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# The Relation of Law and Social Evolution

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# THE RELATION OF LAW AND SOCIAL EVOLUTION

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The acceptance of an invitation to present a discussion before a group of specialists imposes a serious obligation. The obligation requires the selection and discussion of some subjects suitable for the thoughtful review of the specialists who have honored one with the invitation to participate in their annual conference. Conscious of this obligation "The Relationship of Law and Social Evolution" was selected for presentation to the members of the North Dakota Bar association. It is a subject which bears close relationship to biological studies pursued for many years. It was suggested also by reading a stimulating article relative to "Socializing Legal Education" which was published recently in the New Republic.

Students of living matter use the term "law" in a different sense from that employed in human legislation. In biology "law" is a term applied to the orderly procedure which is observed in nature, and frequently expresses results rather than processes. In other words, in science "law" is a statement of ascertained facts as they are observed in a succession of phenomena. In jurisprudence "law," of course, is a prescribed course of action made and enforced by constituted authority which society has brought into existence for the control of human beings. An interesting illustration of "law," in the biological sense, was stated clearly and succinctly by that great leader in science, Von Baer. The studies leading to the recognition of the truths expressed in the law are intimately associated with Von Baer and the law has been christened with his name. Von Baer's law has been tested unnumbered thousands of times and found true with practically no exception. It incorporates salient truths of organic evolution and reads as follows: "The order of development in living matter has been from the simple to the complex, from the general to the specific and from the homogeneous to the heterogeneous." This far-reaching law of Von Baer's comes repeatedly to one's mind as he reads the illuminating article, "Socializing Legal Education." This discussion on legal education urges "the application of the scientific methods to the understanding and the control of social behavior." While Von Baer's law is suggested by the discussion "Socializing Legal Education," it should be observed that the time factor lying back of the resultants referred to in Von Baer's law is vastly greater than the time factor associated with the evolution of human society. It may very well be that the ratio of the time factor in Von Baer's law and the time factor

in evolution of human society is one thousand or two thousand to one. Moreover, we should remind ourselves that the resultants referred to in the law of Von Baer are natural resultants, whereas those indicated in most of the social rules and social laws are artificial and not natural.

If the biological law of Von Baer is a natural law and the laws of society are largely artificial it is evident that any comparison between the resultants pictured in Von Baer's law and any resultants indicated in social evolution would be analogy. Nevertheless it is interesting to note that the analogy runs parallel in nature and in human nature. In truth there seems to be something more than analogy between the truth incorporated in Von Baer's law and the truths observed in social evolution. It is possible to use identical statements found in the law of Von Baer if we substituted "human society" for the term "living matter." The statement then reads, "Human society has evolved from the simple to the complex, from the general to the specific and from the homogeneous to the heterogeneous." The evidences which support and prove this modified law of Von Baer's as it is applied to social evolution, is found in all human institutions such as the tribe, the family, the state, the church, the school, the industries and every expression of organized human relation.

The most important property of a living plant and of a living animal is that principle or property called life. This property of life is the most important of all principles or properties of matter because it makes possible the repair incident to the work essential for the continuance of living matter, and it makes possible the phenomenon of growth in the early life of the individual. Life is also the *active principle* which makes the phenomenon of reproduction of other individuals possible. The superlative importance of the life principle is recognized everywhere throughout the biological kingdom, and it finds its maximum economic accent in the biblical question, "What will a man not give for his life?" Naturally, the whole history of evolving law is filled with recitals of how intelligent man has endeavored to protect this priceless principle, life. Every chapter of social evolution is filled with records of how man individually and collectively has striven to protect and preserve his life. The early stone tablets, the laws of Babylonians, Medes, Persians, Egyptians, Hebrews, Romans, Greeks and all ancients, medievalists, and moderns testify that *life* is the first and essential possession of man and organic matter.

The members of this North Dakota Bar association know that in later times the individualistic doctrine of government grew out of the magnification of the supreme importance of the *life*

principle in social evolution. This doctrine went so far that its proponents held that the state, as the unit of organized society, should do four dominant things for the individual. First, the state should give the individual all protection possible to his life; second, it should give the individual employment; third, it should give him economic assistance; and fourth, the state should give the individual instruction. This is a good doctrine of human needs and state service provided proper reservations are made. For instance, what efforts should the state require on the part of the individual in each of the four dominant fields of social adjustment, and second, how far should the state go in giving the four dominant services named in the doctrine of individualism? Obviously, our organic and social evolution do not parallel in this individualistic doctrine of government. Perhaps, the best approach to a parallel between organic and social evolution might be found if we should reduce the humanistic doctrine to two products—one, the right to life, and two, the right to develop oneself through culture. Even so we are using words and terms of variable meaning and significance. However, they vaguely suggest a parallel to Von Baer's natural law because the tendency is from the general to the specific. This was illustrated definitely in the French Declaration of Rights (1789). This declaration sanctioned especially the right of resistance to oppression, and made that resistance to oppression one of the natural and indefeasible rights of man, having the same basis for recognition that was given to the subject matter of liberty, property and security. The chief difficulty with the individualistic doctrine of social evolution is that man has always existed in groups. He exists only in society and through society. To insist that man exists as an isolated being is to assert what is not true. Therefore, the idea of the social man is held properly to be the only possible starting point of juridicial doctrine.

The evolution of society is vitally related to and expressed by the processes exhibited in the development of human institutions. Variation is the dominant principle in Von Baer's law. Changing practices in human institutions such as the family and its initial expression, marriage, is the dominant principle in social evolution. The relation of law to social development is well exemplified in connection with the study of marriage. No subject so profoundly affects the biologic and economic status of society as marriage. Moreover, no social custom of society has been so affected by superstiton, religion, philosophy and politics as marriage. In view of the multiple complexes associated with marriage it is natural that there should have been extensive legislation relative to age, intelligence and consent of the parties who may enter into the marriage contract. Marriage customs and

laws vary greatly among different races and nations. Biological development is closely associated with climate. Consequently, the age of parties eligible to enter the marriage contract has a variable biological basis in tropical and non-tropical regions.

In Indian, China and other oriental countries child marriage has been made obligatory for religious and other reasons, whereas the Greeks and other highly intellectual peoples of the middle ages, and the peoples of western and modern civilizations have regarded the vigor of offspring of primary importance. They have recognized that maturity of parents was more favorable for production of virile progeny than could be secured from immature individuals. As a result of scientific and cultural study there has been evolved an extended legal procedure regarding age, intelligence, and consent of principals to the marriage contract. The allied subjects of defective and delinquent progenitors have evoked extended legal procedures respecting the marriage of the insane, the feeble minded, criminals and other types of defectives and delinquents. The voluminous legislation regarding marriage shows that the relation of law to social evolution is definitely associated with protecting and improving the biologic and economic factors of society. This and myriad associated legislation recognize *life* as fundamental and primary.

Possibly, even more extended legislation has been had relative to property rights in family relations than has been developed for the biological welfare of society. The laws respecting the property of husband, wife and children and the laws respecting devising of property to heirs, and the more recent inheritance tax laws suggest something of the economic evolution which has been exemplified in this complex relation of law to the ownership of material resources and the transfer of that ownership from one person to another and one generation to a succeeding generation. There is a direct and vital relationship existing between the living principle, *life,* and *property* which is produced by that active and constructive life principle. This relationship may be examined most easily probably in connection with modern industry. Industry and its manifold associations with capital and labor in these days of big business offer almost countless examples of the growing importance of control which society assumes it must exercise over the life and property of the individual. We cannot enter into a minute discussion of legislation and industry, but we may make brief mention of the great divisions and note that property rights have been the basis of much of industrial legislation. This is logical because the average legislator is possessed by fears, and also, because he has an exaggerated notion of the great power of business organizations. Likewise, the average legislator is not

familiar with economic laws and the growing and involved technique incident to carrying on large business transactions. Under the compulsion of fear and ignorance the average, untrained citizen rushes into legislative halls determined to gain the protection of that mystical thing or agent which is called "law."

Industrial legislation is expressed in almost countless measures. They express an effort to control the hours, wage, sanitation, protection from injury, unfair competition, boycotts, combinations in restraint of trade, adequate returns for invested capital, etc. Questions such as watered stock, taxation, and many kindred topics are involved in the great mass of legislation relative to control of property, the product of the living principle. When we scrutinize the various laws relative to industry we note that the main battleground of industrial disputes leading to consequent legislation, has been that of "wages and hours." Here social evolution has a real contribution to make to society. The first essential is that individuals and society shall understand that the clear and reasonably comprehensive diagnoses of industrial ills must be made before preparing a prescription of those ills. An intelligent and honest study should be made of such symtoms of industrial ills as unrest, friction between employers and employees, worry with reference to those who have investments, and the dissipation of energy which makes for general inefficiency in the working of our economic machine. These symtoms must not be confused with the disease. It must be understood that there the line of procedure in social evolution is a correct and careful procedure in legislation no matter whether it is dealing with such subjects as collective bargaining, corners, or combines in trade, and so and so forth. In other words, we must understand if there is to be progress in our civic and social adjustments that henceforth laws must favor combinations of public and private agencies in order to improve industrial conditions. This is a truth which is dominant in the world everywhere, and is applicable to domestic, economic and social relations.

In the evolution of legislation and social adjustment there has been proposed and there has been used, at various times, so-called arbitration courts or industrial tribunals. We have learned from long experience, and this experience has been in the nature of an evolution and not a revolution, that industrial tribunals must not stifle by excessive regulations the development of private agencies. We were once told to think imperially in the United States and today in a world with expectancies of evil to come we need to think imperially. That is true, but our age demands that we think industrially, and to think industrially means that we must think cooperatively. Moreveover, we must remember that legislation

is an expedient and not a panacea. We must know also that unless laws are made with reference to protecting the life and the property of the individual that social progress will be impossible.

In the discussion of the relationship of law to social evolution we have thus far accented the two superlative values in human society, first, *life* as the fundamental and living principle, and second, *property* as its material expression of production. Obviously there could have been no protection of these two outstanding factors of *life* and *property* unless some form of organized direction or government had been evolved. The form of government has paralleled the evolution of civilization. It began with primitive man. There has been a slow ascent from the period when tooth and claw and sheer force dominated primitive affairs. Gradually, from a state of mere brute dominance the individuals became associated into tribes, clans and nations. The forms of government evolved in this gradual ascent from primitive to modern man are patriarchal, oligarchical, monarchical, democratic and representative. It would be useless to prepare a brief relative to the merits of each of these forms of government. It is sufficient to say that each form of government was considered by the people who developed and used it as the most satisfactory and useful for the protection of life and property within the day of the generation which evolved it. This much has been said in order to accent the fact that the human institution known as "The State" is the apex of that pyramid of society which has been building for, possibly, a million years. In the beginning of society each individual was a law unto himself, responsive only to two great primitive thrusts, first, the continuance of the individual's own life, and second, the reproduction of his kind. From that broad foundation of the unorganized primitive being we have built the great pyramid of social organization with its multiple controls called government—the apex of that pyramid of social controls.

The great philosopher, Hegel, developed an extended doctrine of the individual and his relation to the state. Among many other things he said:

"A right belongs to the individual on the basis of the family. What this right is, what the right of the individual is in the unity of the family, appears only after the family has just been dissolved and when those who must be members of it appear as autonomous persons. The right of the family consists essentially in that its *substantiality* must subsist; it is this right against externality, against the breaking of the unity. Against love there is a sentiment, a subjective one, but which can not exist before such unity." (The family receives its complete development by

means of three elements, namely; first, the form of its immediate notion as marriage; second, the external essence—property—the welfare of the family and its management; third, the education of the children and the dissolution of the family.) (Let us only note that in regard to marriage Hegel declares that it does not rest simply on the will and sentiment of those who enter into the contract. It must have for its basis reason; for its end, the child; and, beyond that the furtherance of the ends of the state.)

In discussing "civil society," Hegel had in view especially human societies in the modern form in the countries called civilized, that is in modern nations.

A people, a nation, is either a family enlarged, and then it has a natural origin, or else it is the union of family communities, which having lived apart and independent up to a certain time have been united either by a power of domination or through themselves voluntarily, and determined by the desire of assuring the realization of their respective action and their needs.

"The state brings the *family* and *civil society*, as well as the will and the activity of the individual, again into substantial existence and thus, by its unrestricted power, breaks up the subordinate spheres in order to keep them in inherent and substantial unity.

"The state in the moral spirit is the will which manifests itself, makes itself clear and visible, substantiates itself. It is the will which thinks and knows itself and carries out what it knows and in so far as it knows. The state finds in ethical custom its direct and unreflected existence and its indirect and reflected existence in the self-consciousness of the individual and in his knowledge and activity."

Hegel distinguished between "civil society" and "the state." He said that "civil society" is "simply a grouping of individuals for the satisfaction of particular needs and the protection of particular interests." "Civil society" is the difference beween the family and the state. "Civil society" is developed more slowly than the state. It has three elements, first, system of needs of individuals, second, realization of freedom and protection of property by administering right, and third, provision against risk by means of government and corporate body."

Hegel, of course, glorified the human institution, the state, and therefore urged that it should be endowed with limitless power in matters of legislation and executive and judicial control. He stated that, "The state, that powerful and complete synthesis of the general and of the particular, realizes in its fullness the moral and divine on earth." If one reads the expositions of

Hegel in regard to social evolution in his Philosophy of Mind and his glorification of the apex of the pyramid of human government, The State, it teaches one that the German nation, through its educational agencies and its governmental guidance, made a god out of the state, and regarded the kaiser as the chief high priest of the state, the national diety.

In this republic we have a totally different conception of the state and its relations to society. Instead of the making the state the end of social evolution we insist that it should be an agent or a servant of society. Consequently, in harmony with that idea and ideal we have evolved the democratic and representative form of government. We believe that citizenship in a sovereign nation which is a republic has the following qualities: first, protection of life and property; second, pursuit of happiness guaranted; third, sovereign rights of a freeman—free within the freedom of law; fourth, responsibilities of protecting one's land and all the rights and legal privileges afforded by that native land. This sentiment is adequately expressed in the concluding paragraph of the Declaration of Independence which reads as follows:

"We, therefore, the reperesentatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain, is, and ought to be, totally dissolved; and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Protection, we mutually pledge to each other our lives, our fortunes, and our sacred honor."

I know of no more eloquent tribute in the English or any other language to the high ideals of altrusim, patriotism and freedom than are expressed in these words, "And for the support of this declaration, with a firm reliance on the protection of Divine Protection, we mutually pledge to each other out lives, our fortunes, and our sacred honor." This seems to me to be an expression of the very acme of intelligence in directing and guiding the relationship of law to social evolution. It is a plain statement of the belief that *authority* and *responsibility, rights* and

*duties* should be evenly balanced in private and public, and in individual and social adjustments.

This reference to the state as the apex of the great pyramid of social evolution suggests the extended divisions of law related to social evolution such as constitutional law, the American common law, evolution of equity, international law and statute law. This is not the place, neither is there time nor need for entering into the discussion of any one of these great and notable divisions of legal evolution in our republic. It is, perhaps, sufficient to say that a study of any one of these multiple divisions of law reveals that there have been, for the most part, a continuous progression and refinement of social controls. This truth is exemplified certainly both in criminal and civil law. Parsons, in his book "Legal Doctrine and Social Progress," says: "Liabilities are on a higher plane today than they were some hundreds of years ago. Today criminal law aims directly at prevention, adjusts the punishment to the degree of guilt and strives to reform the criminal with increasing care and wisdom." He states also that "Civil law with a good degree of consistency aims to throw the loss airsing an any transaction upon the one who has in the course of actions producing the loss, manifested in greater degree those qualities which should be eliminated."

A study of the relationship of law to social evolution indicates clearly that the functions and objectives of the law contemplate a much larger scope of usefulness than governments have performed thus far. These functions and objectives may be classifield under two headings, general and specific. Under the heading of general functions and objectives are first, restraint, prohibition and compulsion; two, protection; three, relief; four, regulation; five, development, and six, service. Under the heading of specific functions and objectives; first, to establish justice, order, economy and felicity; second, to insure domestic tranquility; third, to provide for common defense; fourth, to secure the blessings of liberty; and fifth, to promote the general welfare. While the state and national governments have made more or less advance in realizing each of these general and specific objectives it is generally believed that much greater progress may be made and must be made in the future than has been made in the past. Further progress in realizing these general and specific functions and objectives will be in the direction of simplifying and clarifying rights and duties associated with life and property and in the simplifying and clarifying the liability of wrong doers and the liability of insurers on the contract implied by law.

In endeavoring to trace with exaggerated brevity the relationship of law to social evolution we have chosen three pegs on

which to hang the discussion, first, the life principle; second, the production of the life principle expressed in property; and third, the human institution, the State. The question now arises why a review of all this well known matter before the North Dakota Bar Association? The answer to that question is this. There is an outstading need that the legal profession accent from time to time the superlative importance of human progress, human happiness and human rights. This Association composed of leading students and practitioners of law has and must have a great and vital resposibility for the enlightenment and legal leadership of the citizens of this Commonwealth. There are perfectly safe, sound and sane procedures which must be followed by the citizens of North Dakota in regard to the making and keeping of laws. That procedure must be in definite and strict accord with the laws of social evolution. The law of this State and the law of this nation may well be compared to a famous analogy made by the lucid teacher of biology, Thomas Huxley, when he referred to living matter as a whirlpool. He said that a particle of living matter was like a whirlpool into which non-living and unorganized material entered, was worked over, became a part of the living matter—the whirlpool—and then later on having served its function and having become worn out with its work broke down and passed out of the whirlpool into the stream of non-living matter. To my mind this biological figure of speech may be applied to the law as an expression of the social organisms. In other words, the law is the living whirlpool of the social organism. Into this living whirlpool of law there enters continually a stream of ideas, of suggestions of non-legalized matter. This material on being worked over by the intelligence of society becomes a part of the living matter known as law. It operates as a living and vital force until it has served its social function and then it becomes worn out and useless and should be and is thrown out of the social living whirlpool and is eliminated as worn out and dead matter in order that social progress may continue.

Law is naturally conservative. It emerges from the past experiences of mankind and all but the edges or fringes of law belongs to the past. It is because of this fact that radicalism always goes in advance of law. Radicalism has been called the centrifugal force of society, and law the centripetal force which draws customs as well as institutions toward a center. Radicalism of course means a disturbed condition of society and would ultimately destroy society if it operated without the control and ripening influence of law. Working harmoniously together *radicalism* and *law* make for social advancement. No government, either state or national, can long exist if it is radical

or if it is wholly static in refusing to modify its laws of social control.

The North Dakota Bar Association has a great responsibility and a great opportunity to make clear that *law* develops in the minds of men a social consciousness. We have heard much in recent years of a new social consciousness. However, much of this discussion in regard to social consciousness is prophetic. This Association has much to do for the citizens of North Dakota in furthering the development of social consciousness. Perhaps, we may answer the question, "Why have we offered this brief?" regarding law and social evolution with this quotation:

"Concurrent with the making of a great social consciousness, but different, is the development of social conscience. No force is greater than the law in the creation in men of the social conscience which will say that every child, no matter how poorly born, shall have the fullest opportunity for development that is possible; that every man willing to work shall have the opportuity for healthful work and hopeful rest; that every locality can develop freely and fully; that present righteousness is greater than precedent; that human life shall take precedence over property rights. The law is helping to create the conscience which in turn will make the new law expressing itself. This view of the law is above and beyond the specific schemes and formal rules of the socialists of various schools, it transcends the narrow comprehension of pur-blind and anti-socialists and so-called individualists; yet it grasps the best ideals of both and builds upon the good foundations of the past and present. The law is here. It fits human life on the whole fairly well. It is far in advance of many. It is a great uplifting force to the masses. And law is to hold fast that which we have gained, as well as to be the arena in which the spheres of individual and communal development are slowly and painfully to be molded and remolded and given definition."

North Dakota has been a great storm center of governmental readjustments, during the past few years. This State has furnished and is furnishing a remarkable laboratory for the study of changing legislation. The proponents of the most pronounced changes are known within and without the State as Radicals, and the opponents of thes changes are known within and without the State as Reactionaries. By reason of the fact that this is a great laboratory of vigorous and dynamic force the North Dakota Bar Association has had and is having large responsibility and opportunity for directing and guiding the citizens of the Commonwealth.

Speaking at the recent Denver meeting of the National Bar

Association Mr. James M. Beck of New York, former solicitor general of the United States, urges a closer study of our domestic institutions to the end that they may be preserved. He is quoted as saying:

"It cannot be questioned that democratic institutions are continuously becoming more unworkable. The giant growth of our nation has put an undue strain upon it governmental machinery and an ever-widening suffrage has made the problem of a qualified electorate even more difficult. The representative system is increasingly losing its strength. The complexity of our problems makes it increasingly difficult for the people to determine policies by the simple expedient of voting for either John Doe or Richard Roe.

"An even greater danger to representative government is found in the present tendency to substitute direct referendums for the deliberate action of a legislature."

Mr. Beck is from that part of the Union where great wealth has been accumulated and where conservatism in many governmental matters is firmly established. Personally, I do not believe that he is correct in his statement that representative government has been greatly endangered by the substitution of direct referendum for legislative action. The Initiative and the Referendum and the Primary election and other legal agencies have been worked out in social evolution partially because of the leadership of radicalism. They are being refined and orderly developed today under the conservative influence of law. The Initiative and the Referendum and the Primary all demand and require the emancipation influence of education. If the people, the common people, are adequately informed and stimulated they may be fully trusted to reach correct and safe decisions in governmental matters. Any other conclusion is illogical and inconsistent with the theories and practices of a democracy and a republic.

This discussion would be inadequate and incomplete if references to possible trends in legal education were omitted. At the beginning of the discussion mention was made of an article which appeared in the April 14th number of the New Republic entitled "Socializing Legal Education". This article gives encouragement to the American citizen who is seeking for better and more hopeful outlooks during a period of public apathy. Reference is made to the innovations adopted by the Columbia and Harvard Law Schools. The faculty of the Harvard Law School petitioned and received an appropriation "for the scientific study of the operation of criminal justice in Boston." Almost coincident with the new movement at Harvard the Columbia

Law School broke a tradition of one hundred and fifty years by establishing a permanent research seminar for the purpose of employing "the methods of science in promoting the administration of criminal justice throughout the United States". A more recent venture and a more radical and comprehensive proposal has been recorded by the Harvard Law School. The American people are now being asked for five million dollars to increase the endowment of Harvard University in order that the Law School may perform its legal work of professional training more adequately and in order that five great research professorships and a number of research scholarships and fellowships may be established.

The relationship of law to social evolution will be accented and advanced according to the appeal of the Harvard Law School for an additional five million dollar endowment. Accent is placed upon the fact that the scientific method will be applied in an effort to gain an understanding and to improve the control of social behavior. Schools of Medicine and Engineering have long carried on researches in their respective fields. Divinity schools have not excelled in research with the exception of biblical scholarship and church history. However, there is a movement in the Union Theological Seminary to apply the methods of technique and research in the Divinity School. Union Theological Seminary proposes religious education as a subject for continuous investigation and it encourages its pupils to develop a spirit of systematic investigation and inquiry into the social implications of the profession of the ministry. It is only recently that Law Schools have indicated an interest in the use of research which has been the great handmaiden of modern civilization. Research regarding the working of legal rules and institutions in contemporary society has formerly been carried on almost entirely by individual jurists. However, the case method of teaching law, which has prevailed at Harvard for more than a quarter of a century, is closely related, in theory at least, to the research idea. This idea has now been acknowledged in the memorandum associated with the appeal to the American public for the additional five million dollar endowment for the Harvard Law School.

In broadcasting this appeal to the American people, the Harvard Law School is manifestly trying to give reality to the conception of what makes the law live which its Dean, Mr. Roscoe Pound, has so ably and so persuasively expounded. The Faculty of the School is proud of the fact that it studies and teaches the common law as the result of the experience of the English-speaking peoples in the promotion and administration

of justice rather than as rules of thumb or as a closed and immovable system of doctrine and dogmas. The law is entitled to endure, not as a system of rules, but as a mode of legal thinking and as a matter of deciding concrete controversies. And fundamentally what the Harvard Law School is trying by its present proposal to perpetuate or rather to revive in the American legal profession is precisely a method of legal thinking which is at once realistic and visionary. Specialization in the practice of the law has necessitated a separate provision for legal research and for the task of professional self-criticism which during the period of the many-sided, all-around legal practitioner was precipitated as part of the daily routine of a lawyer's business.

The memorandum points out that the call for research in the law is peculiarly imperative. Lawyers, courts, legislatures, the administration of justice in general and the administration of criminal justice in particular are all subjects of serious criticism on the part of the lay public. The strain upon law due to the changes in modern life and the resulting delays, uncertainties and miscarriages of justice demand on the part of research scholars in the law schools of the country a service which, so the memorandum says, cannot be performed by any other agency. Obviously it is not a job for laymen, although political scientists in the colleges may contribute to it. Nor is it a job which can any longer be confided to practicing lawyers and jurists. The work of the contemporary lawyer is so specialized and he is so much engrossed with the management of enterprises and the practical guidance of business that he sees the law as a practical convenience rather than as the reflection of the effort of a whole society to order its affairs and unfold its life. The bar associations are, as research agents, subject to the same limitations as individual lawyers. Nor can the judges be expected to serve as the alert public conscience of the American legal system. The insight into the problems of justice which a judge of today can derive from his personal experience is too fragmentary, specialized and local to prepare the judiciary to perform for contemporary America the constructive work which its predecessors performed so successfully during the formative period of American legal institutions. If the law schools do not undertake this work of systematically exploring and watching how well the law and its administration are fulfilling social purposes, American justice may lose its way and become for the time being at least in part an obstacle to social fulfillment."

"The Harvard School is asking for an endowment in order not merely to study the unfolding of this vast and complicated experiment as one of the essential social processes, but to educate graduates who will carry into the practice of law a personal familiarity with scientific method and a personal devotion to its standards and purposes. The project may assume too much. The existing tendency to mechanize, specialize and standardize American activities and American intelligence may continue to prevail for another generation or more. But this unpleasant prophecy is only one among several possibilities. Certainly the most promisiing counter-agents to this tendency are most of them born of a faith in some of the newer projects of social education, and of the several expressions of this faith that which the Faculty of the Harvard Law School has just revealed is the most mature and the most inspired by a combination of moral and scientific vision."

In conclusion it may be said that possibly too much accent has been placed upon the life principle, its product—property, the State as the apex of the pyramid of human evolution from brute to man, and the kindred subjects of social controls and numerous divisions of law as they reflect the growing, developing relations of law and the evolution of society. Possibly it might seem more appropriate in these days of "crime waves" in great cities, grave scandals in oil and politics and wide sweeping defiance of the 18th Amendment to the Federal Constitution and many state laws to confine the discussion of law and its relations to social evolution to Lincoln's and Kipling's militant words. Lincoln said:—

"*Let every American,* every lover of liberty, every well wisher of his posterity, swear by the blood of the revolution never to violate in the least particular the laws of the country, and *never to tolerate* their violation by others. As the patriots of seventy six did to the support of the Declaration of Independence, so to the support of the constitution and laws let every American pledge his life, his property and his sacred honor. Let every man remember that to *violate the law* is to trample on the blood of his father, and to tear the charter of his own and his children's liberty. *Let reverence for the laws* be breathed by every American mother to the *lisping babe* that prattles on her lap, let it be taught in schools in seminaries, and in colleges; let it be written in primers, spelling books and almanacs; let it be preached from the pulpit, proclaimed in the legislative halls, and enforced in the courts of justice. In short, let it become the *political religion* of the nation."

Kipling proclaimed:

"Now this is the Law of the Jungle—as old and as true as the sky;

And the wolf that shall keep it may prosper, but the wolf that shall break it must die."

As the creeper that girdles the tree trunk the Law runeth forward and back

For the strength of the Pack is the wolf, and the strength of the wolf is the Pack.

Now these are the laws of the Jungle, and many and mighty are they;

But the head and the hoof of the Law and the haunch and the hump is—Obey."

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September 10th, Morning Session
Invocation by Rev. Davenport

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PRESIDENT YOUNG: We shall now have the report of the Committee on Constitution and By-Laws—Mr. Aylmer.

## REPORT OF COMMITTEE ON CONSTITUTION AND BY-LAWS

Your Committe on Constitution and By-Laws begs leave to report as follows:

In 1921 the State Legislature enacted a law creating a "Bar Association of the State of North Dakota"

And provided that the association should adopt a Constitution and By-Laws and rules for its government. 1921 Ch. 25 page 58.

On July 7th, 1921 the Bar Association met at Grand Forks and adopted a Constitution and By-Laws, which was printed in a report of the annual meeting for 1921 on page 5.

The Constitution and By-Laws as adopted has never been brought down to date, although some changes have since been made. To find out what the present Constitution and By-laws are, requires considerable time in examining the annual reports since 1921. Your committee has made a careful examination of these reports, and has brought these Constitution and By-laws down to date, the same being attached to this report.

New members are coming into this Association each year who will not have the previous reports of this association, and who should know what the Constitution and By-laws of this associa-

tion are. We older members should also have easy access to them

## MOTION TO PRINT CONSTITUTION AND BY-LAWS IN EACH ANNUAL REPORT

*Your committee therefore recommends* that a motion be made at this meeting directing the Secretary to bring this Constitution and By-laws down to date after each annual meeting, and that same as revised be hereafter printed in full in each annual report of this association.

Article 7 of the by-laws as amended provides additional *standing committees* to be appointed by the president with the concurrence of the Executive committee.

The Executive committee made its report at the 1924 meeting (See page 13-1924 proceedings) recommending that the activities of this association be enlarged by the addition of 13 additional committees, called "sections". This part of the Executive Committee's report has been attached to the Constitution and By-laws as part of this report.

It is not a part of the By-laws, and the question is whether it should be made a part of the by-laws or not. At the 1924 meeting this part of the Executive Committee's report was referred to the committee on Constitution and By-laws, and nothing was done with it at the 1925 meeting. (1924 report page 19). At the 1924 meeting Judge Knauf indicated that the "sections" should be in a little different class than the ordinary committee of the Association. (1924 report page 61). Judge Knauf said with reference to the organization of these sections as follows: (See page 61, 1924 Report, bottom of page) "The idea was to carry out the Bar Association principles of the American Bar Association, as nearly as possible in the State of North Dakota; to make the rules and By-laws of this Association conform to the rules and laws of the American Bar Association, so that there might be a more uniform process in each State; the idea being that the more important work of this Association here in the State should be carried on under Sections which might be more or less independent of the rules and orders and by-laws which might be laid upon the Association from time to time. It appeared to us at the Executive Committee meeting that we could do well by forming all of the more important works of the Association into Sections, which might be somewhat independent of the By-laws of the Association and that for the lesser phases of our work we might continue with committees. The distinction between the two isn't very well founded and so far as the state is concerned it wouldn't matter whether

they were called Committees or Sections. There is a distinction on the more important work and we believe the forming of Sections should be used, and in forming Sections like the Section on Americanization has done this year have even gone outside the regular work of the Association and have sought to correlate the work of the Americanization forces from all the different societies in the State. We have succeeded fairly well this past year and believe that in the course of another year by spreading out and calling this a section we can get correlated all of the working forces within the State of North Dakota."

## MOTION RE STANDING COMMITTEES

It would seem that a motion would be in order at this time, and this committee recommends that such motion be made that the recommendation of the Executive Committee in its 1924 report found on page 13 of the 1924 proceedings regarding the creation of certain sections be approved, and that the Secretary print the same at the end of the By-laws, in each annual report, so they will not be lost sight of, but that the same be not made a part of the By-laws.

The report of the Executive Committee which recommended creation of the 13 additional sections as above stated is as follows: to-wit: (See page 13-1924 Report)

"Whereas, it is the belief of the Executive Committee of this Association that the best interests of this Association and of the people of the State of North Dakota require that the activities of this Association be enlarged by the addition of the following committees, to be known as Sections; now, therefore,

"Be it Resolved, That there be formed within said Association the following Sections, viz:

1. A Criminal Law Section.
2. A Comparative Law Section.
3. A Judicial Section.
4. A Legal Education Section.
5. A Public Utilities Section.
6. A Uniform and National Practice Section.
7. An Americanization Section.
8. A Classification and Re-Statement of the Law Section.
9. A Bench and Bar Ethics Section.
10. A Legal Aid Work Section.
11. A Law Enforcement Section.
12. An Office, Printing, Books and Supplies Section.
13. An Internal Affairs (of Association) Section.

"Each Section shall meet at least once a year on seven or more days notice from the Chairman of the Section, and with

the exception of the Section on Americanization each Section shall be composed of such number of attorneys as the President of the State Bar Association shall designate, he naming the Chairman and personnel of each Section and the Section on Americanization shall consist of one member of the Association in each County in the State, and a Chairman of the Committee in addition, all named by the President of the Association.

"The proceedings or any part of them of any of these Sections may, in the discretion of the Executive Committee, be published.

"Each Section must make a report at least at each annual meeting of the Association, giving in detail the work accomplished, with recommendations.

"Any matters arising in the Association properly referrable to any of such Sections may be referred thereto.

"Appropriations may be made from time to time by the Executive Committee of the Association to any Section, but the financial liability of the Association to the Sections shall be limited to such appropriations as may be made for them and shall cease upon payment to the treasurers of such Sections or Conferences of the amount so appropriated.

"The duties of each of such Sections shall be such as are usual, natural and necessarily the functions of such sections.

"1. The Criminal Law Section shall carefully consider the Criminal law and Procedure in this state and recommend such timely changes, codifications, etc., in the law and procedure as may be properly applicable to the State of North Dakota, to the end that the law and procedure may be improved thereby.

"2. The Comparative Law Section shall consider the matter of laws of this state as compared with the laws of other states, foreign and domestic, and make reports when and where our laws may be improved.

"3. The Judicial Section shall consist of Judges and ex-Judges of Courts of Record in our state and nation, a part of whose duty it shall be to regain and to retain for the Courts of North Dakota and the United States their time-honored eminence and position in the hearts of our people and in the estimation of the world.

"4. The Legal Education Section shall be particularly bounden to raise the standard of education and secure the highest character of applicants for admission to the Bar of North Dakota.

"5. The Public Utilities Section shall be specially authorized to secure just and equitable rates for the public and for the public utilities operating or to operate in North Dakota.

"6. The Uniform State and National Practice Section shall endeavor to secure a uniform practice act for the various similar Courts of the States and Nation.

"The foregoing statements are not to be construed as limiting the duties of such Sections but only as suggestions as to the duties to be by them performed; nor does the foregoing limit the Committees which shall or may be appointed by the President of this association."

## MOTION TO PRINT CODE OF ETHICS IN EACH ANNUAL REPORT

We also have a Code of Ethics which was adopted in 1923, and to which an amendment was made in 1925. It would seem advisable to keep this up to date and print it each year in the annual report, or at least direct the Secretary to send a copy to each person hereafter admitted to the bar.

At the 1925 Bar Meeting some discussion was had relative to the *Powers of the Executive Committee* between the annual meetings of this Association. Between the annual meetings the Executive Committee acts for the Association, and in the opinion of this committee it should have broader powers than the present By-laws permit. It has been the custom heretofore to pass a resolution at each annual meeting giving broader powers to the Executive committee, and it is for the purpose of doing away with the necessity of making this resolution each year that an amendment to the present by-laws has been suggested. The duties of the Executive commiteee are covered by Article 3 of the By-laws as follows:

"Duties of the Executive Committee: The Executive Committee shall make all necessary arrangements for the meeting of the Association, and provide in their discretion for its entertainment, prepare the programs for its proceedings, audit all bills against the Association, and the accounts of the Secretary-Treasurer, and perform such other duties as may be required by the Association."

## MOTION RE POWERS OF EXECUTIVE COMMITTEE

Your committee therefore recommends that a motion be made amending Article 3 aforesaid to read as it now reads, and to include the following: to wit:

"The Executive Committee shall have full power and author-

ity in the interval between meetings of the Association to do all acts and perform all functions, which the association itself might do or perform, except that it shall have no power to amend the Constitution or By-laws."

This latter paragraph is a copy of the By-laws of the American Bar Association with reference to the Powers of the Executive Committee, and would seem to cover the situation satisfactorily.

## BAR BOARD

At the 1925 meeting it was suggested and a motion made that some method satisfactory to the members should be adopted as to the selection of candidates for the Bar Board.

1925 Report pages 8-17-18.

Article 9 of the Constitution reads as follows:

"Referendum: Whenever a petition signed by not less than thirty members of this Association shall be presented to the President, asking that a vote of the members of the Association be had on any measure affecting the public interest, state or national, or by way of indorsement of candidates for judicial or other office, the President and Executive Committee shall forthwith and within ten days provide for the submission of such question or measure to a vote of the members by the postal ballot, the details of which shall be prescribed by the Executive Committee. Such referendum shall be by secret ballot and thirty days from date of mailing, the ballots shall be allowed for completion of the votes. At the expiration of that time the ballots shall be canvassed by the President and Secretary, and by a Judge of the Supreme Court or District Court to be selected by the President, and the result shall be published in three daily newspapers published in the State, one of which shall be published at the capital of the state. No expression of approval or disapproval by this Bar Association on any such measure or candidacy shall be given in any other manner."

This Article 9 was passed before the enactment of the 1923 law providing that the Bar Association shall submit a list of the Members for appointment to the Bar Board.

In view of this Legislative Enactment it becomes necessary for this Bar Association to select before January 1st, 1927, and send to the Supreme Coure the names of three members, one of whom shall be appointed by the Supreme Court to be a member of the Bar Board on January 1st, 1927.

Another list of three names shall be submitted prior to

January 1st, 1929, and every two years thereafter a similar list shall be submitted.

Therefore, it would seem advisable to amend Artic'e 9 of the Constitution so that this Association may select such names every two years without the necessity of first having the petition with reference thereto signed by at least thirty members of the association, etc., as provided by Article 9.

It would seem that at least as to this particular matter, a more simple procedure should be adopted.

## MOTION RE SELECTION OF MEMBERS TO BAR BOARD

IT IS RECOMMENDED THAT ART. 9 of the Constitution be amended to read is it now reads and that the following be added, viz:

"Except that with reference to the selection of names to be furnished by the Bar Association to the Supreme Court re membership on the Bar Board as provided for in Chapter 134 of the 1923 session laws of the State of North Dakota, the following method of selection is hereby adopted to-wit:

At the annual meeting of this Association immediately preceeding the time for appointment of a member of the State Bar Board, an election shall be held by secret ballot, each member voting three names, and the names of the three members receiving the highest number of votes shall be submitted to the Supreme Court as provided by law.

In the event of a vacancy occuring on the Bar Board other than by expiration of term, a referendum shall be carried on among the members of this Association by such method as shall be adopted by the Executive Committee, the names of the three members receiving the highest number of votes, to be submitted to the Supreme Court as provided by law.

In conclusion as above suggested your committee recommends action on the following:

1st. Motion to print Constitution and By-laws (revised to date) in each annual report.

2nd: Motion to print Code of Ethics (revised to date) in each annual report.

3rd. Motion that the motions of the Executive Committee at its meeting October 15, 1923, in creating 13 additional sections or committees be printed in the report of the annual meetings, following the Constitution and By-laws, but not as a part

thereof, but for the purpose of keeping the same before the Association.

4th: Motion to Amend Article 3 of the By-laws extending the Powers of Executive Committee.

5th: Motion to amend Article 9 of the Constitution re Selection of Candidates for appointment to the State Bar Board.

Respectfully submitted,
A. W. AYLMER,
Chairman.

PRESIDENT YOUNG: I think it would be well for us to dispose of each suggestion as we go along. Do you move the adoption of the amendments you have read?

MR. AYLMER: I make a motion at this time that the Constitution and By-laws be revised to date after each annual meeting by the Secretary and as revised, be printed in each Annual Report of the Association.

The motion was seconded, and carried.

MR. ELLSWORTH: At this time I move that the Secretary be instructed to revise the Code of Ethics after each meeting, and, as revised, that the Code be printed.

PRESIDENT YOUNG: The motion is to have the Code of Ethics printed and that the Secretary keep it up to date.

The motion was seconded and carried.

MR. AYLMER: With reference to the standing Committees, I move that the recommendations of the Executive Committee in its 1924 session, found on page 13 of the 1924 proceedings, be approved and that the Secretary print these recommendations in each annual report so that they will not be lost sight of but that they will not be made a part of the By-laws.

MR. ELLSWORTH: It seems to me that we are about to make a mistake in this connection. I think it is conceded that the Constitution ought to be printed in the Proceedings. Whatever the Executive Committee has taken to itself, it has never tried to amend the Constitution and By-laws. It seems to me that if there are to be additional standing Committeess appointeed, it ought to be by the Constitution, and not at this meeting.

MR. CUPLER: At the 1924 meeting this Association added a By-law known as Article Seven, to read as follows: "There shall be appointed by the President additional committees as shall be necessary more efficiently to carry out the work". It would seem that that article of the By-laws gives power to the committee to appoint committees from time to time as they deem necessary.

At the 1924 session, those interested in passing the resolution stated at the time that this article of the By-laws was passed so as to give the Executive Committee power in making it a part of the By-laws.

MR. ELLSWORTH: If I have understood, these are standing committees.

PRESIDENT YOUNG: I don't understand that there was an attempt to create standing committees.

All in favor of the motion that the action of the Executive Committee with reference to the creation of additional committees be approved and that the list be published with the by-laws, but not as a part of the Constitution and By-laws, say "Aye". Motion carried.

MR. AYLMER: At the 1925 meeting, it was suggested and a motion made to that effect, that a method of procedure satisfactory to the members should be adopted with reference to candidates for the State Bar Board. At the 1922 session article nine was adopted, to-wit:

Article 9. Referendum: Whenever a petition signed by not less than thirty members of this Association shall be presented to the President, asking that a vote of the members of the Association be had on any measure affecting the public interest, state or national, or by the way of indorsement of candidates for judicial or other office, the President and Executive Committee shall forthwith and within ten days provide for the submission of such question or measure to a vote of the members by the postal ballot, the details of which shall be prescribed by the Executive Committee. Such referendum shall be by secret ballot and thirty days from date of mailing the ballots shall be allowed for completion of the votes. At the expiration of that time the ballots shall be canvassed by the President and Secretary, and by a Judge of the Supreme Court or District Court to be selected by the President, and the result shall be published in three daily newspapers published in the State, one of which shall be published at the capital of the state. No expression of approval or disapproval by this Bar Association on any such measure or candidacy shall be given in any other manner.

Up to this time there is nothing else in the Constitution and By-laws providing thy method for this association to select candidates for any office. After that article in the Constitution was passed in 1922, the legislature, in 1923, passed a law providing for the creation of a State Bar Board, and provided that this Association should name the candidates for this Board by this method: That the Association submit to the Supreme

Court three candidates for each member to be appointed to that Board and that the Supreme Court should select one of these candidates, so recommended. The 1923 law being passed subsequently to Article 9 (which I have just read) Article 9 of course is not created in contemplation of the 1923 law. A couple of years ago, a vacancy occurred on the Bar Board and the Executive Committee followed out a referendum for the selection of candidates. At the last meeting of the Association the Secretary suggested that a different method be provided. In view of the Constitution, it would seem that an amendment would be necessary. The Constitution provides:

Article 10. Amendments: This Constitution may be amended at any annual meeting by a two-thirds vote of the members present upon amendments which have been suggested at previous annual meeting, or amendments which have been suggested at the next preceeding annual meeting.

It would seem that according to this provision of the Constitution with reference to Amendments, that if we are to amend Article Nine, all we could do at this time is to suggest an amendment and at the next meeting pass it. In view of the fact that a candidate will have to be chosen by this Convention and the name presented to the Supreme Court this year, it would seem that the present provision for selecting candidates would have to be followed. For the future, however, it is suggested that Article Nine be amended by adding the following:

Except that with reference to the selection of names to be furnished by the Bar Association to the Supreme Court re membership on the Bar Board as provided for in Chapter 134 of the 1923 Session Laws of the State of North Dakota, the following method of selection is hereby adopted, to-wit: at the annual meeting of this Association immediately preceding the time for appointment of a member of the State Bar Board, an election shall be held by secret ballot, each member voting three names, and the names of the three members receiving the highest number of votes shall be submitted to the Supreme Court as provided by law. In the event of a vacancy occurring on the Bar Board other than by expiration of term, a referendum should be carried on among the members of this Association by such method as shall be adopted by the Executive Committee, the names of the three members receiving the highest number of votes to be submitted to the Supreme Court as provided by law.

I, therefore, at this time move that such amendment be made to Article Nine.

PRESIDENT YOUNG: You are submitting that for the purpose of having a vote on it at the next annual meeting?

MR AYLMER: Yes.

The motion was seconded.

MR. ELLSWORTH: Does not that amendment take the power of selection away from the majority members as provided by law?

PRESIDENT YOUNG: That is not important at this time. That was decided at the last annual meeting.

MR. CUPLER: I might say that the first paragraph provides that the members shall select the candidates at the annual meeting but the second paragraph provides that the executive committee have a referendum, so in each case the members will have a power of selection and it will not be up to the executive committee alone.

PRESIDENT YOUNG: The members having taken separate action on each suggestion, we will simply file the report, if there is no objection.

It was suggested to me that the committee on judicial council will report at this time.

MR. A. G. BURR: In order to have a better understanding of the scope of the work submitted to this committee, we decided to make a preliminary investigation. This report has received the support of all members of this committee.

## REPORT OF COMMITTEE ON JUDICIAL COUNCIL

At the 1924 session your committee set forth the necessity for the "continuous study of the administration of justice;" showed the methods employed by other states in attempting to solve the problem, and suggested the formation of a judicial council for the state—giving a tentative outline. This report will be found on page 36 et seq. of the printed proceedings. The association acted favorably on this report and directed your committee "to formulate a law in accordance therewith to be presented to the next session of the legislature." This action will be noted on page 40 of these same proceedings.

At the 1925 session your committee attempted a review of the progress of similar plans in the different states—giving a resume of the legislation in each state where the plan had been put into operation—and pointed out that now we were in better position to estimate the value of such legislation as we were securing experience as well as theory. Your committee presented, also, the draft of the bill which had been prepared and presented to the legislature with an explanation of why it had not been pushed,

the gist of which was that awakened interest and the natural conservatism of the bar had suggested deferring legislation until the matter could be studied at better advantage. Your committee suggested to this association, at the 1925 meeting that, "while not rescinding the action taken last year (1924), this whole report be submitted to the full membership of the bar of a year's study that your committee be continued and that at the next session final action be taken. There will be another session before the convening of the legislature, hence no harm can arise from the delay." This report was adopted by the association as you will note by reference to pages 36-43 of the 1925 printed proceedings.

The personnel of this committee was changed by the association in 1925 so that but two of the old members remain; but among the new members appointed is our honored chief justice of the state. During the year Judge Christianson called a meeting of the district judges of the state to be held at Bismarck, and there the needs of the state were discussed and propositions presented and debated. Your committee will not attempt an outline of the work done at this meeting, but trusts Judge Christianson may have the opportunity of reporting this branch of the work himself. Your committee refers to this, however, as being part of the method adopted for "the study" by the membership of this association. Different members of your committee arranged for discussion of the proposed plans, at meetings of the bar in different localities. As a sample of this line of work may the chairman be permitted to refer to a meeting of the lawyers of Pierce county, held at his home last winter, where this proposed bill was presented and discussed from all angles. We are not in a position to state, and have no means of telling, how many of these discussions did take place or to what extent the bar "studied" the problem. The matter was taken under advisement by the bar for this purpose, attention has been called to it in different ways, notably by Bar Briefs, members of this committee have asked local associations to include discussion in the agenda, and if not thoroughly understood now, may it not be because of lethargy?

Since last meeting our country has had added experience of the wisdom of such a movement. We have not tried to state the experience of all of the states which have adopted the plan. It will suffice if we refer to but one—Massachusetts. The situation in Massachusetts is typical of the country—not in the extent of the problem, or the phases in which it presents itself; but in the nature, the evils, and the proposed remedies. Those entrusted with the administration of justice as well as those affected by it, and this takes in a good deal of territory, knew or felt that

things were sort of out of joint. Accommodation to circumstances had been effected to some extent; but no complete survey had been attempted. Ignorance of the situation, or at least a hazy idea of the extent of work demanded, the natural conservatism of the profession, the inertia of society combined to obscure conditions. As in many other instances those empowered to study conditions were amazed at the necessity, the rammification of purpose and the field assigned it. It may be well to quote from the first printed report of the Massachusetts Judicial Council to show that it is not a temporary condition confronting any state. In this report prepared for and presented to the governor, the council says:

"The problem set for the council is broad and far-reaching. It must seem so without doubt to every one, be he layman or lawyer. But the year's work has brought home to the members of the council the extent of the problem in a way they find hard to put into words. The problem as it exists today can not be met by the study of one year or of several years. Not only that, but the problem must of necessity change from time to time. It it for this reason (without doubt) that the council was created 'for the continuous study' of the judicial system of the commonwealth. The council recognizes that the investigation and study made by it during the year that has come to an end is but a beginning."

Here we have the beginning of the presentation of facts—we have passed from the realm of theory to the actual, concrete presentation of things as they are. A vast amount of data as to the number of cases docketed in all courts, the classification of these, methods of dealing with them, results of such methods, the reasons for failure, the contribution of each branch of this failure—courts, bar, litigants, public—rules and their workings, comparisons with other jurisdictions and similar matters is presented, so that the farther the council goes and the deeper it delves the greater seems to be the need for such study.

It has been somewhat common, lately, to refer to the success of the English method adopted; in fact there has been a sort of reaction against this as a foolish and sycophantic worship of a foreign system. But when such well-balanced minds as Chief Justice Taft hold this system up as a model which can be adapted to our needs; when men like Professor Sunderland of the University of Michigan make it the subject of an interesting and instructive address, as he did for the American Bar Association of last year, when this Judicial Council of Massachusetts refers to it constantly and sets forth Professor Sunderland's address in full; when members of this same council go to England for the

express purpose of studying the system first hand, it may be we can learn something from Europe about the workings of courts even though not a world court.

To administer justice speedily, at low cost, with certainty and equity, and to make it effective is the aim of government. To a certain extent we may agree with Mr. Justice Riddell of the superior court of Ontario, when he says:

"We regard the courts as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. We are a poor and a busy people. We can not afford to waste time or money."

Somtimes this feature is lost sight of. Administration of justice is more than a mere "business" matter, however. It is so vitally connected with civilization itself, so constructive in the ideals set forth and maintained, so essential to the development of the higher nature of the race, that the dollars and cents involved, or the property rights affected are mere incidents. But as security, stability, progress, are reflected in the manner in which we deal with these same dollars and cents, or property rights, we find that idealism is translated into fact in even the most commonplace and sometimes apparently trivial incident. The study of legal philosophies may leave us in doubt whether there in inherent in man instinctive principles as the revival of the theory of the law of nature would indicate, or whether morals and principles are the product of environment; but whatever may be our conclusion in this respect it is certain the administration must keep abreast of the times. Haphazard methods, opportunist in character, will never create assurance. We should study the problem from all sides and continually mold to meet the exigencies of the times. As Prof. Quincy Wright of Chicago says, in the July 1926 issue of the American Journal of International Law,

"The ideal system provides a convenient body of rules, principles and standards, which, if applied to any possible dispute, will give a maximum of satisfaction to the interests involved; but few actual systems reach the ideal and none can continue to unless legislation or other means of changing the law keeps the system continually abreast of conditions and interests in an ever-changing world." To be required to run to the Legislature, however, for every needed change, so as to conform rules and methods to needs, would be not only diletory, confusing, and uncertain of results, but would be confession that the profession, which above all others, is the expert in this field is incompetent to take charge of the situation, as well as conceding to the Legislative part of the functions of the Judicial Department.

The work of this Committee during the last three years is presented to this session for final disposition.

Respectfully submitted:
A. G. BURR, Chairman
W. F. BURNETT
CHAS. M. COOLEY
W. O. CRAWFORD
Committee.

I have the voluminous report of Massachusetts with me, if any of you care to examine it.

The report of this Committee is respectfully submitted with reference to the proposed draft of the law that was printed. In the 1925 provision, there has been some disagreement about the intention of the bill. It was suggested that it follows the Washington bill; if anything, it follows the Ohio. The Massachusetts and the Ohio bills do not make provision for practicing attorneys to be represented on this Judicial Council, but that is merely a matter of personnel.

MR. NOSTDAL: It would be well if you would give a short outline of what that bill contains.

MR. BURR: As a short outline, the proposed bill recognizes that there are four different features, all of which should be represented in the selection of this Committee. It is my personal opinion and that of two other members, but not embodied in the bill, that in addition to the Council, there should be a representative of the Law School to give the theory of the study of law. Under the bill the Council will comprise the Chief Justice of the State and three District Judges to be appointed by the Governor. The Appellate Courts will look at it from one angle, the Trial Courts from another, perhaps recognizing each other's attitude. But the legal profession itself is a potent factor there and there are two departments there, one represented by the prosecution's side, so the bill makes provision for the Attorney-General of the state to be a member of the Council. Those who take charge of the defense should be represented, so the bill makes provision for the President and Secretary of the Bar Association to be members of this Council. It is my belief that the Dean or a professor from the Law School should be included.

The bill is broader than in some other states. The main purpose of the bill is for the study of the administration of justice. The bill provides for the right to require reports from all departments that are effected by or effect the administration of justice, even going so far as to have charge all over the state of the administration of the Justice Courts. It is

authorized to install a Bureau of Statistics which would be of value in making a report to the Council, also required to submit a report to the Governor sixty days before the legislature, also that the Governor has the right to require any of the Judicial Council to appear at any time before the Legislature. It is an advisory body. Those who are selected are those who have had their salaries paid so there should be no expense. Those who attend have their expense accounts paid. There are no salaries attached, and therfore no added expense to the state.

The Committee submits the report for final disposition. We have no recommendations to make.

PRESIDENT YOUNG: It is to be understood that the adoption of the Committee's report does not make the Association approve the bill that has been presented.

JUDGE CHRISTIANSON: In this report, some reference is made to the Conference of the various judges called last May and it was suggested that I might say something about it. However, being that reference was made to it, it might be advisable to make a brief statement as to the reason why that conference was called and also as to what the accomplishments were.

We hear much about question of legal reform. The first obligation of everybody, and especially those in public office and those practicing law is to get along with the instrumentalities we have as far as we can. So it occurred to me that it would be desirable to have the different members of the Supreme Court and others to talk over things that were interfering with the administration of justice. The problems were so many that it was almost impossible to get over all of them. We spent two whole days.

Some of the things were confidential. We asked the District Judges for a full, fair, and plain statement of anything they would have to suggest to the Supreme Court. On the other hand, the members of the Supreme Court in the finest possible manner discussed their relations. Well, there were differences here and there in the present system which might be obviated in our administration of justice. I am going to ask some of the District Judges here to tell whether they think anything was accomplished.

Let me state a couple of things which were accomplished. There came before the Supreme Court of the State of North Dakota cases in which a man was convicted of homicide. The record had been kept filed. The State's Attorney's office had delayed the trial and a man, who for six years had been under conviction for homicide, was at large. Then some one moved that the case be dismissed. It should be evident that such a

situation is little short of a disaster. We had situations of that kind which we talked over. Some reference was made as to states attorneys making remarks of prejudice. We had a county where twenty-five Affidavits of Prejudice were filed by the ministers of justice—a great expense to this state, some of which we had to take out of our department. The States Attorney's office dismissed over fifty per cent of those cases, Now it is hard to believe that those affidavits of prejudice could not be filed in the best of faith. When these Affidavits of Prejudice are filed, sometimes there is no doubt that they are filed for delay.

We talked over all these briefly and we talked frankly to each other. Some of the things that were said, you would not like to have said in public. It was a lesson on the freedom of expression. One of the things that was taken up was this: the Attorney General came over and called attention to the fact that the District Judges are ignoring the law that when a man is sentenced to the Penitentiary, all the facts should be filed in the case so that the Pardon Board would be in possession of every fact that the District Judge had at the time bearing on that question.

There was the frankest and fairest discussion. Some of the District Judges did not hesitate and we were glad to have them tell us in what particulars the Supreme Court was hurting the administrative end of the administration of justice.

After a thorough discussion, we unanimously agreed on the principle of the Judicial Council, that it would be desirable to have a Judicial Council established, and we all agreed that it would be highly desirable to establish a Bureau of Statistics. We were not agreed upon the proposal that all the department should be represented. I do not say that there was unanimity at all on the discussion as to whether the Judicial Council should consist of all the judges of all courts of record in this state. I don't care what sort of an organization you have for a Judicial Council. The effectiveness and efficiency will depend on the organization of men who are administering it. We have adopted plans and rules, but eventually the administration will depend on the men on the trial bench because ninety per cent of the cases end there. We feel that any recommendations that might be made for the improvement of justice in North Dakota would be much better if we had the united cooperation of all the men in the District Courts and the Supreme Court, in this state.

We had suggestions, we had discussion—things were told us by some of the District Judges, for example, that we had not heard about. Judge Moellring discussed the proposition as to

what he did in handling prisoners in county jail. I think that is one of the greatest blots on our system of justice. Do you reform them? No. You simply add a burden to the tax-payer. But he, in his District, has been sentencing them to labor and the prisoners have been performing service to the tax-payers. They are building roads and bridges that are worth thousands of dollars to the tax-payers.

Judge Jansonius outlined a plan that he followed where these men in place of laying around in jail, had been required to perform some labor on the highway.

I am just indicating to some extent some of the discussions, not for the purpose of making recommendations, but for the purpose of pointing out what can be done with the committee we are talking about today. This body of judges were in favor of the Judicial Council. It was the opinion of all the men there assembled that all the District Judges would be in that Council. We did not go further in that direction because we thought you would be interested in other plans. As to whether the Judiciary were interested in that Council, I would ask Judge Pugh to state.

MR. BURR: In order to place the matter before the Association so it can be discussed, I move the Association rescind the action of 1924 where it was moved to draft a bill as outlined.

The motion was seconded.

MR. CUPLER: I don't think that would be the advisable thing to do. We have gone ahead here for three years in this Association; we have appointed a Committee; the Committee has acted: we approved it. I think we ought to stand by what we did. I don't mean I don't approve of what Judge Christianson said. The Supreme Court will always have the power to do what they have done. There is nothing to prevent them from continuing to do just that thing. I deem it their intention to join with the Bar Association to carry on the work that we did here three years ago. Let us not divide on matters of detail. It matters not to me whether the District Judges are represented on that Judicial Council. Let's not back up. Stay by what we have done. Let's move ahead. In my opinion the best interests of the Courts require that the State Bar Association be represented officially on the Judicial Committee, that the six hundred lawyers in this state have a voice in the conclusions reached by the Judicial Council. We do not want to butt in, but the work of the Judicial Council will abolish the Statutes of Procedure and substitute rules of court and I think we who are practicioners should have a hand in introducing the rules of court. I don't think there is any disagreement between the courts and the

lawyers, but I would like to move now that the report of this committee be accepted and approved, and it is the sense of this meeting, that when this Judicial Council is established, in it shall be included members of the Bar Association.

PRESIDENT YOUNG: There is another motion before the house. We are in danger of getting into confusion as to the subject of our discussion. This Association approved the Judicial Council idea. In 1924 this Committee was asked to present a bill, in fact, it presented it, to the Legislature. That was the bill submitted to us a while ago. This Association has not approved the bill. It has approved the Council idea.

The report which was presented today, if adopted, will not commit us to a definite idea.

The motion before the house is on the rescission of the action of two years ago.

JUDGE CHRISTIANSON: I think the best answer to your suggestion is this: The first thing we did was to ask the Attorney General to come over. We also ask the president of the Bar Association to send suggestions. He sent us a letter. Nothing could be further from our idea than to have an organization which would be impervious to outside suggestion. The one thing that I thought would be desirable was that the Judiciary of this state is in favor of a Judicial Council. We are unanimously in favor of that. Another thing: One of the District Judges was Judge Wolfe of McKenna's district. Judge McKenna could not be there. In Judge Wolfe's letter, there was the characteristic statement which embodied the idea of the Bar Association. "Whatever we do, let us just create a Judicial Council and give them power and not let the Legislature have power to destroy the very purpose we are trying to accomplish." I don't want to impress you that there was any antagonism to the idea of the Bar and the Attorney General's office being represented, but the consensus of opinion was that instead of having one or two judges appointed to sit on that Council (Massachusetts had just one Supreme Court judge), we thought, as I said, that the first object of the members was to get the law and figure out the remedy and for that reason we thought that every District Judge should be represented. I don't think that there was any antagonism to the Bar being represented.

MR. BURR: I think there may be a little misunderstanding on the matter. In 1924, the draft of the bill was submitted in the report in its legal form, but not in outline, and that plan was approved by the association. So it is included in the draft. It is for that reason that I moved that we rescind that action so that

it go back to where it was before. The 1924 action approved the plan whereby three judges and the Secretary of the Bar Association should compose it. That was approved and we were asked to draw a bill in support of it.

MR. CAMPBELL: The motion is to rescind the action of the Association heretofore taken in adopting the form in its general principle. In the 1924 action, you will notice the first section in regard to the members of this Council is that it shall consist of the three Justices, the Attorney-General, the President and Secretary of the State Bar Association. "The Council shall have the power to invite members of the Judiciary, members of the Bar to attend the meetings, take part in the proceedings, advise them of duties, and etc." I am heartily in accord with Judge Christianson that the whole Judiciary of this state should be a part of this Council. I am in accord with the thought that the members of the Bar in active practice should be in there. I am apt to distinguish the active practicioner from one in an official capacity. I think we should have a representative of the practicing attorneys, as well as those who have gone into a political office. There is an old saying, "Where there is the participation of the entire Judiciary, it is our property". When it comes to the Committee, we have a small body of men that can act and will respect the old saying, "What is everybody's business, is nobody's business." Have the Association start out to appoint a Committee that is in active charge. We should not rescind. We should go on. Therefore, copying Judge Christianson's view-point and the view-point of the Judges at length, I think we should go right ahead.

MR. MOELLRING: I believe there should be a second to Judge Burr's motion and we should take more time in preparing a proper bill for the Legislature. I have no hesitancy in saying that I believe the Council should be composed of at least the Supreme Court judges and the Courts of general jurisdiction. Whether it should include more, I am not here to advise or suggest at this time. I don't believe such a Council would be unwieldy if it could act through its members. I think if we could have all the judges of the District Courts meet together two or three times a year, it will mean much good to all of us. I think we will have a better administration of the law.

PRESIDENT YOUNG: The question is on the rescision of the action of the Association as to the character of the Judicial Council, but not as to the approval of the Judicial Council plan. All in favor, say "Aye".

Motion carried.

MR. CUPLER: In order to get the matter going and make

some progress, I move that a Committee be appointed by this Association to meet with the conference of Judges and that this Committee be empowered to act for the Association in bringing a bill for the Judicial Council; that the Bar Association and members of the Bar be on the Judicial Council in addition to the judges; and that this Committee have power to present this to the Legislature.

Motion seconded.

MR. WOOLEDGE: I suggest that it be limited to a Committee of three.

PRESIDENT YOUNG: You can discuss this as much as you want.

MR. CUPLER: May I ask that this Committee be five instead of three?

PRESIDENT YOUNG: Our question is as stated by Mr. Cupler. All in favor say "Aye".

Motion carried.

PRESIDENT YOUNG: This is the time designated for consideration of the report of the Committee on Judicial Ethics. The report was read yesterday. We are ready to consider the report.

JUDGE ELLSWORTH: I move the adoption of the report by the Committee as read yesterday.

Seconded.

PRESIDENT YOUNG: The motion has been made and seconded that the report be adopted as read yesterday.

MR. MANLY: There are a number of the members of the Association who were not here when the report was read and would like to know what the report was.

PRESIDENT YOUNG: Is Mr. Lovell here? If I am informed correctly, the Code submitted is the Code of the American Bar Association. If I understand it, it is word for word. That is as definite information as I can give you. All in favor of the motion, say "Aye".

Motion carried.

PRESIDENT YOUNG: At this time, we are to receive the report of the Committee on Jurisprudence and Law Reform. Judge Pugh.

## COMMITTEE ON JURISPRUDENCE AND LAW REFORM

Your Committee on Jurisprudence and Law Reform beg leave to report that, in his letter of appointment, the President

pointed out avenues of activity which the committee might well consider to-wit:

First: Can changes be made in our practice which will further serve to prevent delay and unnecessary cost in litigation?

Second: Should the committe co-operate with the Committee of the American Bar Association to prevent legislation by Congress stripping the Federal Judges of the powers in the trial of jury cases, and if so, how?

Third: Can the declaratory judgement statute of this state be made an effective means of preventing delay in, and reducing the cost of litigation?

These matters have had our consideration and we submit the following, commencing with the second item and followed by the third subject mentioned by our President:

I.

It is our opinion that the bar association of this state by appropriate resolution should take a definte stand against the movement or effort on the part of some members of Congress to curtail or abridge the powers of the Federal Courts; for such efforts, if successful, will strike down the historic powers of the federal judiciary, impair the prestige and usefulness of the judges, and form the opening wedge which may ultimately destroy the independence of the judiciary, as a co-ordinate branch of the government of the nation. The history of the courts and bar of this country shows there is no fear that the judiciary will so aggrandize itself as to "endanger any of the powers of other departments of government, or to endanger the life or liberty of citizens, or to deprive the jury of their appropriate functions." The bench and bar have been the bulwark of liberty and justice and progress for centuries past. "The danger rather to be dreaded in making judges men of straw, thus stripping the courts of popular reverence, and annhilating the popular estimate of the power and sanctity of the law."

*The Declaratory Judgment Act*

Chap. 237 S. L. 1923, Secs. 7712a1-16 Supp. C. L. 1913, is the Uniform Declaratory Judgment Act prepared by the Commission of the American Bar Association on Uniform State Laws. Similar statutes have been enacted in a number of the states, Connecticut, New York, New Jersey, Pennsylvania, Michigan, Wisconsin, Kansas, Wyoming, California, Florida, South Carolina, (Report of A. B. A., 1925 p 408). This act is an adaptation of the English Statute of 1852, providing in effect, "that no suit shall be open to objection on the ground that a

merely declaratory decree or order is sought thereby and it shall be lawful for the court to make binding declarations of right without granting consequential relief." Because it was considered that act was too narrowly interpreted by the courts, to-wit: that such a judgment could not be given unless consequential relief might also be given, the High Court of that country, in 1883, in order to broaden the scope of the act, promulgated a rule or order "that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not." In 1893 a further order was promulgated to the effect that the court of chancery shall have the power to make declarations of the rights of the persons interested in deeds, wills or other instruments.

The Michigan act, adopted by the legislature of that state in 1919, reported verbatim in 179 N. W. 351, was held to be unconstitutional by the Supreme Court of that state, the decision appearing in 179 N. W. 351. The court of eight was divided on the question, two justices supporting the act. Inasmuch as a comparison of the Michigan Act with that of ours, discloses no fundamental difference between them, the decision of the Michigan case becomes of considerable interest:

Even in England, whose laws and rules of procedure have been held before our eyes as the models to which we have been exhorted to aspire by many eminent lawyers and publicists, the early act of parliament on this subject fell into disuse, until revived by the rules of the court, and even then the courts were somewhat reluctant in their enthusiasm, holding that the rule meant that if there is a cause of action, the plaintiff may ask and the court award merely a declaration asserting his rights without awarding damages or other form of specific relief, saying that "jurisdiction will be exercised with great caution, after due regard to all the circumstances of the case."

The Kansas legislature apparently attempted to avoid the objection raised by the Michigan court, and provided that the application of the act (passed at the 1921 session) should be to cases of "actual controversy." The Kansas statute seems to have been used frequently. Reference is made thereby in the following cases: State v. Grove 201 P 81; State v. Kansas City 204 P. 690; State v. Wooster 208 P. 656; State v. Wyandotte County 230 P. 581; West v. City of Wichita 234 P. 978.

The California court held the act of that State to be constitutional. Blakeslee v. Wilson 213 P. 495.

The act is declared by its terms to be remedial and claims for its purpose to settle and afford relief from uncertainty and insecurity with respect to rights, statua and other legal relations. Whether the Act, as adopted by the legislature of this state, shall be held to be constitutional when that question shall be raised, is yet to be determined. The lawyers of the state have not generally invoked its aid. This reticence may be due, partly to the novelty, the innovation upon our methods of administering justice, partly to the question whether or not it may be invoked only in actual controversies, and partly to the fact that it has not yet been passed upon by the Supreme Court. We know of but one case in this state where the provisions of the act were invoked. There may be others. The defendants in the case of Wirtz v. Nestos, et al, set forth a request in their answer, praying for a declaratory judgment as to the meaning and effect of the guaranty fund acts of 1917 and 1923. The court in the opinion disposing of the case made no direct reference to the Declaratory Judgment Act; but a perusal of the opinion of the court discloses in clear terms the powers and duties of the Guaranty Fund Commission, and the purposes of the Guaranty Fund Acts. This the court, in all probability, would have done in the absence of the declaratory judgment act.

If it shall be determined that the statute may be invoked only in cases involving actual controversies, its provisions may be referred to but seldom( for in such cases the large powers of the court, in equity, will usually be sufficient to enable the court to determine all matters necessary to a complete adjudication of the controversy.

The principle is in its experimental stage in this country and through it, ultimately, may be realized the aim of the maxim: "Justice is a steady and unceasing disposition to render to every man his due."

An interesting address on this subject by Mr. Frank K. Dunn at the American Bar Association annual meeting of 1920, will be found in the proceedings of the association for that year, at page 383.

An excellent annotation appears in 12 A.L.R. 52, while an extensive review of the decisions bearing on the subject was made by the Michigan Supreme Court in the case referred to. The Committee on Jurisprudence and Law Reform of the American Bar Association had prepared and caused to be introduced in Congress, at the 1921 session, an act relating to this subject, copy of which appears at page 363 of the proceedings of the association for 1922. The law was passed at the late

session of Congress. It will be noted however that the law adopted by Congress departs somewhat from the uniform state law and follows more closely the Kansas Act. We are unable from our experience to make recommendations concerning this measure, but submit this report, for what it is worth, to the bar of the State, that the subject matter may excite the interest of the lawyers, to the end, if workable, the citizens of the state may enjoy its advantages; if it be faulty, that its faults may be discovered and corrected.

III

Propaganda, oral and written, has been spread and now is being disseminated, relative to what is popularly termed the "law's delays", and the effect thereof upon the increase of the numbers of people who commit crime. These orators and publicists charge the delays, the expense of administering justice and the failure to mete out justice, to the courts and to the lawyers, the officers of the courts. These critics tread the ground that appeals to popular prejudices. They have refrained from directing the attention of their considerable audiences to the primary and sacred obligation resting upon the courts—the attainment of justice; and the courts ought not to deflect from the performance of this great duty by the mania for speed which seems to have taken possession of the American mind in other departments of life. The courts in this state are not in absolute control of the rules of procedure in either criminal or civil actions. If they are to bear the stigma placed upon them, it would be only natural justice to them to place at their disposal the means and power to remedy the faults if there be any. Any reasonable examination of the statutes of the state will convince the thoughtful citizen that some of these delays may be traced directly to measures adopted by the legislature.

It may not be inappropriate to direct the attention to the recommendations made by the conference of states attorneys, relative to section 10776 C.L. 1913, providing for the so-called "double-barrelled" affidavits of prejudice, and also to the remarks of the Attorney General found on page 121 of the Report of the Proceedings of this Association at its last session—that of 1925, and to recommend to the favorable consideration of the legislature the bill introduced at the last session of the legislature, having for its purpose the amendment of this section of the Compiled Laws. This bill was known as H. B. 169. A case which exhibits some of the vices of this statute is that of State v. Boyd 26 N. D.224.

It will be observed that upon the filing of the double-barrelled affidavit the power of the court to determine and pass

upon the truth of the assertions therein stated with reference to the disqualification of the county, is suspended, the judge becomes a mere clerk, with directions to carry out the will of the litigant.

If the facts relative to the operation of this law since its adoption, showing the expenses and burden upon the tax-payers, occasioned by the additional expense which the counties of the state have been obliged to pay, the delay in criminal prosecutions for which it has been directly responsible, and the instances in which justice has broken down and utterly failed by reason thereof, were assembled, we have no doubt they would be so imposing as to compel attention of legislature to its iniquities.

*The Conciliation Statute*

This statute was enacted in 1921, and is Chapt. 38 of the Session Laws for that year and Sec. 9192-a1-a15, Supp. C. L. 1913. It is known as the Conciliation of Controversies Act. It is our opinion this statute has not fulfilled the expectation which the legislature had in view in its passage. The statute is cumbersome, adds an additional step to what must necessarily take place before a matter of small concern can be brought to trial, with its consequent extra work and expense upon the creditor and oftentimes upon the debtor as well. The use which has been made of this statute during the time it has been on our books surely indicates that in its present form it is undesirable to both creditor and debtor. The proceedings intended by the act to be taken before a claim may be reduced to a judgment or final determination are wholly unnecessary in thinly settled peaceable rural communities as ours. The court machinery already established by the constitution and the statutes are sufficient for and efficient in the adjustment of all disputes arising, and this, at a minimum of time and expense to litigants. The conciliator's court is a useless incubus which produces very indefinite, infinitesimal results, which we could well forego in the interest of all citizens of the state. If it be retained, it should be drastically amended, in the following, amongst other particulars: The duties, powers and jurisdiction of the conciliator should be clearly defined, so as to restrict them to the consideration of actual disputes involving small sums; to except from their jurisdiction claims based upon promissory notes; to confer power in the concilliators to make findings on the causes brought before them, and to circumscribe their territorial jurisdiction. In other words, to become valuable, the conciliators court must be made a real "small claims court." Otherwise, it is our belief the law does not supply any real need.

These restrictions would, in no way, interfere with or prevent the voluntary submission to conciliation of controversies by the parties thereto:

PRESIDENT YOUNG: You have heard the report of the Committee on these matters. What action will we take with reference to it?

MR. WOOLEDGE: I move that the report be filed.

Motion seconded and carried.

PRESIDENT YOUNG: We will now have the report of the Jurisprudence Committee on Legislation proposed by the States Attorney's Association. Mr. Pugh.

## SPECIAL REPORT OF THE COMMITTEE ON STATES ATTORNEY'S LEGISLATIVE PROPOSALS

We would want to make about the same remarks as I did about the other Committee—that two other members and myself were able to go over this matter. We spent quite a little time last night but that is not satisfactory. A report of a Committee on matters so weighty would have little influence with a deliberate body of this character so that about all we can do with reference to this report is to present it in such shape that it may be before this body, and I understand that is the reason that the report of the State's Attorney's Committee was referred to us, namely, that it might come here in a proper way.

Generally I would report that the three members who composed the committe are not in accord on the matters suggested therein, with certain exceptions. With respect to the first paragraph, having only a short time to consider this report, and having no information as to the extent of the revisions proposed by the State's Attorneys so with respect to that paragraph we want to report it to the Convention without recommendation either way, because we know nothing about it.

Number Two appears at least plausible, and the State's Attorneys have given the matter consideration, and we report that favorably. I believe the statute we have at present is along those lines.

The third paragraph, "Auto Thefts". I am sorry to say we did not have that act nor did we have information concerning the matter, but we are all agreed that there should be some legislation with reference to the prevention of auto thefts and if that legislation could be got in shape, we would want to report it favorably.

MR. GOSS: Can you tell me as a matter of information

whether the American Bar Association has finally approved of the Motor Vehicle Act?

PRESIDENT YOUNG: They have. The action was taken at Denver.

MR. PUGH: (continuing) Number Four: The Committee-men who met last night were of the opinion that that matter should not be referred to the Convention with our recommendation because we are unable to determine the necessity of additional legislation on that line.

Number Five: The committee-men that met were unanimously of the opinion that that should be reported favorably.

Number Six: Two members of the Committee were in favor of recommending this section favorably to the Convention; the other member of the Committee neither denies nor affirms. In fact, legislation of that kind may be the subject of abuse here and there, but in the hands of the States Attorney who is desirous of doing justice, it might be all right. We therefore return this section to the Convention for its action thereon.

Number Seven: This we have already referred to.

Number Eight: That section, the members of the Committee agreed should be recommended to the Convention.

Number Nine: Two of the members present believed that it was a necessary amendment to our present criminal law. The other member has not been able to make up his mind on the advisability of such a statute, and if such a statute be enacted, and there be not a statute giving the defendant the same privilege, such privilege should be given to the defendant.

Number Ten: Two of the committee were in favor of that proposal and the other member believed that he ought to with-hold his opinion thereon.

Number Eleven: That is recommended to the Convention favorably.

Number Twelve: Two of the members are in favor. The other member expresses no opinion thereon.

Number Thirteen: That section and the next one, (Number Fourteen), are referred to the Convention without recommendation either favorably or against it. If I understand it, the law with respect to Indictments is mandatory that the names of the witnesses before the Grand Jury should be on the Indictment. It strikes us that in this country, the State's Attorney knows the names of the witnesses and it should be no hardship to require him to indorse the names on the indictment.

Number Fifteen: This is favorably reported to the Convention.

Number Sixteen: The committee believes that this matter should be referred to the Convention. The committee was divided on the proposition and expresses no recommendation.

Number Seventeen: This committee had no information before it with reference to the law of the State of California and therefore makes no recommendation.

Number Eighteen: This has for its object the placing of the authority of releasing children from rural schools in the County Superintendent instead of the States Attorney and we recommend it to the Convention.

We believe we could not do anything with this report except what we have attempted to do and we have done this simply to place it before the Convention.

MR. ELLSWORTH: I move that all portions of that report that have just been submitted by Mr. Pugh in which the Committe on Jurisprudence and Law Reform, also all parts in which that portion of the committee were not unanimous, be referred back to the committee for further consideration with instructions to report at the next meeting.

MR. WINEMAN: As a substitute motion, I move you that this Association adopt the report of the committee.

PRESIDENT YOUNG: The original motion was to the effect that all parts of this report—I had better have Judge Ellsworth say it.

JUDGE ELLSWORTH: All parts of the report of the committee be referred to the Convention, also portions of the report where they were not unanimous in approval be referred back.

MR. MCINTYRE: It seems to me that the adoption of the motion of Judge Ellsworth would simply be a delay of a year and it is hardly courtesy to the States Attorneys who have met with this Convention not to give consideration to their report. I believe that this Convention should consider it. I favor Mr. Wineman's substitute motion. The adoption of this committee's report would refer practically the whole matter to the Convention with certain recommendations.

MR. NOSTDAL: I would like to have the ruling of the Chair on what the effect of that motion would be.

MR. LEWIS: In regard to your substitute motion to adopt the report of this committee I would not take up time here except on matters that seem to me important on principle. I was one

of the members of the committee who went over it. It was an informal meeting but I think Judge Pugh has a little understated one thing in regard to the "Syndicate Law". I think two members of the committee, and I for one were opposed to any Syndicate Law until it is studied, because, first: there is no call for it here; and second: we want to use very great care between propaganda that incites to action and between free speech as such. If it is not something that directly incites to action, as Justice Holmes said, the more you disagree with a statement, the more you ought to allow it to be spread over the land. That is the best way to scotch and kill anything that is not good. I do want to call attention to that danger. I think the last thing we should do is to do anything to stop free speech, though I favor a law that prohibits free action.

MR. ELLSWORTH: I take it that in matters of great importance, before it proceeds to those matters, the Convention ought to have the assistance that is rendered by that committee. Here is a report involving matters of very large importance. It was submitted to them yesterday afternoon. Only a portion of this committee was present, and in those matters where they could not agree and where they referred the whole matter back to the Convention, it seems to me that if the Convention tries to consider them, it will not give them the consideration they ought to have.

MR. MANLEY: I fully agree with Mr. Ellsworth. This report contains very important matters which we ought not to take affirmative action on without study. I would like to study the matter. I do not understand a number of things. Before this Association goes on record in favor of that report as a whole, it should have given plenty of time to consideration.

MR. NOSTDAL: I am sorry I cannot agree with Judge Ellsworth. I think we ought to decide now. Most of the things in that report have been discussed for many years. We can discuss them now and if we come to some item we cannot decide, we can pass it back. I am in favor of Mr. Wineman's motion to this extent.

PRESIDENT YOUNG: The question is on the substitute motion as read.

MR. ELLSWORTH: I want a ruling . This report approves and recommends the securing of a commission for the jury list. Does the adoption of this report mean that the Association adopts that?

PRESIDENT YOUNG: I think so.

MR. ELLSWORTH: Then I disagree with the adoption of that

report. I don't think we should recommend the changing of the method of selecting jurors without a discussion.

PRESIDENT YOUNG: The original motion has reference only to those parts on which the committee did not agree. If the substitute motion is passed, it will adopt the whole report.

SECRETARY: The paragraphs on which the committee reported favorably are: number two, defining conspiracy; number five, allowing both sides an equal number of peremptory challenges; number seven, repealing the double-barreled affidavit law; number eight, limiting time of appeal in criminal cases; number eleven, authorizing commission system of selecting jurors; number fifteen, relating to state's attorneys contingent fund, and number eighteen, transferring control of compulsory school attendance to superintendents.

MR. GOSS: I want to draw attention to this thought, that regardless of what this convention will do, the committee can present it to the legislature.

Substitute motion carried by a rising vote, 60 to 19.

MR. ELLSWORTH: I would like to inquire what the effect of that motion is. Have we endorsed those eight or the whole eighteen?

PRESIDENT YOUNG: You have endorsed the seven. How much time will your report take, Judge Goss?

JUDGE GOSS: Five minutes.

PRESIDENT YOUNG: We will have the report of the committee on public utilities.

JUDGE GOSS: Your committee on public utilities reports as follows:

## REPORT OF COMMITTEE ON PUBLIC UTILITIES

Your committee on public utilities begs leave to report the following:

(1) We note with pleasure that the constitutional amendment extending the term of office of members of the Board of Railroad Commissioners to six years, one to be elected every two years, received favorable action at the last election, and, therefore, the first recommendation of your committee on public utilities made to your association a year ago has become a law.

(2) By chapter 182 Session Laws of 1925, the Board of Railroad Commissioners were empowered to order and permit common carriers to publish and charge special freight rates, classification, rules and regulations. The purpose of this was to permit

the carriers to make special freight rates upon certain commodities between certain points without making such rates the maximum to be charged for the same or shorter distances between other points, all within the state. In many instances the carriers desire to publish special commodity rates lower than the general rates, as for example, rates upon brick from manufacturing points; livestock to packing plants and grain to milling points within the state. Sections of the state are receiving benefits from this legislation.

(3) The legislature two years ago enacted a law fixing the rate which might be charged by carriers for transporting lignite coal within the state. Similar legislation for the same commodity has for years been a source of litigation. We believe this to be a step backward in rate legislation and utility supervision and this measure should be repealed, and the power to regulate such rates placed with the railroad commission, subject, of course, to the law as already declared in litigation upon this subject.

(4) Power should be given to the Board of Railroad Commissioners to permit public utilities to discontinue their service when conditions so demand. On account of the consolidation of local power companies, or their purchase, instances have occurred where, if the discontinuance of the furnishing of heat, or electric service, can be granted, or the discontinuance of local plants permitted, high tension electric lines can furnish service to those communities at a much lower rate. Under such circumstances, the Board of Railroad Commissioners should have power to permit the abandonment, or discontinuation, of the local utility plant, and, likewise, municipalities should be given the power to sell and dispose of their electric utilities, where, being run at a loss, or where private enterprise can more advantageously serve the municipalities; or where high tension power lines can substantially and more economically do the same service. And power should be given the commission to deny a new franchise where a community is already adequately supplied. That a certificate of necessity and convenience must in all cases be secured from the commission before being permitted to instal complete utility service.

(5) Bus lines and auto transportation lines now under the jurisdiction of the railroad commissioners are operating under laws that were, in large measure, prepared, as would be apparent, from such legislation by the competition of auto transportation lines, i. e., the railroads. This legislation should be revised and many apparently oppressive portions of it modified. Likewise, the law as written should be made more clear in some respects, as for instance, the power of the railroad commissioners

to govern the transportation of commodities where no fixed termini can be scheduled, which the railroad commissioners now assume jurisdiction of here, as heretofore in Minnesota, and which the Minnesota supreme court has recently held to be beyond the jurisdiction of their commission.

In this connection we would suggest, also, authority be given to municipalities of a certain population, or over, to exact from the auto transportation lines within such municipalities the right to place the same under indemnity bonds against careless and negligent injury to persons and property while conducting such business and permit such indemnity bonds to be written by indemnity companies and permit one bond to cover the machines and drivers operating under one business.

And in this connection we would also recommend that the power to license and require fees for such business and persons engaged in it be given to the Board of Railroad Commissioners, and taken from the municipalities, and that a maximum fee be fixed at a low amount. At present the license and other fees exacted by the municipality, by the state, and the licensing of autos and trucks, and by the federal government, run to considerable amounts and oppress such business, with the public paying the freight.

(6) A year ago we recommended the abolition of all future franchises, and that in lieu therefor certificates of convenience and necessity for long periods, renewable by the board, except for good cause shown, be granted, thus to assist in taking public utilities out of politics and especially local politics, and to prevent local factional difficulties from intimidating local utility business, or threatening litigation against them.

(7) *Taxation of public utilities.* A tax on public utilities as on all lines of business, should be just and only equal in amount to that levied upon the general business at which said public utility is located. Tax of public utilities is merely a direct tax upon the people supporting it, being merely passed on to them as an over-head charge. The scheme of taxation in force in this state should be changed to a tax upon gross incomes on gross profits, and to require as little accounting as possible, both by the public utility and by the state, to whom their returns are made in taxation matters. We understand that at present a considerable portion, at least 25 cents per month, upon each telephone instrument used in this state, is spent uselessly in such accountings, and in the collection of and anyalizing reports, with no appreciable public benefits. Such an expense is a useless tax in that amount passed on to the consumer.

The last two legislatures have had before them a change of such a gross income tax. It is to be hoped that the coming legislature will make a change accordingly for the general public benefit.

(8) While on the question of taxation of public utilities, mention should be made of income taxes, federal and state. The federal income tax has decreased, it being now approximately one-fourth of what it was at the close of the war, at which time the state income tax was approximately only one-half of the federal income tax. The contrary is now the case. The federal government has decreased its income taxes until the state income taxes collected average at least twice the federal income tax. In the old state income tax there was a provision that in no event should the state income tax exceed the federal income tax upon the individuals and corporations. That provision was quietly stricken from the old state income tax law, and today we have a conditions where by economy the federal government has decreased its income taxes and the state has wholly failed to make any decrease therein. We believe that the former provisions of our law should be re-enacted to the end that the state should not be empowered to collect any greater income tax from a corporation or individual than is paid by that individual to the federal government. If the federal government has forced economy in such respect the state should do likewise and keep step therewith.

(9) *Double Appeals in Public Utility Matters Should Be Abolished.* Under present procedure a hearing upon rates is tried to the railroad commission and that body makes its decision. An appeal then, and usually, as a matter of course, is taken to the district court involving months, and perhaps, a year or more delay before a decision there. Then a second appeal may be taken, likewise, to the supreme court, with further delay as a necessary incident. We believe this matter could be simplified by requiring such a hearing to be brought in the district court, with the court obliged to refer the matter to the railroad commissioners as referee of the district court, with their decisions to be subjected to exception, modification and determination in the district court, with the judgment of that court entered thereon. This, we believe, the matter where one appeal to the supreme court, with the ordinary record, would save much delay and expense usually incident to such appeals.

(10) *Workmen's Compensation Bureau.* As public utilities are peculiarly concerned, and frequently in contact with the Workmen's Compensation Bureau of the state, under whose jurisdiction their employees must be for recovery for injuries received

during employment, we recommend a change in the existing workmen's compensation law to provide that all decisions of that bureau shall be subject to review *upon law and fact,* by trial de novo, and whether its findings be for or against compensation to the injured employes. As the law at present stands, the bureau may allow a small recovery in favor of the claimant entitled to thousands and because the finding is in his favor for some amount, no review can be had in the courts. Real actual relief may thus be denied a worthy injured employee. As lawyers we are trying to believe that the findings of administrative boards should not be superior as to power of review in any particular to those of courts, and that the supreme court should be the power of last resort in such decisions as in all others, and that no bureau should be a favorite under the law by having its decisions above review in the courts in any particular.

In this report we are indebted to Assistant Attorney General John C. Thorpe, and to many others for matters brought to our attention.

The above matters we present for the consideration of this association.

Respectfully,
E. B. Goss, Chairman
W. H. Stutsman
Alfred Zuger

President Young: Is there a motion for its adoption?

Mr. Goss: I move the adoption of the report.

The motion was seconded and carried.

President Young: I will ask that the reports of the committees on cooperation with the press, jury reform, salaries, terms, and powers of judges be submitted at the afternoon session. We will take ample time to consider those reports. The committee on comparative law submits no formal report. Mr. Homnes writes that the committee has been considering the subject and in another year, if they are permitted to continue, they will submit something.

The committee on uniform state laws also has framed no report. The convention at Denver acted on ten laws, eight of them automobile laws. The local organization committee submits no report.

Mr. MacIntyre: In connection with the local organization report—there is no report because of the illness of Mr. Cuthbert. I move you that the secretary wire to Mr. Cuthbert at Devils Lake our sympathy and wishes for his early recovery.

The motion was dutly seconded and carried.

PRESIDENT YOUNG: The committee on internal affairs has submitted no formal report. This committee has worked effectively through the year and in a personal letter to the president the following pertinent comment appears:

So far as my knowledge extends as to the work and functions of this committee, it is one presumed by the laymen to be not only of a disciplinary character, but a committee sitting as a court and jury, always in session, ready to hear and determine any and all complaints and grievances, real or fanciful, which any person may have against any member of the bar, of this state, and then to meet out judgment accordingly.

These complaints vary in character, ranging from charges of embezzlement to making exorbitant charges in the matter of fees, soliciting and encouraging litigation, especially in bankruptcy matters; failure to report on claims held for collection; abstracting, or in common parlance "swiping" files from brother attorneys, and failure to meet and discharge personal obligations.

I desire to state, however, that it is to the great credit of, and a very high tribute to the personal character, honesty and integrity of the members of the bar of this state, when I say that, during the entire year last past, there have been filed with this committee, so far as has come to my knowledge, a total of only sixteen complaints. Some of this number have been thoroly investigated and closed; some are still pending; but so far, only two have been shown to have had any real merit, and in those two instances the breaches of the rules of professional ethics and professional conduct were not at all very aggravated, and upon request were very promptly and speedily adjusted to the entire satisfaction of all the parties concerned.

I do not mean to say, however, that there were in fact no grounds whatever, for some of the other complaints made, but of those which have been fully investigated, aside from the two cases referred to, the complaints involved more of carelessness on the part of attorneys rather than any willful violations of any rule of professional ethics or conduct.

If we, as lawyers, and members of the bar association, would exercise just a little more care and caution, be a little more patient and considerate and a little more frank with our clients, we would very soon so command the respect and admiration of our clients and the public generally, that the work of the committee on internal affairs would be still less.

C. S. SHIPPY, Chairman.

PRESIDENT YOUNG: I don't know that you care to consider that a report but I thought that the association should know.

MR. BEEDE: I move that we should consider that as a report. It will reflect credit on the bar.

The motion was seconded and carried.

PRESIDENT YOUNG: The committee on memorials have submitted a report. Mr. Libby is not here. Biographies are of Dwyer, Wardrope and Ames. Is there a motion to accept this report and have it printed.

MR. BURNETT: I move this report be accepted and filed and copy as published be forwarded to the near relative of each member.

The motion was duly seconded and carried. (See appendix, page 205 or 206.)

PRESIDENT YOUNG: The Morgan Memorial committee—Mr. Bangs asked last year that the report of the committee be submitted this year. No members are here. We will pass it. We are adjourned to this afternoon at the auditorium.

SEPTEMBER 10, 1926, AFTERNOON SESSION, 2 P. M.
PRESIDENT C. L. YOUNG, OF BISMARCK, PRESIDING

PRESIDENT YOUNG: Before opening our afternoon program, I want to announce again to you members of the bar the evening session or annual banquet. I know that some of you have been on formal banquet programs—we feel that the association never has presented to the convention a better program that that which will be offered this evening and we urge every member to remain for that particularly.

One other thing. At the conclusion of the first address of the afternoon we have no doubt that many of you will want to leave, but I want to ask that you remain for a musical number which will be furnished following the principal address of the afternoon, but after that the bar association will continue with their business session.

I am reminded of the recent social story of what happened when the governor of North Carolina met the governor of South Carolina, and for a few minutes this afternoon I was wondering what was happening when the governor of North Dakota met the governor of Minnesota. But they are both here and I want Governor Sorlie to present the speaker of the afternoon.

GOVERNOR SORLIE: Good afternoon, everybody. I didn't know there were so many lawyers in the state of North Dakota.

We are very fortunate, that is, the members of the bar association, I don't happen to be one of them, to have the speaker of this afternoon. Being that all the lawyers are here, and I assume that we have the brains here, the fellows who adjust and fix things, I want to ask them to work out the problems I have in mind.

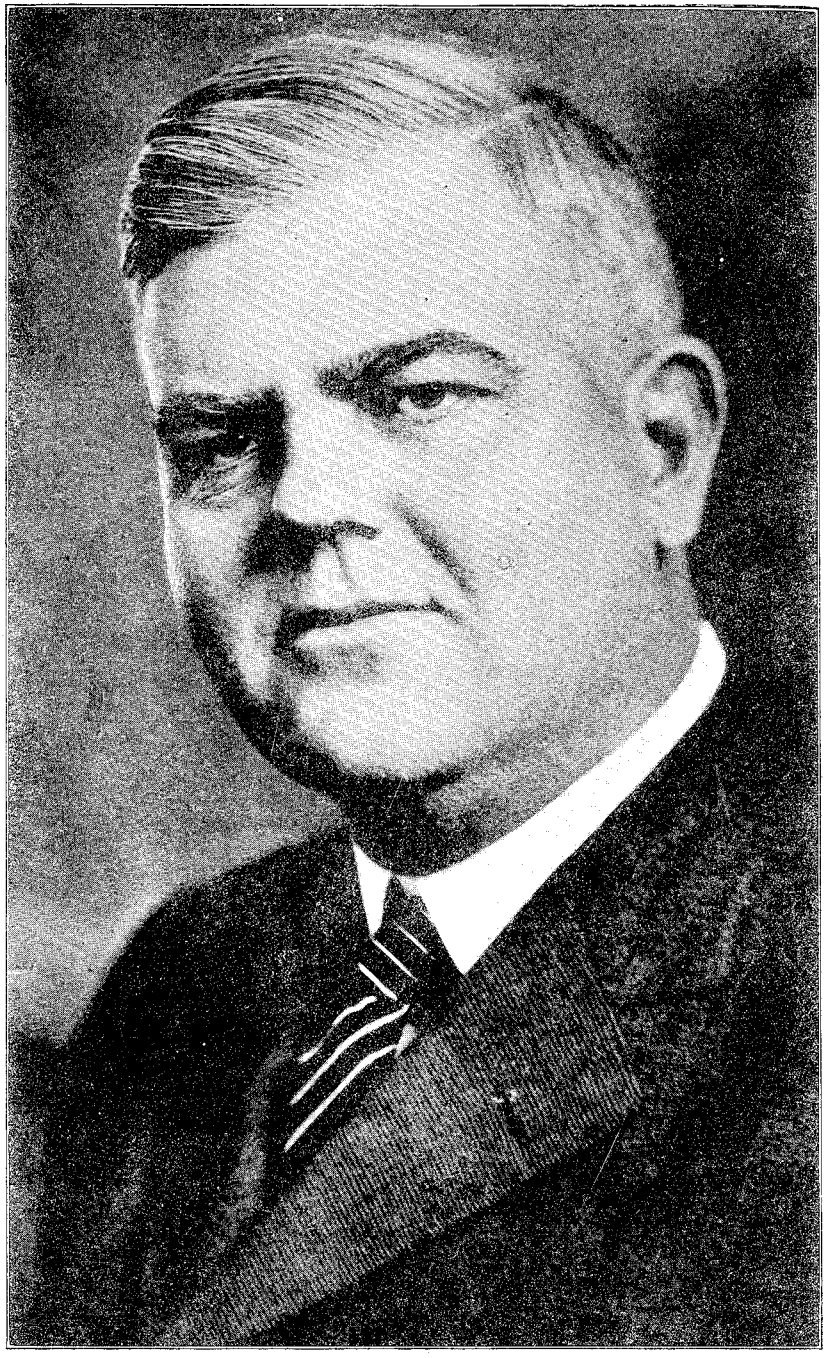
We have a lot of people in this state who are violating the laws, particularly the prohibition laws, and the penitentiary is not the place for them. The second offense, they are sent to the penitentiary. The first offense, they get a county jail sentence with hard labor, but it is usually less. If you lawyers can work out a law arranging to put these fellows on the highway to work out that sixty or ninety days at really hard labor, the gradual effect of that would be that they would not be in the peniteniary because there would not be a second offense. If the judge would sentence them to time on the highway, they would not commit a second offense and would not go to the penitentiary. And I believe it would eliminate a lot of crime that is going on if they were exposed at home in their own communities. And if the judges, with those habitual breakers of the law, in place of giv-

ing them one or two years—if they would give them twenty years and then ask for a suspended sentence after they were a year in the penitentiary, and the pardon board would parole them, the courts would not have them again because the parole board could reach out and get them if they did not behave after that. If you give them a parole sentence for a year and a half, we could send out and get them at any time and save the county a lot of money.

I consider this a great pleasure. Governor Christianson and I have met before at different times and places. The meeting just referred to took place. It gives me great pleasure to introduce to you at this time the governor of Minnesota, Governor Christianson.

GOVERNOR CHRISTIANSON: Mr. chairman, your excellency, Governor Sorlie, members of the State Bar Association of North Dakota, ladies and gentlemen: I shall speak today on the States and the Nation. I expect to discuss the relations of the state to the nation.

I suppose it is a rule that every address should have three parts: first, an introduction; second, a body, and third, a conclusion. In other words a public speaker should tell his audience what he is going to tell them, then he should tell them and then finally he should tell them what he has told them. That is the basis I have adopted this afternoon, though I ought to explain that although my address has an introduction, there will be very little body, and you will have to supply your own conclusion.



THEODORE CHRISTIANSON
Governor of Minnesota