1930)

Less than a year ago our late President Bagley prepared an address to be delivered at the Grafton meeting of the Lakes District Association, of which we are guests today. In that message he started out by saying:

> "First as to the Bar Association. That is what I am here primarily to speak to you about. It is my main interest in life at present."

That message was not delivered to you because death came to him before the time appointed for your meeting. Death came to him too, as we feel, before his allotted time. In the passing of our friend, the Lakes District and the State Bar Association have lost one of their most influential and loyal members. His life typified our highest conception of the ideal lawyer. He was what we call a Main Street lawyer of whom there are so many in this State. His profession was to him, as he said, not only a way of living but a way of life and it was life in all its creative fullness and usefulness.

We know that he looked forward to his year of service as President with a fine, almost boyish, eagerness and enthusiasm. For him it was but another and larger opportunity to do further service for his profession and his beloved State. It has been a matter of poignant regret to me that he could not have lived out his "main interest" to the end of his term. Had he been permitted to do so we would then have been immeasurably his debtor.

Since the time that he laid down his work the State Bar Association has also been my major thought and interest. And it is about the Association, its present and its future, that I wish to speak to you today. I feel that I can pay no finer personal tribute to my friend than to try to outline to you the work he had so carefully planned. The message that I desire to bring to you is therefore not original. It will be but the raising again of the standards that have been set up for this Association. This I do, not by way of preachment, but with the simple hope that we may see more clearly the way before us.

Our profession enjoys at least one unique distinction. Before we can begin our work as lawyers we must be "sworn in." No other regular occupation or profession is required to take an oath to support the Constitution of the United States of America and the State of North Dakota, as we are required to do, before embarking upon the interesting task of making a living. That oath has a double result. It marks our entrance upon the practice of our profession and it also marks our admission to membership in the State Bar Association of North Dakota. At one and the same time we enter two fields of activity, our profession and our professional organization. This is true of no other field of endeavor in this State. With the exception of five other States, it is a situation not found elsewhere in the United States.

Our admission oath does another thing for us, it makes each one of us an officer of the Courts of this State. We share with the Judiciary from then on a distinct and peculiar responsibility. We are jointly responsible with them for the administration of Justice. As Senator Hoar has said:

> "The lawyer is then the chief defense, security and preserver of free institutions and of public liberty."

We are therefore first and primarily Ministers of Justice. That is our heritage from the past and that is our present high position. The Association has recognized that responsibility in the Constitution that has been heretofore adopted as guide and authority for the profession.

The figure three is an interesting numeral. It shares historically with its sister number "seven" much of fact and fancy in the past as well as in the present. The symbolic nature of the numeral three we all appreciate and it will not be necessary to remind you of how often it has figured and does still figure in the affairs of mankind. So our Constitution divides our responsibility into three parts. This trinity of objectives is found in the second article of our organic law and is the very heart and soul of that document. All else therein is merely routine. This three-fold declaration reads as follows:

THE OBJECTIVES OF THIS ASSOCIATION SHALL BE:

1st.—TO PROMOTE THE ADMINISTRATION OF JUSTICE.

2nd.—TO UPHOLD THE HONOR OF THE PROFESSION, and

3rd.—TO ENCOURAGE CORDIAL INTERCOURSE AMONG THE MEMBERS OF THE BAR.

This is a complete set of plans and specifications for the way of life of the lawyer and is both foundation and superstructure of our Association. At the expense of appearing trite and of dealing with the obvious, I wish briefly to speak about this three-fold contract of ours. It is not merely a scrap of paper. It is your contract and my contract. It follows the oath that you and I have taken at the beginning of our work as attorneys. It is the platform upon which we all stand.

The first plank of this platform is the very essence of our professional obligation. If that is carried out in spirit the two following will naturally take care of themselves. For we can neither uphold the honor of the profession nor have cordial intercourse among ourselves if we do not first promote the Administration of Justice. We cannot fulfill the first without thereby substantially performing the other two parts of our contract. For our contract is what we know in the law as an indivisable contract, each provision mutually dependent upon the others. Failure to carry out one provision carries the rest down to defeat. In adopting this first purpose we have but recognized a well known opinion of the public which believes that the administration of justice is our peculiar responsibility. If we fail in any particular part of this responsibility then the public is not slow to criticize. But with public criticism we are not today concerned. What we should be primarily interested in is our progress in the promotion of our objectives.

This age, in addition to whatever else it may hereafter be called, whether the Age of Machinery or the Age of Materialism, might be described as the Age in Search of Efficiency. In every line of human endeavor present methods are being placed under the search light and tested as never before in the world's history. In that search for efficiency every lawyer should be interested. But at the outset we are handicapped by a natural heritage, the stand-pat—if I may so express it—conservatism of the profession. This conservatism in the past has led many of our best men to oppose many necessary reforms as, for example, the organization and enlargement of the jury system; the establishment of equity jurisdiction in our Courts; the emancipation of women acts; the homestead laws; workmen's compensation laws, etc. When our National Constitution was first submitted to the public for

adoption many an eloquent plea was made against it by the then leading lawyers of this country on the ground that it would destroy liberty as then existing and throttle it in the years to come. There has been, in so many historical instances, a spirit of pessimism against change of any kind on the part of our profession. This dread of the new by the legal fraternity has seriously retarded and impeded many essential reforms. In our district meetings where we have been discussing some of the matters of proposed reform that I shall mention today, there has been distrust simply because the matters under discussion were in the nature of innovations or were different from the existing and accepted order of things.

No matter what may have been thought in the past as to the unchangeableness of the law, we know today that nothing is static. The law is not an exact science, and change and development are the order of the day in this field as well as elsewhere. And that very change and that very development is the life of the law. It too, must adjust itself to changing conditions in human affairs if it is to take its place in the march of progress.

Justice Cordoza of New York has aptly stated this fact in this way:

> "As the years have gone by and as I have reflected more and more upon the nature of judicial process, I have become reconciled to the uncertainty because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery but creation—and that the doubts and misgivings, the hopes and fears are part of the travail of mind, the pangs of death and the pangs of birth, in which principles, which have served their day, expire and new principles are born."

If our profession is going to respond constructively to the first of our objectives it must welcome new ideas with an open mind. While I am far from advocating the acceptance of every new theory or claimed improvement of method, I do believe that in this day and age when the creative genius of our profession is so much needed to bring our procedure for the administration of justice in a fair measure up to the progress in other branches of human endeavor, we should cultivate a more critical attitude towards the technique of our profession. It is far better that we become our own severest critics than have that criticism come from outside. I sometimes wish that we could all have a dash of the mental attitude expressed in Louis Untermeyer's lines, where he says:

> "From sleek contentment set me free
> And fill me with a bouyant doubt."

We need to cultivate what Edwin Mims calls "Our constructive imagination."

There must be a change in the mental approach to new methods of procedure on the part of our profession if progress is to be made. Procedure does not exist for its own sake, but as a means to an end. What I am hopeful of is that we may carefully examine this procedure to ascertain how well it works under present day conditions, and if it does not work, why not, and if it works only fairly well how it can be improved. While our rules may, in the past, have given a fair degree of satisfaction, are they now adapted completely to the changing conditions of today? It seems to me that a careful inquiry into these questions is always proper and advisable.

Some of the suggested methods of improvement I wish briefly to mention.

The Bench and Bar are governed largely by rules made by the legislature. Our practice is standardized by regulations prescribed for us by an agency that has nothing to do with their operations afterwards. If delay and expense sometimes result because of these hard and fast rules we, and not the legislature, are held to blame by the public. Such a condition seems unreasonable. As a substitute it has been suggested that the Supreme Court make the rules. It originally had that power. With this suggestion I am in hearty accord. President Lowell has said:

> "The ability of popular government to endure will depend upon its capacity to use experts."

The field of law seems to be the one exception where this is not in full practice. It seems begging the question to state that in order to satisfactorily administer justice, the rules for its proper exercise should be determined and prescribed by those who have a practical understanding of what we call the "mechanics of operation." And that the improvement of these rules should be gradually accomplished by the same understanding source. That there is much of surplusage in our procedure and many survivals from a time of extreme technicality in practice arising largely from a tenacious clinging to old ideals of substantive law and procedure, cannot be denied.

There is much of reform in the trial of actions that is likewise desirable. A short time ago I sat through a trial that lasted four days and I am sure that I am not exaggerating when I say that better than one whole day of that time was consumed in the making of and arguing about objections of a technical nature to admission of evidence, to hypothetical questions, to fine drawn distinctions between fact and opinion, in determining whether answers were or were not conclusions and much argument upon the mere form of the questions. And to no ultimate purpose except to confuse court, counsel and jury. Much of this method of procedure is in line with what some one has described as:

> "The meaningless mumble of the objection of incompetent, irrelevant and immaterial sounds through the courts like the drone of destroying locusts."

If experience is a safe guide and teacher then we have ample grounds for the conclusion that the remedy lies in giving supervision of our rules of procedure to those who are experts. The experience of Equity rules and practice, of Admiralty rules, of Bankruptcy courts and of Administrative boards of every kind including our own Workmen's Compensation Bureau which yearly handles vast sums, shows clearly that regulation by experts is the simple and effective way. It demonstrates that in this way judicial procedure can be kept in constant adjustment to new conditions and demands, meeting, as has been stated "the needs of readjustment of the frontiers of justice."

There would then be no need to wait for the uncertain action of the legislature. Such a means of regulation would tend to minimize the present importance of mere procedure to the detriment many times of the proper application of the substantive law. I know of no more important matter that we lawyers can be interested in either individually or collectively than the fostering of this reform.

Other suggested improvements which I have only time to mention are, among others:

A more practical method of selecting juries.

Giving more power to Judges in selecting and instructing juries.

Giving less than a majority of the jury power to return verdicts.

Better technique in law making. Suggested schools for legislators-elect prior to the opening of legislative sessions. Some states have research bureaus for this purpose and others have committees of bar members to sit

during the legislative term as free advisors on questions in proposed legislation.

Improvement of the conditions surrounding the judiciary. The voters at the last election approved the extension of time of service of both district and supreme court judges.

Better salaries of Judges and officials of the state legal department.

Election of Judges by the members of the Bar.

Public defenders.

But if we agree on any of these suggested measures, that is only the first part of our duty. Unless we can bring home to the public the necessity for these reforms by giving it the facts in each instance and demonstrating the advisability of the adoption of the change, we have labored in vain. This is one of our most important responsibilities, next to getting together on a program. Every means of publicity should be taken advantage of including a friendly press, collective advertising and having members of our profession on the programs of public meetings of all kinds. We should be militant missionaries for these reforms for which we stand. The public is fair. With the facts before them and a united bar behind them they will do their share in a matter that is also their concern.

Second—UPHOLD THE HONOR OF THE PROFESSION.

This can be done largely in two ways.

First—Raise the standard of education and qualification for those seeking admission to the profession so that the unfit and the unprepared may be barred in the first instance.

Second—Require strict adherence by members of the Bar to the statutory obligations and Association standards as evidenced by our Code of Ethics.

The career of the lawyer has been referred to as one of the dramas of our civilization. The lawyer by virtue of his calling has always been on a pedestal. There is no profession or business that is subject to more severe scrutiny by the public. Notwithstanding our conservatism we have always been in the forefront of those who have made history. Our creative genius is responsible for much of the progress of the past in all lines of human endeavor. In the realm of governmental activity I am content to cite but one instance. Our profession firmly established the principle of the right of the courts to declare statutes of States and Acts of Congress as well as acts of the executive void. By thus placing the courts supreme above other governmental agencies the Union has been preserved. In addition to its leadership in the field of the administration of Justice the Bar is also found in positions of leadership in executive and administrative work.

To maintain this position we must place increasing emphasis upon higher standards of preparation. Our State College of Law is doing splendid work along this line. Our committee on Legal Education and Admission to the Bar has made some recommendations that will further this work and this should receive our hearty approval. Advocating additional requirements over those now in force will be charged as selfishness on our part. For those inside to urge raising the bars against those on the outside seeking to gain admittance will always give rise to this criticism. But there is no vested right in the privilege of practicing law. With the increasing complexity of our civilization much more is required as a fundamental basis for the service we are under obligation to render than ever before in the past. There is a new standard of service that requires a new standard of preparation. A lawyer without thorough basic knowledge and preparation is not equipped to meet the responsibilities of today. That knowledge we believe cannot be obtained in a grade or high school course but requires University or College training in addition. But mere book learning is not enough. That is only a part of the necessary preparation. Here again the number three comes into play for we find that there are three requisites. Our first, as stated, is adequate scholastic and legal education.

Our second ground of preparation is character training. It is the moral foundation of the individual that counts here. The question is always "Has the prospective lawyer the moral stamina to 'stand by' under all circumstances." I realize that we are on debatable ground when we attempt to establish rules that measure this element of our qualification. Our Committee on Legal Education and Admission to the Bar has suggested the adoption in principle of the Interlocutory Bar. Briefly summarized this provides for a conditional license to practice for a period of years, not exceeding five. Strict supervision of the practitioner is maintained for the conditional time and at the conclusion a final check up and examination is had and the applicant then given a full license. If this were adopted it would give an additional anchor to the new practitioner that I believe would hold in most cases. It has been stated that there is no profession in which moral character is so soon fixed as in our own. The experience of our Grievance committee and Bar Board and lately the experience of the California Bar Association under its self-disciplinary Act proves that most offenses are committed in the beginning years of practice, when character is being moulded and developed. Would it not be the part of wisdom as well as charity to surround the beginner with the safeguard of this new idea? To uphold the honor of our profession it is of the highest importance that we are of high moral character and purpose with courage to maintain those high ideals against the pull of materialistic influence.

The third requirement as a part of our preparation is a fundamental knowledge of the working forces of society; of the motives that govern men and women and of the history and traditions that underlie these motives of human action. Again this cannot be gained in a grade or high school curriculum. It can, outside of the realm of experience, only be gained by a broad practical and cultural education such as is being increasingly furnished in our higher institutions of learning.

We must realize that our profession is something more than an agency for giving legal advice to clients. We should remember that it is also our duty as well as privilege to be in the vanguard of the army of progress in legal, social, economic and governmental science instead of being content to sit in our house by the side of the road merely mending the troubles of those who have made wrecks of their social and economic affairs. To be able to do this we must have sufficient intellectual and mental training to appreciate what justice means, what social science means, what economic and political science means so that we may assist in applying them and aid in their adjustment to present day problems.

This brings me to the second point of our plan to uphold the honor of the profession and that is in the matter of the discipline of our delinquents. I have had the opportunity during the past year of my service to know of the work of the grievance committee and the Bar Board and it is very gratifying to learn how very few complaints are filed with these agencies of correction. They are mostly of a trivial nature. All complaints have been carefully investigated and adjusted. The Association owes a duty to attor-

neys unjustly complained of to right the wrong thus done. This has been religiously done. We likewise have required strict adherence to statutory and ethical standards on complaints that have been found well taken. The public is quick to criticize the bar for delinquencies unremedied. The Bar never has taken the position of shielding offenders within its ranks. We believe with Attorney Harry D. Nims of New York that:

> "To insist that the bar shall be made up of men fitted morally and mentally for reasonable public service is not to sacrifice a single principle of democracy. To set up a plan by which the incompetent lawyer who neglects his clients' business, who by dilatory methods increases the expense of justice, who fails to bring his cases to trial, who disregards the convenience of court and public, shall be disciplined by his own profession so far as it may be necessary to remove these abuses cannot be otherwise than healthful and right, both from the standpoint of the bar and the public."

We also agree with the conclusions of the Carnegie Foundation's annual review of legal education when it says:

> "The more relentlessly and the more publicly this machinery operates the greater confidence will the public at large have in the moral integrity of the legal profession as a whole, and the greater will be the disposition to allow its claim to public leadership as a selected and courageous body."

The legislative committee has recommended with certain limitations that we adopt the California method of discipline within the bar association itself. I believe that this would be of benefit to the Association. To hold us responsible for the conduct of our membership and at the same time give us no disciplinary control over it has always seemed to me to be the height of inconsistency and absurdity. Let us have the responsibility and we will cheerfully assume the criticism. The very knowledge among the membership of our home rule responsibilty will have a heartening and steadying effect, I believe.

Our third and last objective is to

ENCOURAGE CORDIAL INTERCOURSE AMONG THE MEMBERS OF THE BAR.

There is much of need for this constructive work. While other businesses and professions, in order to advance their interests in the changing conditons of today, are becoming more closely organized we seem to lack that enterprise. There are plenty of objective symptoms that indicate that we are going to suffer as a profession and individually if we do not do something. Our pride in our orthodox individuality is destined for a severe shock. We need but to consider the fact that banks, trust companies, public accountants, insurance companies and individuals masquerading under the guise of collection agencies and otherwise, have entered the field of service that has been heretofore the sole legitimate province of our profession in the drawing of wills, drafting of contracts and other forms of legal work, to get a fair idea of the tendencies of the times for us. And this work is done by these agencies without any of the safeguards thrown around it in our hands. We need but to contemplate the huge combinations and mergers that are gradually withdrawing from our field of usefulness lucrative business that used to be ours to appreciate what further may still be in store for us and for those who are contemplating entering the profession and for whose future we are now trustees. We can regain this lost ground and consolidate for the future in only one way and that is by a close knit organization in which the majority of the members participate. It seems strange to me that the great profession to which we belong, second only in social and economic importance to that of the government itself, is so thinly organized. While our creative genius has heretofore shaped and launched many a professional and economic organization that is most effectively doing its work in the world today, we have failed to bring that creative spirit into our own field. There is not one good reason why we cannot do so. The problem is to arouse the members from their present lethargic indifference. We need a new vision of the grandeur of our profession and its importance in the social scheme of today. We need a rebirth of the sense of our obligation to ourselves, our fellow attorneys and the communities in which we practice. We need a clearer appreciation of the outstanding fact that our fullest expression is possible only in organized cooperation within the Association. We need to shake off another kind of pessimism that blinds us to the real situation. We are suffering from a decided indifference both as to our mission and as to our ability to carry out that mission. "The world is too much with us" and dulls that fine sense of appreciation of responsibility to our profession which is today ours more than ever in the past. If we but appreciated the power that is ours, and would concentrate our efforts we could accomplish many important things. For the properly equipped lawyer is by education and training fitted for leadership; is well versed in the history of jurisprudence and governmental problems; his faculties are trained and his mind disciplined; clearness of perception and power of expression are his also; creative genius and resourcefulness are his hand maidens; he tempers his judgments with sympathy and insight and he possesses the courage of compromise. This, backed by a long heritage of respect for constitutional government and for "liberty within the law," gives him justification for his position of claimed leadership.

As our first step towards the utilization of this now largely dormant and unused power of the profession, we have followed Judge Bagley's plan of completing the district associations. That work is now happily accomplished. Every Judicial District as well as numbers of city and county units, have now been formed and officered. We wish now to consolidate our position. Our first suggestion in that direction is to make the heads of the district organizations members of the executive committee instead of continuing the present method of open choice by the President. This will bring together the executive heads of the State Bar and all the Judicial District organizations and thus coordinate and correlate the work of all of them. If there can then be added self-government within our organization by giving to us the power to admit new members and also the power of self discipline, with the final judgment resting as now with the Supreme Court, we shall then have the additional advantage of these responsibilities which will help keep the Association active. If the District Associations would then have two or more meetings yearly in the nature of clinics and combine with them social features we could then, possibly, break down that spirit of solitariness which is the state of the average lawyer today. We could then build up that solidarity of the profession which is our greatest need. And when we have accomplished this task of working shoulder to shoulder as friends within the Association we shall have gone far toward making the Association a living, moving and constructive force in the State of North Dakota.

We can then as individual members truly say that as Ministers of Justice of the great State of North Dakota, which we love, we have substantially performed our part of the three-fold contract which I have tried to present to you today.