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President's Annual Address

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Indiana State Bar Association

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PRESIDENT'S ANNUAL ADDRESS

By LOUDEN L. BOMBERGER*

Precedent and authority are popularly supposed to control our profession. In addressing you this morning, I acknowledge an obligation to both. Authority, even a mandate, is found in the By-Laws; precedent arises from the acts of all my predecessors. During the first twenty years the Articles of Association, our fundamental law, required the President to open each annual meeting with *an* address. At the end of twenty years, possibly by an assumed prescriptive right, the Constitutional mandate was removed and the By-Laws written to provide, as they now do, that the President "shall at each annual meeting deliver *the* President's address."

I find no requirement, Constitutional or otherwise, that the members shall listen to that address.

A perusal of the Annual addresses discloses a gradual change in type from scholarly essays by the acknowledged leaders of the Bar in the early days, to something on the order of an annual report by the administrative head of an organization whose activities reveal a growing sense of responsibility for service to Society.

Were I lacking both precedent and authority for addressing you today, I would be constrained, nevertheless, to report to you upon the state of the organization, its objectives, its activities and its accomplishments; most of all to project your interest into the immediate future, wherein lie solemn responsibility and great opportunity for the Bar, as well as disturbing uncertainty for the status of the profession.

During the past year, you expanded the Young Lawyers Committee, the Committee on Membership, and the Committe on American Citizenship to include members in every county and certain of the larger cities. Obedience to your instructions in this respect has increased committee membership in our organization to practically one-fourth of the entire roster.

* Address of Louden L. Bomberger, President of the Indiana State Bar Association, at the Annual Meeting of the Association, September 16, 1938.

In addition to the enlargement of certain committees, you have authorized and there have been appointed special committees on Administrative Law, on Canons of Ethics, and on Judicial Selection and Tenure. These committees have seriously set about their tasks and there have been placed before you their respective reports and recommendations. I recommend that they be made standing committees of the Association.

I wish to acknowledge with the deepest sense of obligation the fidelity with which all officers and committees have discharged their duties during the past year. The members of the Board of Managers have attended five meetings, at much inconvenience to many of them, besides giving serious thought to our problems and wise counsel to your officers by correspondence. Committee chairmen have responded generously to requests from headquarters. They report much enthusiasm and serious effort on the part of their committeemen. Their service has not been spectacular, and would not provoke the throwing of ticker-tape from office windows, but those who retain a sense of perspective, offer to them deep and genuine gratitude.

Upon assuming office, I made certain declarations of principles and objectives. I am now ready, not only to recall them, but to give an account of the year of stewardship. At that time, after recounting some of the things that the organized Bar of Indiana had accomplished, I quoted from the Journal of the American Judicature Society this statement:

> "While the Indiana State Bar Association has not yet brought about inclusive and compulsory bar organization, it has, in the past three or four years, made more progress toward worthy goals than most state associations."

And, after reminding you that the passage of the Rule Making Bill by the General Assembly of 1937 had placed greater responsibilities upon the Bench and Bar, I dogmatically declared that our goal was to proceed unfettered in improving the administration of justice. You concurred in acknowledging that we now have the full responsibility.

Moreover, I further announced as a creed for the conduct of litigation:

"A litigant has the right to have his cause presented by a thoroughly trained lawyer of integrity and ability, to an impartial judge, capable of analysis and discrimination, and prompt in his decisions, and an early review of the decision by a Court equally capable, unhampered by unnecessary procedural technicalities. The method and manner of presenting a cause must be completely subordinated to the ultimate objective. While the orderly processes of practice must be observed, yet an appeal must not be paralyzed by a praecipe, nor must lawyers be terror-stricken in the presence of an assignment of errors.

"The integration of the bar, complete political independence of the judiciary, the careful building in of younger talent, are of major importance. We shall not neglect them."

Does the Indiana litigant have his cause presented by a thoroughly trained lawyer of integrity and ability? We know that Indiana has, in a few years, arisen from a place of derision and disrepute to the front rank of the states insofar as the standards for admission are concerned. For this, we have to thank our Supreme Court and the Board of Bar Examiners. You will observe that the Committee on Legal Education, after exhaustive study, has recommended further improvements with respect to these standards. It should be devoutly wished that we constantly improve the methods of selection so that to a greater extent those applicants for admission who are not "naturals" should be discouraged from entering the profession, and this advice should be given before they begin professional training rather than afterwards.

Is this thoroughly trained lawyer one of integrity? Unfortunately, not always. And more deplorable still, we do not have adequate machinery for maintaining and enforcing the highest possible standards. On another occasion, I said that in the matter of discipline our system is grossly inadequate:

"We have archaic and absurd statutory provisions, which not only permit the bringing of unjust charges, accompanied by damaging publicity, but hamper the detection and punishment of unprofessional conduct and leave it to the vagaries of juries to determine whether or not the guilty shall be chastised. Comparatively few evil-doers continue to taint the whole profession. Nothing short of giving to the Supreme

Court complete authority to discipline the members of the Bar will assure a just and uniform method of dealing with the problem. Fundamentally, the Supreme Court must be permitted to determine who shall be upon its roster of counselors. The whole question is essentially one for the judicial branch alone."

Moreover, the position of the Bar with reference to discipline is nothing short of ludicrous when compared to that of other professions and callings. Architects, barbers, land surveyors, pharmacists, embalmers, dentists, physicians and veterinarians are forbidden by statute to carry on their trade or profession until examined and passed by a Board composed of members of their own calling. This Board has statutory power to discipline, to suspend and revoke licenses. Its action in this respect is reviewable only by a Court upon the record. It is only the lawyer whose conduct may be examined and passed upon by a jury of laymen. Indiana must free itself of the stigma upon its intelligence which compels the man who treats the horse and the dog to meet the judgment of his professional peers and consigns the fate of a lawyer and the control of a Court over its officers to the sympathy, prejudice or inadequacy of a jury.

In greater numbers we are becoming convinced that the only solution is in the complete integration of the Bar. The report of the Young Lawyers Committee on this subject is a noteworthy contribution and should carry conviction.

We may well be assured by two quotations from this report:

"The younger members of the Bar take the stand, however, that the future of the Bar is largely in their hands and are determined to press forward toward a greater and better Bar."

* * * *

"In conclusion, we may add that the result of the state survey by this committee indicates quite conclusively that the young lawyers stand as a rock in favor of State Bar Integration and that no opposition can prevail against it."

I accept these as inspired words, and am sure you will joyously greet the day when their objective is accomplished.

No progressive lawyer who really understands the Integrated Bar opposes it, no state that has adopted it has aban-

doned it, and no one who is at peace with his professional conscience can object to it.

You may assume that the integration of the Bar is a comparatively new subject, but the president of the State Bar Association in 1902, in the annual address, "Upholding the Honor of the Bar", hinted at the principle when he declared that there is an inherent power in the Courts to control and discipline lawyers. We may well pause to pay respect to this long-range vision which was to have recognition in genuine activity after more than thirty years.

This Association has on at least two occasions gone on record in favor of an Integrated Bar, and at the session of the General Assembly of 1935, secured the introduction of a bill to that end. This effort failed. The Supreme Court was petitioned in 1936 to integrate the Bar under its inherent power. This petition was dismissed without opinion or comment. Hence, we may assume, a plea of former adjudication would not lie to a further petition. During the year, an independent committee, working entirely outside of the organization, known as the Committee of Thirty, has done yeoman service in creating sentiment for the Integrated Bar and reports are that wherever it has been intelligently presented, as it invariably is by the representatives of this committee, the audience is overwhelmingly for it.

If the majority opinion be that it requires legislative action to integrate the Bar, perhaps it is, nevertheless, within the power of the Supreme Court to enlarge in the meantime its control of disbarment. The General Assembly in 1937 expressed its idea of the duties of a lawyer and stated the grounds upon which his license to practice law might be revoked and prescribed procedure.* Disbarment proceedings are treated as civil actions. Therefore, it would seem possible for the Supreme Court under its rule making power to set up the machinery for carrying on this type of civil action. There ought to be a method of summarily dealing with the case. No Constitutional obstacle is conceived of to a declaration by the

* Chapter 88, P. 452, Acts 1937.

Court that all matters of disbarment and other forms of discipline shall be conducted under rules prescribed by the Court, providing for the appointment of a master or committee to hear the evidence and make a recommendation to the Court. I recommend that this be made the subject of an appropriate committee for study and recommendations, though possibly at an early date we may get from the General Assembly as much protection as the veterinarian and embalmer have obtained.

The next right of a litigant mentioned in the creed is to have his cause presented to an impartial Judge, capable of analysis and discrimination and prompt in his decisions. This description epitomizes, in my opinion, the ideal Judge. It is sometimes said that Judges are born, not made. Certainly the ability to analyze and discriminate is not possessed by every practitioner at the Bar. But we are concerned today with seeking a method of assuring that the Judge is impartial. By this I mean that he is free from every form of improper influence. He should satisfy Socrates' standard, which has not been improved upon in twenty-five hundred years. He said that it is the duty of the Judge merely to ask whether the cause is just. Uncommon is the Judge who can limit his inquiry to this question when he is compelled to keep his eye on the next primary or general election.

During the year it has been my responsibility to speak to sixteen assemblies of lawyers and to lay groups nine times. On seventeen of these occasions, I have spoken entirely or in part on the subject of an independent judiciary. The well-nigh universal approval of this theme by the layman as well as the lawyer may be traced to several sources. Not the least important of these is the revulsion of the people against effort, high and low, to tamper with the integrity of the Courts, to subject them to executive or legislative compulsion, and the public indignation against the sacrificing of capable judges by political machines to serve purposes other than the administration of justice.

But I am constrained to believe that there is another source of support which goes back to the inception of our Associa-

tion. At the first Annual Meeting held in 1897, our first president, Benjamin Harrison, distinguished lawyer and statesman, having served his country in various capacities, including the highest, made a strong plea for the independence of the Courts. His eloquence seemed to partake of a high spiritual inspiration. Among other things, he said what I wish to emphasize today:

"Anything that tends to diminish the respect of the public for a Judge, tends to the public injury."

At the Annual Meeting in 1900, President Robert S. Taylor, in a scholarly address, traced the separation of the office of Judge from those of the patriarch, military chieftain and law giver. At one time, he reminded us, Judges were slaves and tools of tyrants. In America we had the first great example of an independent judiciary. He characterizes the story of this evolution as the history of the rise and progress of civilization.

"At every step in the enlargement of the domain of freedom, the Judges on the Bench have garrisoned the newly won territory. The right to a supreme and independent judiciary is the right preservative of all rights. Without this, no right is secure. Above all offices which men bestow upon each other, his, the Judge's, is the one of real veneration and real confidence."

In 1903, the President warned that a lack of faith in the ability of the Courts to settle the differences of the people may endanger the security and continuity of our form of government; that the security of the citizens is in the feeling of faith that he has in his government and belief in the integrity and impartiality of those who are called upon to administer the laws and secure to him the protection of his person and property. He earnestly pleaded for the selection of Judges apart from the influence of local and national politics and declared that upon this point depends the confidence that will be reposed in the judiciary.

In 1906 and 1907 at the Annual Meeting, there was emphasized the necessity of the freedom of the Courts and the

lodging of all judicial power therein beyond the reach of the legislature.

In 1912, the Committee on Jurisprudence and Law Reform recommended the appointment of a special committee to report at the next meeting "what mode, if any, can be devised for nomination and selection of Judges which will more fully protect the independence of the judiciary and its freedom from partisan or other influence." The committee was appointed and reported in 1914, pursuant to this mandate, and recommended:

> "First. As to the election of judges. That all judges of our courts of general and appellate jurisdiction be elected at elections to be held for such offices only; and that the nominations of candidates at such elections be by petition only."

In 1919 a bill was presented for the non-partisan nomination and election of judicial officers, and providing for nomination by petition. It was reported that there were thirteen lawyers on the House Committee; twelve of whom voted against the bill; that the reason of their opposition was frankly expressed to be that they wished to keep the judicial offices in politics.

In the report of a committee on the Appointment and Nomination of Judges, at the Annual Meeting of 1926, this was said:

> "It is a well known fact that the appointment of Judges in cases of vacancy and even the nomination of Judges have been dictated and brought about largely by those in charge of political machinery of the State."

A Committee was established to advise with the Governor on the appointment of Judges. There have been occasions subsequent to that time when this Committee's assistance was welcomed by the chief executive.

In 1928 and 1929 reports and resolutions were adopted on the general subject of non-political selection.

In 1931 a Senate bill for the non-partisan election of Judges was defeated, but at the 1937 session, the Judicial Council

introduced a similar bill. The report of the Council at the Annnal Meeting of the Bar Association discloses this opinion of the influences behind its defeat:

"It is fair to say that apparently at least the opposition to it was entirely political and that was the reason why it was never as a matter of fact reported from the Committee."

This historical sketch, together with the report in your hands by the Committee on Judicial Selection and Tenure, reveals the story of the fight for an independent judiciary in this State.

What shall we plan for the future? That we should be inactive is unthinkable; that we should accept defeat at the hands of political managers is abhorrent; the goal which has been more or less intermittently an objective of the Association since its inception must be attained. I recommend that the Committee on Judicial Selection and Tenure, not only be made a permanent one, but that it be definitely charged with the responsibility of devising and promoting a campaign of action. There is no time for delay. Within a few years there have been "built up new instruments of public power," which, if freed from the restrictions of the Constitution, as interpreted by independent courts, may be oppressive and tyrannical. Their adaptability to serve political ends has not been overlooked; their effectiveness for this purpose is so apparent that one may despair of their ever being cast off. They appeal to any politician, regardless of party label. The virtues of a free Bench can hardly be expected to arise from the witches' caldron wherein are stewed concoctions for political appetite.

We must so strengthen judicial fibre and enhance judicial prestige that the people will continue, as Chief Justice Hughes said, to resort to the Courts for standards of judicial conduct.

In our creed it was said that a litigant has the right, finally, to an early review of the decision of the trial Court by a Court equally capable, unhampered by unnecessary procedural technicalities. Just prior to this declaration, the Supreme Court of the State revised the rules of Appellate Practice, tending

very definitely toward the elimination of delays therein. But this step is merely a preliminary one toward the general reformation not only of Appellate Procedure, but of trial practice as well, which is clearly needed in this State. In taking this position, we have historical precedent, for it is not a new one in Bar Association activities. At the second annual meeting of the Association, the presiding officer urged each member to ask himself frequently during the year, "What can I do before the next Annual Meeting to advance the science of jurisprudence, to promote the administration of justice, to uphold the honor of my profession?" The subject was given more or less desultory attention until 1916, although a strong appeal was made in an address before the meeting of 1913.

The subject aroused the interest of the politicians in 1916, and the Republican State Convention of that year adopted the following plank:

> "We recommend that the next Legislature take proper steps for the reformation and simplification of methods of legal procedure in the Courts throughout the State."

This was promptly met a week later by the Democratic platform which pointed with pride to the fact that the last Legislature, being Democratic, had adopted two reform measures and then declared:

> "If there is just ground for further reform in civil procedure, we pledge its legislative enactment."

In 1921, a Committee was appointed to make specific suggestions as to changes and additions needed in the practice and procedure to the end of creating a speedier administration of the law and of minimizing the now existing delays in such administration. The Committee reported next year, expressing their amazement at the magnitude of the task and secured the passage of a resolution calling for the appointment of a new committee to study the question and report annually for the next three years. It is not recorded that the committee ever made a report. In 1930 the Committee on Jurisprudence

and Law Reform recommended the investigation of a plan for a complete and radical change in our form of procedure, stating:

"Your Committee believes that the time is ripe in Indiana for the adoption of a procedural reform. Entirely too much time and energy, and too much of a client's money is wasted, in litigating procedure. A client pays the bills for the litigation of procedure, but receives no benefit therefrom."

At the Mid-Winter meeting in December, 1930, the procedural reform question was sharply debated. The opponents of reform declared that there was no need for it; that the present code system has served its purpose well and on the whole has been fairly satisfactory. The proponents of the measure sounded a warning that seems to have been slow in making its impression, but I think has aided in arousing the Bar. They said that there was abundant evidence for the conclusion that our legal procedure was far from satisfactory in its results. They cited the increasing dissatisfaction of the public with delay and expense and particularly with the decisions on procedural technicalities, as indicated by newspaper and press comments all over the country; that it were far better for the Bench and Bar to make the necessary adjustments than to have the project undertaken by untrained and lay legislators under the pressure of an outraged public opinion. At this meeting a bill was approved, placing rule making power in the Supreme Court.

At the Annual Meeting in 1931, the fate of this bill was reported to the Association. It was stated that the opposition to the procedural reform bill by lawyers in the Senate was even more violent than their opposition to the bill for the election of judges on a non-partisan ballot. They argued that tampering with the present procedure would be dangerous to the welfare of the state. This position was severely criticized by the committee on legislation, which recommended that the Association continue its efforts both for the election of judges by a non-partisan ballot and for a reform of the civil and criminal codes.

At the Annual Meeting in 1932, the Committee on Jurisprudence and Law Reform recommended the re-introduction of the procedural reform bill in the 1933 General Assembly. The Committee said:

"There can be no need of proof, to the layman at least, of the widespread dissatisfaction with the administration of justice. The Bench and Bar may deny that this dissatisfaction is well founded, but can hardly claim that it does not exist."

The Committee made a strong argument for procedural power in the Supreme Court. The Association approved the report of the Committee as to rule making power, but rejected it with reference to the reform in appellate procedure.

As late as the Annual Meeting of 1933, it was urged by some speakers that the present code of procedure is particularly adequate and satisfactory, needing no adjustment.

At the Annual Meeting of 1934, President Seebirt vigorously attacked the lethargy of the Bar on the subject of delays and procedural technicalities. He said:

"Delay in the functioning of the machinery of the law is costing the people a staggering amount in economic and social values."

He recommended as objectives of the Bar Association:

"The coordination of the lawyers of the State into a more harmonious and sympathetic body, a better trained Bar, an experienced and able judiciary freed from the hazards of political tenure, a more prompt dispatch of business, and the creation of conditions in the practice that will enable the profession fully to attain and enjoy the high place in our social order to which it is entitled."

At the Annual Meeting in 1937, a very valuable symposium was presented on the question of how procedure and practice may be improved under the rule making act. As heretofore noted, the Supreme Court acted with commendable zeal and promptness in modifying the rules of appellate procedure after the Legislature had abdicated its traditional intrusion upon the functions of the Court.

Yet we are far short of the goal. But in the form of the new rules of Federal Practice, we have an opportunity never

before afforded to the Bench and Bar of our respective states. You will hear tomorrow a discussion of these rules. The overwhelming opinion of lawyers throughout the country seems to be that they should be adopted by the states. It is within the power of our Supreme Court to do so. Naturally the Court expects support by the Bar for any program it adopts. It, therefore, becomes the imperative duty of the members of this Association, the only state-wide organization available for action, to familiarize themselves with these rules, to form an unbiased opinion as to their value and their adaptability to Indiana, and to make known that opinion to those in authority.

I have sketched at some length the history of the Indiana State Bar Association with reference to the three vital subjects of Integration of the Bar, Reform in Procedure and Independence of the Courts. While it might appear to the superficial that the attention given to these subjects has been sporadic and not articulated, I prefer to view the history as evidence of the accumulation of force and conviction that these questions must be solved correctly and that the time is upon us. Edmund Burke is credited with having said that the present generation has an obligation to be true to its ancestors and faithful to its offspring; that it holds a trusteeship for the unborn. Can the organized Bar of Indiana discharge that trust any more completely and comprehensively than by now resolving that the ground that has been gained shall not be surrendered; that remaining obstacles shall be overcome; that sentiment shall be crystallized into action, so that the day will come when the excellent lawyer will be known for his ability to see the justice of his cause and present it in the perspective of its relation to the social order, rather than for his ability to emerge successfully from crossing swords on procedural technicalities, and that after all, the administration of justice shall be upon that high plane where the litigant gets that to which he is entitled.

The American Bar Association has recently taken an epochal step by the establishment of a Committee on the Defense of Liberties vouchsafed by the Bill of Rights. The tra-

ditional attitude of the Bar to defend the penniless against criminal charges will now be enlarged to embrace his civil rights. It is clear that denial of such rights to one imperils the rights of all. Government must have no more freedom to oppress by civil process, whether by Board, Bureau or Executive order, than it has to convict the innocent of crime.

The progressive leader of the American Bar, whom we are honored to have as a guest on this occasion, asks for the appointment of State committees on the subject. I recommend that the incoming President be authorized to appoint a special committee for this purpose, wtih a member in each Congressional district.

History discloses on the whole, sufficient progress toward worthy goals to encourage us to go on. If one be inclined to take a pessimistic view, he might find encouragement in one of the delightful essays of the philosopher and naturalist John Burroughs. He says that the most marvelous thing about man's evolution is the inborn upward impulse in some one low organism that rested not until it reached its goal in him; that while man has probably attained stabilized, if not perfect, physical development, the mental and spiritual realms are yet open for improvement. He points out that in this upward progress, man learned to love the beautiful and the artistic long before he loved the true and the just; he was proud before he was kind; he was chivalrous before he was decent; he was tattooed before he was washed; he was painted before he was clothed; he built temples before he built a home; he sacrificed to his gods before he helped his neighbor; he was heroic before he was self-denying; he was devout before he was charitable.

A moment's reflection will disclose the parallel between this description of man's progress and that of the evolution of the law. There arose somewhere an urge to strive for perfection in dealing with the rights of men. The administration of justice in its crude beginnings was hardly just. It was rigid before it was equitable; indeed, the rigidity of the law gave rise to equity.

The lawyer appealed to prejudice, rather than to reason;

he depended upon oratory, rather than logic; he sought results, rather than justice; he glorified the technicalities of procedure, rather than ultimate rights; he ambushed his opponent in the thickets of the practice instead of meeting him in the open field of fair play.

He carried his characteristic individualism to the extent of making it difficult to organize any association of the Bar; indeed, America was a nation for about one hundred years before sufficient sentiment could be created to organize an American Bar Association. Indiana was nearly a century without an organized Bar.

We are only in the beginning of true cooperation among lawyers. Perhaps it could not have been reached at an earlier day because of inferior methods of communication. Physical, mechanical and other scientific development have so impressed our social life that we cannot live apart. It has been wisely said that the law is but one of the manifestations of the social order.

Hence, I deem it but a necessary aspect of present day civilization that the Bar be thoroughly organized; that it understand that its problems are not only State-wide, but nationwide; that its responsibility is greater than ever, much greater than it could have been in the circuit-riding days when a man rarely left the bounds of a few counties and knew little about his brethren, except as he met them in the local forum.

It is encouraging to see that in the midst of so much bewilderment in this modern life there is a determination on the part of the Bar to improve the practice and procedure; to administer justice with the least possible expense and the greatest reasonable speed; to protect the public against illegal practice; to raise the standards of admission and professional conduct; to assure to every man adequate defense of his civil rights; to protect the Bench from political vicissitudes; these things constitute the administration of justice.

As an organized Bar, we should take solemn pride in our responsibility, always conscious of the great truth announced by an American statesman a century ago—that justice is the chief business of mankind upon the earth.