North Dakota Law Review

Volume 6 | Number 1 Article 3

1929

President's Address

John H. Lewis

Follow this and additional works at: https://commons.und.edu/ndlr

Recommended Citation

Lewis, John H. (1929) "President's Address," *North Dakota Law Review*: Vol. 6 : No. 1 , Article 3.
Available at: https://commons.und.edu/ndlr/vol6/iss1/3

This Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

PRESIDENT'S ADDRESS

HON. JOHN H. LEWIS

By custom, which sometimes does not seem a wise one, an address by the president is a regular part of the anual meeting. When I at last sit down to write one, after mulling it over for a year, I am impressed by the vast number of things that might be said, my inability to say them, and the difficulty of picking out something concrete enough to be worth while. Bar association meetings are like Sunday sermons, of little value unless their influence and principles continue over into the week. Glittering generalities gain us nothing.

As we grow older we grow broader minded, and are lucky if we can keep a part of the earnest convictions of youth. Experience of life makes our judgments both kinder and vaguer. Among so many sides of so many questions, who is to say which is right, or even preferable? And yet the calm contemplation of Nirvana makes no actual progress; our job must be to get an inkling of the meaning of the world if we can, and then do our bit in a small corner of it. Frankly acknowledging these limitations, let us try to lay down a principle or two, and then offer no apologies if we deal with minutiae.

It ought to go without saying that the main principle of a lawyer's life, as of any other life, should be service. We are all here to make the world a little better, and the lawyer especially to make it better in the enforcement of fixed rules of conduct between man and man. Therein lies his technical problems; tthe larger problems of men as a whole deal with the development of economic and social systems and personal conscience. Nothing, it seems to me, can take the place of this personal conscience; no systems can of themselves reform the world, though they may help mightily in such reform by appealing to the conscience in the wisest way.

At times we grow discouraged, and feel that all is wrong with the world and especially with the law; that, as one maker of bon mots expressed it, "We have no courts of justice, only courts of law". Yet really we have accomplished much; the "success of justice", as one of our speakers reminded us last year, are enormous. It is always the failures which stand out, the moreso when they are distinct exceptions, not in consonance with the background. And we do well to devote our attention to them; we should aim, not for self-satisfaction, but for improvement.

It would be foolish to expect that we can have perfect law obedience or perfect law enforcement, as long as we do not have perfect men. It would indeed be a sad situation if we had. Laws are of necessity framed in general terms, to meet the average case, and framed in ironclad fashion. The great safety valve of necessary exceptions is the jury. If the jury had today its historic function, of triers of fact under the superintendence and with the assistance of the judge, instead of being left to wander in a mass of evidence and oratory, deprived of the help of one unbiassed expert in the court room, we should hear less of its faults. Yet it must

be admitted that law obedience and law enforcement are at a low ebb in this country. No one wishes the network of detailed regulation that characterized pre-war Germany, but that is no argument for a condition approaching anarchy.

Never has there been an experiment in democracy before on the scale of that today in the United States. All former democracies were comparatively small and homogeneous. The nearest approach to it is in England, which is indeed large in population, but homogeneous, and surrounded by innumerable restrictions from custom. Today, when custom is, comparatively speaking, losing its force in England, thinkers are asking whether their democracy can last.

Monarchies and oligarchies have regularly made use of strong and skilled men. Democracies hesitate to do so. Liberty and order find it difficult to share the same throne. They must, if success is to be attained. Perhaps the greatest need of democracy is the willing and intelligent employment of experts.

We cannot have a reasonable degree of law enforcement in a democracy unless we have the spirit of the people behind the laws; we cannot have a reasonable degree of law enforcement unless we have a reasonable degree of voluntary law observance. And that we cannot have if we insist on having too many laws. Because in its nature law must be fixed and ironclad, it should deal only with the main situations of life, leaving much to be regulated by public opinion. When this principle is violated, as it is universally in this country, disobedience and disrespect for law, and inability to enforce it, are the inevitable result. It am not speaking of that bone of contention, that leading subject of discussion and dispute, the eighteenth amendment; whatever be our views on that, and they are almost as many as there are men to discuss it, it deals with a large problem, probably with an extra-hazardous instrument, and may well justify a solution of its own. I am speaking of prohibitions in general. When a can cannot legally smoke in a public dining-room or drive an automobile through town faster than ten miles an hour, the result is a foregone conclusion. The sport of law-breaking will last as long as the sport of law-making.

I refer, of course, to unconsidered laws, those which aim to enforce upon the community as a whole the ideas of a vociferous minority on unimportant details. The increased complexity of modern life renders inescapable a great increase of regulations such as would have been intolerable in pioneer times, when human relations were more personal and many such matters could be governed by give and take between men personally acquainted with each other. Under modern conditions, traffic, zoning and factory laws have become necessities, and can be expected to increase year by year.

As always, the remedy is more difficult than the diagnosis. I am neither a prophet nor the son of a prophet, and cannot suggest an infallible solution. If I venture to make suggestions for improvement, then, as the actor said in the old play, "I may be wrong; I usually am". No doubt the great but slow remedy for all evils lies in education, in the development of public opinion. But, in the face of the earned stigma of being a lawless nation, we, and especially those sworn to uphold the law, may not well shrink from

an attempt to do something, however, inadequate, to bring about improvement. I am inclined to agree with the school that feels that one remedy lies in attempted enforcement, which will test the reasonableness of laws that are now dead letters.

Our system of criminal procedure is hopelessly antiquated. Born in a time when such offenses as poaching were punishable by death, and the decency of human nature ameliorated conditions by a system of technical loopholes, it has long since been discarded in England, but has persisted in America into a day when it has become the shield of the criminal. Not that the English system of justice is perfect. In an English court room one feels instinctively that the stage is set for conviction. But at least the most important party in interest, the public, is protected, and the principle of the greatest good of the greatest number upheld. The English rule that no conviction shall be reversed unless the reviewing court believes that justice has not been done does indeed take away from the jury the final decision on questions of fact, but does away with a mass of failures of justice. Such a provision is safer to administer in a country where judges are appointed, and for life, selected for their ability and not for political reasons of personal popularity, and given ample salaries, than in one where the contrary conditions often prevail. If we hesitate to go quite that far, we might accomplish much, provided the courts would administer the rule in the right spirit, by a provision that there should not be a reversal unless the reviewing court felt it probable that error of law below had changed the verdict that would otherwise have been rendered. Nothing will be accomplished, however, if the courts insist on emasculating such a statute and continuing the common law by construction.

If in some degree I criticise the courts, it is because everyone has the right to criticise them; that is the privilege of a free citizen, and should go hand in hand with respect for the courts. They are, of course, no more perfect than the lawyers or the farmers. They are the product of our system, and it is surprising that, all in all, they should be so good. When Chief Justice Marshall made his famous statement that "this is a government of laws and not of men," he said something that is splendid for its psychological effect and as the statement of an ideal, but that as a statement of fact is arrant nonsense. No judge worthy of his salt would be consciously influenced by considerations of politics, friendship, or his personal economic or religious views; no judge whatever can help being unconsciously influenced by them all, just as none of the rest of us can help it. To protect him as far as possible from such influences, we owe it to him and to ourselves to give him a long tenure of office, a sufficient salary, and such method of appointment or election as shall reduce to a minimum the inevitable human influences. And in the meantime, as well as when the millenium arrives, we owe him respect, cooperation, indulgence for the human weaknesses which he shares with the rest of us, and admiration for the way in which he does his duty under difficult circumstances.

Judges are of course only guessers at the law like the rest of us. Under the principle that the voice of the people is the voice of God, they are divinely appointed guessers, and we owe them and their decisions the same kind of allegiance that we owe the president of the United States, whether or not he happens to belong to our party.

As a matter of fact most legal questions have two reasonable sides, and in the last analysis about all any of us can say is that on the whole this or that side appears the more logical and reasonable.

Without going into detail, I think it safe to say that many of the technicalities of our criminal law could be repealed with little loss of safety to the innocent, and much improvement in the punishment of the guilty; retaining such substantial safeguards as are not in their essence technicalities, but provisions against a sort of mob justice.

Why are not these reforms made? How shall they be made? One reason why they have not been made is a great inertia, perhaps more in the public than in the legal profession, whose foremost members have long advocated them. One reason is the distrust of such altruistic lawyers, by a public which has not learned to employ experts. One reason, alas, is the opposition to them by lawyers who prefer to play the game as they have learned it, and feel that they have a vested right to win bad cases by their personal ability. Such a viewpoint, while thoroughly human, is entirely indefensible. The fact that it is held by a small minority of lawyers, some of them highly agreeable personally and very able, has done much to instill into the public mind that distrust of lawyers as tricksters which is a handicap to the honest and ethical majority of the bar, and is responsible in part for the difficulty of making the voice of the bar heard in our legislatures when it is lifted in the cause of reform. The remedy must be sought in an organized, earnest and continuous campaign of education by the Bar, in a realization by some of its members that their profession demands public service before personal gain, and in such disciplinary measures as may prove necessary.

The method of trying to prevent crime by extreme punishments has been fully tried out in England in past centuries, and has been a startling failure. Apparently it made human life so cheap that people were willing to take all sorts of chances. Much the same kind of thing has in fact happened with our multiplicity of laws today; we are so certain to violate one of them between daylight and dark that we take our chances and give the matter no thought, and slip into the mood where all law seems to have been made to be violated. Certainty and swiftness of punishment, rather than severity, seem to be the great deterrents. In England a man's trial usually follows within a few weeks or possibly days of his arrest, and on conviction the sentence is carried out without delay. A somewhat similar condition in New Jersey some years ago caused wide publicity for "Jersey justice."

In criminal cases I personally believe that every man is entitled to a defense, and that a lawyer is justified in putting up the best case he can, provided he does not resort to trickery. The litigation cannot be prevented, and the defendant is already in court and has vital interests at stake. In civil cases the conditions are not the same. From the plaintiff's point of view, there is no compulsion to bring the lawsuit, and from the defendant's point of view a settlement may be possible. In civil matters I cannot see that either the client or the lawyer has a vested right to litigate a worthless or immoral case. As I see it, the lawyer has the right to put a failing debtor through

bankruptcy, but not to draw up for him a fraudulent transfer. He has not the moral right to advise either a rich corporation or a fraudulent promoter how to keep within the letter of the law while violating its spirit. In accident cases he has not the right to bring a "strike suit," either for a settlement or in hope of a verdict which he practically knows is unjust. He cannot avoid responsibility for these things by saying that it is his client's business, not his own. He besmirches an honorable profession if he does not insist that his clients as well as himself be decent. Cases where there is a fair controversy he may honestly take, but not cases which rely for their hope of victory on fraud, trickery, or appeals to passion or prejudice. The better lawyers keep to these rules, merely as a matter of common morality between man and man. For those who do not, disciplinary measures are practicable, and should be applied.

There are two methods of practising law, by no means mutually exclusive, the method of litigation and the method of advice and settlement. In large firms, different members specialize in these different tasks, according to their natural inclination and abilities, but most of us have to do both kinds of work. Both are of vital importance; but it seems to me more and more, as I grow older, that the job of keeping clients out of litigation is, speaking generally, as much more important than the job of getting them out of court successfully as medical preventive work is than the cure of disease. Leading business men would appear to share this view, as with large corporations, although perhaps not with the usual country client, the remuneration for this preventive work is higher. Court congestion can also be lessened if the lawyers will try a large part of their cases in their offices, and, with a reasonable client, it is usually not hard to sit around a table with one's opponent and dispose of the litigation to the comparative satisfaction of all concerned.

The pendulum of life oscillates from age to age. We are all familiar with the old rule of an eye for an eye, and the Puritans in their godliness made life not worth living. Today we are at the other extreme, and tend to forgive everything. I have no doubt that of the two, inexorability and kindliness, kindliness is the finer and better, but the best course of all is generally to be found in the golden mean. Some of the iron in the Puritan's constitution is badly needed today. We have poor relief, institutions for the feeble-minded, mother's pensions—all splendid things, but all things which tend to encourage propagation of the unfit. We have passed the stage where we can sit back and allow the laws of natural selection and the survival of the fittest to work out our problems; our growing feeling of altruism and decency, our self-respect, absolutely forbid it. What is the result to be? That the unfit will propagate like flies and inherit the earth? That the struggle for civilization and progress must all be gone through over again? Not only law obedience and a reasonable punishment of criminals, but sterilization of criminals and of the unfit seems called for to save our civilization.

Of the popular criticisms of the bar, perhaps that which has the largest measure of truth is the charge of excessive conservatism. Many prominent lawyers are indeed thoroughly progressive, leaders of reform, but many cling to the idea that "whatever is, is right"—in economic matters, probably largely through their association with property interests; in other matters sometimes through the dislike

of learning new ways. In the excellent work that has been done towards the study of the Constitution, one sometimes feels a tendency to place it on a pedestal for indiscriminating worship. Of course our original Constitution was a compromise document, and the more praiseworthy and successful for that very reason; but it was not written by the finger of God, and from time to time has called, and will still call for amendment. Such amendments, made in a legal way, are always in order, whether they relate to the liquor traffic or to rules of property. Let us hope that we will not fall into the mistake that we have so thoroughly made with our State Constitutions, and as some think we have done with the eighteenth amendment, of filling it with minor and shackling provisions, expressive only of temporary opinion. I am in thorough sympathy with the kind of conservatism that refuses to rush into unconsidered reforms, and insists on thinking problems out before making changes; but lawyers, who should be leaders of public opinion in this work, cannot escape the responsibility for studying abuses and suggesting solutions, and are not justified in merely sitting back and picking flaws in proposed laws, without doing constructive work to find a remedy.

Another criticism is of delay in our court procedure. I am convinced that much of this criticism is unfounded, and represents the unreasoning public demand that orderly investigation be sacrificed to speed; yet the leisurely methods of the profession in the past, more tolerable then than in these days of hectic business activity, have made for a certain inclination to deliberateness that does not entirely accord with the business pace of the times. In some ways it may be well that it does not. This is increased by the high degree of professional courtesy so splendidly prevailing among members of the Bar, which sometimes results in granting excessive postponements. In the large cities the lawyer's office is generally conducted on a business basis, and I believe this is coming to be more the case in the smaller communities. It is the duty of the courts as well as of the lawyers to see that cases are tried without unreasonable delay. To a large extent the failure to do so is the fault of the public, which refuses to furnish judges enough to attend to the business. In our state calendars are not congested, and there is little to criticise in this respect.

We are faced today with a tremendous tendency towards institutionalizing everything, until it sometimes seems as if robots or mechanical men would soon do most of the work of the world. Much of this is unquestionably real progress, but to some of us, perhaps old fogies, this breaking down of individualism is at times depressing. In government, this tendency is shown by the multiplicity of boards, commissions and general governmental activities, such as state bonding and state workmen's compensation. In law it is shown by the increasing tendency to return to the old doctrine of liability without fault. There was a day when the physical instrument causing injury became forfeit, by substantially a proceeding in rem; then was developed the idea of responsibility of the owner for moral fault, especially negligence; and again today the pendulum swings towards recompense for damage however caused, so that the phrase *"damnum absque injuria"* may soon become a thing of the past. This is an inevitable trend of the times; a result of the complex machinery of modern civilization. When a cog slips, the dam-

age is much greater than when contacts were less close, because today we all tend to be bound together in an enormous machine of many interrelated cogs. The law, of course, has never been logical about it, as it has never been thoroughly logical about anything, building itself up largely on considerations of practical results, the traditional British muddling along. I have always felt that the doctrine of responsibility for the acts of an agent lacked logic in a system based on moral responsibility, and our criminal law has generally rejected it. It grew up, perhaps, through the idea that the principal should use care enough in choosing his agent so that accidents would not happen—a doctrine quite unreasonable in huge modern businesses. The first extension of liability came with extra-hazardous instruments. Probably many courts, including our own, would not have so extended the doctrine of agency as to hold that a member of the family driving a pleasure car is the owner's agent, or so restricted the application of contributory negligence in such cases, but for the subconscious feeling that the automobile is an extra-hazardous instrument. But today, judging from past standards, we are living in the midst of a mass of extra-hazardous instruments. Courts feel their way step by step in establishing a new rule, which is only formulated by the student of law after it has become practically established. In view of this tendency of the times, it behooves us to consider how far it is to the public interest to re-establish the doctrine of liability without fault, what should be the extent and limitations of such a doctrine.

In the attempt to do what I have preached in these pages, offer constructive suggestions, I venture to make certain recommendations for the future work of the Association.

The work of the Citizenship and Americanization Committee has been spendid. I recommend that this work be continued from year to year, preferably in the grade schools as in the past, even if the expense should require cutting down some of the other activities of the Association.

I have not discussed, except by a brief reference, one of the most important subjects of the day—the reform of the jury. This is bound up on one side with the powers of judges, already the subject of one of our committees. Dean Wigmore has written a thoughtful article on this situation, which has been abstracted in recent issues of Bar Briefs. I commend to your consideration the address of President George M. Hogan to the 1928 meeting of the Vermont Bar, entitled "The Strangled Judge." There is so much value in the jury, and so much danger in some of its present features, which seriously impair its usefulness and endanger its existence, that a study of the situation by a special committee would seem well worth while. I recommend that such a committee be appointed by the incoming President, and that the subject be made a leading issue of the 1930 meeting.

The vast increase in automobile traffic and in the power and speed of automobiles, causing greatly increased accidents, presents a problem with which our legislature must soon cope. Believing that it is the duty of this Association to study such a pressing problem and investigate what legislation is desirable, before rather than after the Legislature has acted, and attempt to prevent unwise and secure

constructive legislation, I appointed a special committee on Automobile Safety Regulations and Insurance. The Legislative Committee refrained from taking any action, because the subject had not been studied by the Association or any action taken at an Association meeting. The majority report of the special committee is a splendid piece of work from the point of view which it takes. As it and a minority report will be presented at this meeting, I shall not anticipate the discussion further than to point out that the problem may be approached from either of two angles, increased safety on the roads or securing payment for damages inflicted. It is not entirely easy to achieve these results together, and there would seem no doubt that the first is the more important. I commend this subject to your consideration and hope that it will receive careful discussion at this meeting, and I recommend that a similar committee be appointed for the coming year, and that the meeting in 1930 take a definite stand on the problem and submit its views to the next Legislature.

I believe that Bar Briefs has been useful in increasing professional solidarity and interest, and recommend that it be continued, and that the members of the Bar form the habit of reading it and of contributing to its pages as occasion may arise.

The Committee on Local Organizations has not functioned this year as I had hoped it would. There are several City, County and District Bar Associations in the State, of which some are active and some are not. In this age of intense organization, it is possible to carry it too far, and find oneself in the position of the man whose office system was so splendid that it left him no time to attend to business. Nevertheless, I believe a reasonable amount of local organization supplements and aids the activities of the State Association, and makes, both in a social and a distinctly professional way, for the good of the profession. It has been suggested that the State Association lay out a program of work for the local associations, in order that the relations between the two may be closer. This suggestion may be worth considering. In any event, I recommend that the committee to be appointed the coming year keep in touch with the activities of the local associations, and assist in starting new ones where such a course seems advisable.

The subject of legal education is continually before us, although under new forms as conditions change. It may or may not be time for our Association to take an active part in urging higher legislative requirements for legal education and admission to the Bar, but there can be no doubt that this is a subject which should enlist our active interest. It is not for our own sake, but for that of the public, that we must be interested in seeing that only well qualified lawyers transact legal business. It would seem that there can be little doubt that, to do so efficiently, something more is required than a skeleton knowledge of legal forms and principles—the historical and economic background to understand those principles.

Every once in a while is heard the complaint that laymen are doing legal work—drawing deeds, mortgages and wills. In this State we have no statute forbidding them to do so for pay, provided they do not actually go into court. From a selfish point of view, the mature and established lawyer has little objection to present condi-

tions, feeling that the mistakes made by these our half-brothers are productive of more lucrative business than they take away from us. The public, however, which nowadays can be legally shaved only by a duly certified barber, ought not to have the disposition of its property depend on the ignorance of untrained craftsmen. Whenever the Legislature can be made to see that this practice is objected to by the Bar for the good of the public, and not for its own good, it will, as it should, be stopped by law.

The Committee on Fee Schedule reports that it is informed that the schedule is being violated by a number of lawyers, some of them leaders of the profession, especially as to fees in mortgage foreclosures. Probably few of us regard the schedule as susceptible of universal application. It certainly cannot be taken to forbid charity work, and to those who are accustomed to regulate our charges largely by the importance of the work involved rather than on a time basis, its minimum figures seem too high for certain minor cases, and distinctly too low for others. But if it is not to be obeyed in spirit it ought to be changed, and not furnish another example of a law more honored in the breach than the observance. It has done useful service by educating the Bar and public to a knowledge of the value of efficient work. The profit of the lawyer is of far less importance than the service to the client, but such service cannot, in the nature of things, be efficiently performed unless it commands reasonable fees. The attorney fees fixed by the Legislature as taxable costs in foreclosures are lower than such reasonable compensation, and the attorney must, unless he desires to give charity to those who least need it, the moneyed class, charge at least the sums fixed by the fee schedule. If, because of past custom, he allows his clients to dictate those fees, he is holding his profession at too little worth.

The Committee on Internal Affairs, a euphemism for grievance committee, again raises in its report the subject of its lack of disciplinary power. Possessing as we do a Bar Board endowed with sufficient powers, and chosen from nominees of the Association, a change in the functions of that board would seem of doubtful value. I think, however, that the committee of the Association might well serve, in somewhat more formal and active fashion than it now does, as a kind of investigating magistrate, to hold an offender to the Bar Board, which acts as a grand jury. It might well automatically, instead of spasmodically, report direct to the Bar Board cases of apparent professional misconduct which it has investigated. And it is perhaps not going too far to suggest that the Bar Board might make some use of the committee's investigations, instead of being compelled in every case to go over the whole ground again. The committee might also consider a public reprimand to the offender in certain cases. The suggestion that the Secretary of the Association be made the secretary of the committee, and investigate minor complaints which now take up the time of its chairman, is worthy of consideration, and I am inclined to think is wise.

The suggestion has been made that the meetings of the Association be held in alternate years at a city on the Northern Pacific and a city on the Great Northern, in order to afford the most convenient opportunity for lawyers from different parts of the state to attend. It is perhaps neither necessary nor desirable to have a fixed custom in this respect, but the principle seems wise.

There has been a tendency, which fortunately has not crystallized into a fixed custom, that the President and the meeting place should bear some relation to each other. There are some obvious advantages of convenience in this, but I believe it to be a vicious tendency. It has resulted in most cases in depriving the attorney from the small town, which has not the facilities for entertaining the Association, of any hope of attaining the presidency. The men whom our Association would delight to honor, and by whose election it would honor itself, are by no means all in the larger places. The lawyers from the small towns deserve their fair share of the honors, and I hope the Association will so bestow them more liberally than in the past.

In closing, may I thank you all, not only for the honor bestowed and for the year which I have been privileged to spend in trying to do a little for the advancement of the profession, and through it for the interests of the public, but for the hearty cooperation which has made the year so pleasant? It has been an experience never to be forgotten, and has strengthened my admiration for the profession to which we belong. May it always be a leader in working for the public good, and hold high the torch of progress through the generations to come!

CRIME PREVENTION AND LAW ENFORCEMENT

HON. G. A. YOUNGQUIST

I think Judge Lewis has in mind the fact that I am a neighbor of yours—in fact I started practicing law in the Red River Valley in Crookston, and I had at that time, and have since that, more or less contact with North Dakota and its citizens and its lawyers, and have, I believe, retained a feeling of neighborliness and friendship, which should, of course, exist between the citizens of one state and the citizens of another.

I am not sure that the Judge is right in saying that he has chosen quality this time rather than quantity. Of course I would not admit that it is not possible for me to deliver the quality if I had the time to prepare it, but the invitation came to me just a few days ago so I chose the biggest subject that I could think of — one in which I could reach out in every direction and spread myself in whatever channel that seemed to afford itself. That, you know, is what we usually do when we have not the time for careful and accurate preparation so I have chosen that tremendous subject—two tremendous subjects really—"Crime Prevention and Law Enforcement."

There is no crime wave. It is not, it seems to me, even a tidal wave, because if it were after all a wave it would recede some time. But the thing that we have stays with us, and more than that, it keeps growing, so that what we have is a crime problem, and an acute problem. It becomes so when we consider that we have in the penitentiaries of this country about 100,000 men and women, and approximately as many more in the jails and in the workhouses; that there are killed in this country every year by and through the criminal acts of other nearly 10,000 human beings; that the direct cost of crime is estimated at three billions of dollars, a cost of approximately $25 per capita for the entire population of this country, and a total cost of thirteen billion dollars a year. So there is every reason why we should admit that we have a problem, and a real problem, upon our hands; and as I said it is increasing. It is. In 1905 there were five human beings killed by and through homicide out of every 100,000 of our population. In 1925, twenty years later, there were nearly ten out of every 100,000 killed. That gives us some idea of the extent of the rate at which crime has been increasing in this country.

It is interesting to note the numbers. I said there were about 10,000 homicides committed. The larger numbers occur in the great centers of population and in certain sections of the East and of the South.

Illinois, as we might expect, with her several hundred gang murders in the last few years, leads in the statistics of 1927 with 756 homicides. Next comes New York with 635. Then follow those very populous states, Pennsylvania and Ohio with 550 each. After these come the states with smaller population, but states located in the extreme south, Alabama for instance, with 526 homicides in a single year; Florida with a population of about one million, with 485 a year and the States of Mississippi, Tennessee, Kentucky,

G. A. Youngquist
Attorney General, Minnesota

Louisiana, all of them with more than 400 homicides in the year. A rather striking contrast strikes the eye when we move to these Northwestern states of ours. In Wisconsin, for instance, there were that year 73 homicides; in Minnesota 65; in Iowa 59; Nebraska 48; South Dakota we have no figures from because that is not included in the registration area; and from your own State of North Dakota, there were only 11. It must be gratifying to you to know that of the states reporting, 42 states I think it is, there are only two states, Vermont and New Hampshire, that have a homicide rate lower than yours.

With all of this before us, we cannot wonder that some months ago President Hoover said that the crime problem is the dominant issue before the American people, and that we are not suffering from an ephemeral crime wave but from a subsidance of our foundations.

This tremendous quantity of crime and the increase in it has led to something. It has led to the formation, in recent years, of not less than ten national organizations who are either devoting themselves exclusively, or devoting themselves in part, to the investigation of crime.

I might mention them. First, of course, there is President Hoover's National Law Enforcement Commission; another organized some four or five years ago, the National Crime Commission; the American Bar Association through its section upon Criminal Law; the American Law Institute, in its preparation of a new code of criminal procedure; the American Institute of Criminal Law and Criminology; the American Psychiatric Association; the American Prison Association; the National Probation Society; the Social Science Research Council, and last, but not least, the National Association of Credit Men, and besides these a great many states and municipalities have had crime commissions and surveys.

Minnesota has had two in the last six years, and there has come from the work of those commissions some legislation of real value. The cost of crime to life and to property is so great that each state can well afford to establish a permanent and continuing crime commission to make a constant investigation and survey of crime conditions within that state and recommend amendatory legislation, and recommend as well action on the part of the duly constituted officers and to arouse an intelligent public opinion that will operate on the subject.

I have mentioned now the extent of crime. Logically we next come to the cause of crime. Its causes, of course, are legion, and I shall just skim over them, nothing more.

It was for many years a favorite theory that crime was largely due to a subnormal mentality because the tests taken in prisons by psychologists show a rather low mentality. But that was before the War; that was before the psychological tests taken of the four million men in the army proved that the mental level of the citizens of this country was no lower than that, substantially speaking, of the inmates of our penal institutions, so that with that evidence before us, subnormal mentality loses almost all of its force as a cause of crime. Naturally one of subnormal mentality is more easily led,

and it may, in instances of that sort, contribute in part to a criminal career, but it is not nearly so important as it once was thought to be.

Heredity—there is something in that, of course. But when you stop to think of it, you seldom hear of a professional criminal who has children. I happen to be a member of the Pardon Board in our own state. We review every year hundreds of applications for pardon, but when we come to the application of the professional criminal, it is rare, if ever, that it be found that he has offspring. However, there are, no doubt, some children of criminals who have inherited criminal tendencies, but as a rule the majority of criminals come from non-criminal families, so heredity is not the whole cause by any means.

It has been thought, too, that economic pressure is in a large measure responsible for crime but surveys of economic cycles of depression and of prosperity prove nothing.

Recently we have thought, too, that the introduction into this country of large numbers of foreigners has had to do with crime. Undoubtedly it has, especially in criminal gangs such as we have in Chicago and other large centers of population, but I should not for a moment want to be understood as saying, nor should I want anyone else to say, that the foreign born generally are more prone to crime than the native born, because I would be including myself in that classification.

It may be true that prohibition has had something to do with the increase of crime. President Hoover said in his address four months ago that about eight per cent of the major crimes in this country were traceable to the liquor traffic, which means, putting it in other words, traceable indirectly at least to prohibition, but that does not account for it all.

The jails as we conduct them now are in many instances schools of crime, and that will continue to be so as long as we herd together the first offender whose mind is still open to reform and throw him into contact with the confirmed criminal who is a past master in the art and who passes that art on to the young man in order that he may make it his means of livelihood in the future.

Some judges have said, according to answers given to questionnaires, that love of adventure has a great deal to do with a man's choosing a criminal career. It has, no doubt, something to do with it, but I think that easy money and easy living without effort has more to do with it than the love of adventure. There is prosperity, generally speaking, on every hand, and if a man sees an opportunity to share in that prosperity without labor he may, if he has a tendency in that direction at all, accomplish his end by stealing rather than by earning

But after all, when we have considered all of these causes, there remains what seems to me to be the prime cause of all—environment and home conditions. That is where the criminals are bred, and that is where the upright citizens are bred, depending upon the environment in which they live and the home in which they grow up.

Investigations in Chicago show that the delinquency for each one hundred boys living immediately adjoining the business district in that city is seven or eight times as great as the delinquency per hundred boys in districts five or six miles farther out. That is environment. Fifty per cent of the delinquents brought before the Juvenile Courts come from homes that have been broken up by divorce, by drink, or by other causes. That it is true that the home has more than anything else to do with the proclivity of boys and girls for criminal careers is proved by the fact that a recent survey in the Sing Sing prison in New York shows that forty-five per cent of the inmates were under twenty-five years of age.

Those three facts, it seems to me, point conclusively to this other fact: that environment and home training have more to do with the cause of crime and with the prevention of crime than has anything else. And that brings us naturally to the preventative. Of course, prevention of crime is more important than cause or prosecution or enforcement or anything else.

It is a truism to say that if all crime were prevented we would have no crime. But all crime cannot of course be prevented; not at least while you and I live. That millennium may come some time in the future but not in our day.

I was interested this afternoon in hearing your President's excellent talk and his discussion of sterilization with respect to the feeble-minded and the habitual criminals. It may interest you to know that not less than nineteen states in our Union have adopted laws to provide for the sterilization, in some cases, of the habitual criminal, and in other cases—most cases—sterilization of the feeble-minded, and that up to the first of last year some 8515 individuals have been thus sterilized, and that in California, which has taken the lead, there were 5820 of those. That will no doubt have its effect in the future. The effect of it can be limited only, but nevertheless important.

It will be argued by some that severe punishments will do much to deter others from committing crimes. But we wonder whether that is so when we recall the fact that not so very many years ago there were not less than 200 offenses in England, many of them minor in character, that were punishable by death, and when we remember that the juries, unwilling to sentence men to death for minor offenses, found ways of acquitting them altogether. So that cannot be the answer.

Sometimes in our day, punishments are quite too severe. We had a case recently before our pardon board where it appeared three young men with previously good records had gone out one night and held up five filling stations; that all three pleaded guilty to robbery in the first degree. They were sentenced under the law to a minimum of five years and a maximum of forty for each offense, which meant that each of them had a minimum of thirty years to serve and a maximum of 200 years. The Pardon Board in that case exercised clemency to the extent of reducing the maximums so that under the rules of the Parole Board the men might become eligible to parole after twelve years. We thought that was a sufficient punishment for what really was a first offense, and that the Parole

Board could parole them or retain them for the ninety years as they chose.

We have another statute in Minnesota which subjects to life imprisonment one who robs a bank in the daytime where there are human beings in it—life imprisonment without an alternative, without any minimum. That means that one who robs a bank may, in order to avoid identification or apprehension, kill one or more of the persons in it and he subjects himself to not one whit greater punishment for one or several murders than he does for holding up the bank.

One of two things must be true: either murder should be punished more severely, or a bank robber should be punished less severely. I disagreed with our Legislature when it abolished capital punishment in our state. You have at least some measure of it left, because here if one serving a life sentence commits murder, he may be executed. In Minnesota, the lifer may commit murder and suffer nothing.

There are, it seems to me, cases where the death penalty is not too great and that it may be inflicted without brutalizing the officers or the public and doing perfect justice to the criminal.

I have in mind one case occurring within the last six or eight years just across the river, where a man brutally assaulted and then killed a girl and threw her body over the bridge into the river. He had to be protected against the mob. He pleaded guilty to murder in the first degree. He was sentenced to prison for life. But what excuse can there be for such a man remaining alive? Or what excuse can there be for the man, whoever he may be, that is guilty of murder of the little Aune girl in Minneapolis? There are cases where severity of sentence might well prove a deterrent to crime. I think we might well let capital punishment be imposed in every case of murder in the first degree by the jury, because no juror would lightly assume the responsibility of sentencing a fellow being to death.

We have these preventatives, these deterrents, but the one that is most effective, it seems to me, so far as punishment goes, is the swift and the sure apprehension and prosecution and conviction of the criminal. While the improvement of the morals of the people will, of course, most effectively remove the cause of crime, swift and sure punishment is certainly the greatest deterrent that we can devise at the present time.

The reduction of the loss of money in railroad robberies from thirteen million dollars in the year 1920 to one million dollars last year is undoubtedly due to the fact that in the last few years there have been 97 convictions out of every 100 prosecutions for robberies of that sort. There is sure and certain punishment, with a reduction in the amount of money stolen in that manner from thirteen million to one million dollars in a period of seven or eight years.

I attended a psychology class in an extension course of our University some years ago and I remember one of the tests that our instructor gave us, worked out on ourselves as it had been worked on a great many others, was a choice, if we were contemplating the

commission of a crime, whether we would do it in a jurisdiction where the penalty was severe and the chances of apprehension and conviction remote, or would we do it in a jurisdiction where the penalty was light and the chances of apprehension and conviction great, and with us without exception, as we were told was true with all others to whom the test had been given, the choice was the jurisdiction where the punishment was severe and the chances of conviction remote. Everybody is willing to take that chance, so the important thing becomes certainty of apprehension and conviction.

Another preventive measure that might well be adopted is a system of laws — not only in the single state but in all the states in conjunction, because only so can such a law be made effective,— restricting the sale of firearms and making it an offense for anyone to carry firearms without a permit. In the period between 1908 and 1916, of the crimes committed in Philadelphia 30 per cent involved the use of firearms. In the following eight-year period the percentage rose to 45 per cent. In the last two years the percentage was 55 per cent. Of all the homicides, the 10,000 homicides committed in this country each year, about 7000 are committed by the use of firearms. Of course we cannot control it entirely but at least we can diminish the number of firearms in the hands of irresponsible persons, and a man who has not got a gun cannot shoot. If you keep the gun away from him, he can't use it in the commission of these crimes. The numbers in which firearms are used indicates, it seems to me, that if the sale of firearms is prohibited almost entirely and the number of firearms in the hands of private citizens reduced, there must necessarily follow some corresponding reduction in crime.

But after we consider all of these measures, we come back to the proposition that the prevention of crime lies where the cause of crime is.

In education in Americanization of the kind that your Bar Association here is doing, the Americanization of the natives as well as of the foreign-born, and in the improvement of the home and the social environment,—that is where the real prevention of crime must lie in the last analysis.

I said I was speaking on Crime Prevention and Law Enforcement. Measured by subjects, I am halfway through, and likewise measured by time.

There can, of course, be no prosecution, there can be no enforcement of the law unless there be some individual to enforce it. Like the old recipe for making rabbit pie, first catch the rabbit. So here: before the criminal can be prosecuted, first we must catch the criminal. I think that today, under present conditions which I shall mention, the criminal apprehension arm of our government is the weakest member of the administration of public justice. It is not the fault necessarily of that branch of our government or of the individuals who happen to occupy offices in it, but today criminals are organized and crime is organized as never before and criminals are daring and learned. And they are more than that, they are wise enough to employ counsel, not only for their defense but in a case like this:

Two men were in jail in Chicago. One of them after having been there six hours was about to be freed. The other said to him, "How is it you get out so soon? I have been here four weeks and I am still here." The one about to be released said, "You ought to get a good lawyer. I have a lawyer to whom I report by telephone every three hours, and if I don't report at the time when I should he immediately gets out a writ of habeas corpus and looks me up and then serves the writ on the jailer and gets me out." That was his method.

Besides that, we know they have slush funds or defense funds for their defense in case they are caught. And there is the transient. He is hard to find. In reading the newspapers of St. Paul, I have been shocked at times to find that men arrested as criminals, committing serious crimes, live in the same neighborhood as I do. You don't know where they are. You don't know where to find them. Science has helped them with firearms and automobiles. The government itself has helped with building roads on which to run the automobiles in which they escape.

We have left our law enforcement practically in the horse and buggy era, not because sheriffs are not equipped with automobiles, but because there is no organization within the country that can possibly cope with crime that is not only state-wide but nation-wide in its operation.

I drove this morning from your state line over here to Valley City in an hour and a half. I hope I didn't violate any of your speed laws. As against a criminal traveling a distance of sixty miles in an hour and a half, 120 miles in three hours, where has a local organization operating by itself in endeavoring to detect, say nothing of apprehend, a criminal, any chance? What we need is organization on the part of the states.

We know that not all crimes are detected nor all criminals apprehended. Sometime ago former Governor Hadley of Missouri, now chancellor of Washington University, submitted some statistics relative to crime, and he said that in his opinion not more than ten or fifteen per cent of those committing major crimes were apprehended and prosecuted, which means that between 85 and 90 criminals committing major crimes are not apprehended and prosecuted. That shows the importance of strengthening the detecting and apprehending part of our criminal machinery.

We had a recent experience in our state. We have a Bureau of Criminal Apprehension. That Bureau was called down to one of the southern counties for the purpose of investigating a murder. The murder has not yet been solved, but that is neither here nor there, for the purpose of this illustration. While our men were down there making their investigation of that murder, they uncovered three carnal knowledge cases, one robbery, one conspiracy to murder, and one arson case, committed, some of them, as long as two years and more ago, and the result is that thirteen individuals are either in prison or on their way there. That came about by an intensive survey and investigation of that county by skilled and trained operators.

It is beyond the ability and beyond the facilities of the local peace

officers to cope with crime at the present time. Whether there should be a state police, such as Michigan and Pennsylvania and some other states have, I don't know. We are trying an experiment in Minnesota and we think it is going to work out. It is being tried along the line that the state should, under present conditions, provide modern and scientific methods and train the local peace officers in the use of those methods and direct their activities, and supplement those activities by trained men sent out by the State Bureau, and then to gather information relating to the commission of crimes in the state in order that there may be study and enlightenment on that phase of our activity. The Bureau of Criminal Apprehension of Minnesota, which happens to be under the charge of the Attorney General, consists of the Superintendent and Assistant Superintendent, who is also the fingerprint expert, a couple of clerks and eight detectives or operatives. It is the duty of that Bureau under the statute to collect fingerprints, photographs and Bertillion measurements of all those who are arrested in the state suspected of having committed a felony or who are convicted of a felony. It is made the duty of the chief of police of each city of the first class and of each sheriff to send in information to the Bureau, and the duty of the Bureau to tabulate it and to cooperate with other states in gathering together a mass of identification records. We have 4600 fingerprints collected so far.

It is also the duty of the Bureau to instruct the local peace officers in their work, the detection of crime and the apprehension of criminals. When a crime is committed it is the duty of the Bureau to broadcast word of it in order that the peace officers of the state may be on their guard to apprehend the criminal. It is the duty of the Bureau to gather information as to the commission of crimes. All crimes discovered by a peace officer, or reported to them, are required to be sent along to the Bureau, and in addition to that it is contemplated that the *modus operandi* of the crime shall also be reported.

I read some very interesting articles last year on the work of the police of England, Germany and France. One outstanding thing was what they called *modus operandi*. If a house was broken into at a certain hour in a certain manner under certain circumstances and sometime later another house was likewise broken into, they would know both crimes were committed by the same man. They were by this means often able to trace and apprehend the man who had committed the crime. Even that is included in the information being gathered by our Bureau; but the most important function of it, I think, is one which, so far as I know, no other state has, and that is that it has ready for immediate service, night or day, trained operatives, who will go out on the call of any sheriff in the state and assist him in investigating a crime or in catching the criminal. In the first year of its existence the Bureau investigated 98 cases of that sort, and the superintendent reports that as a result of those investigations, in connection of course with the sheriff or local officer, there were 44 convictions. But in the last analysis we must depend upon the local officers, it seems to me, because he is at home; he is responsible for conditions in his own community, and he, more than anyone else, can be made to feel that responsibility.

The city police are better manned and better equipped to police

their areas. I think that the sheriff should "walk his beat" as the policeman does. By that I mean he should make a survey of his county, watch things to see what is going on, not only with respect to major crimes, but with respect to misdemeanors as well, for if professional gambling be permitted or liquor law violations or illegal slot machines or anything else, it simply means they may lead to larger crimes and to more serious problems.

I cannot forego mentioning, especially in this gathering of lawyers, the local prosecuting attorney, the state's attorney under your system, the rural prosecuting attorney. I was one myself for four years. He is the most important cog in the law enforcement machinery. He is the mainspring of the whole machine, and oftentimes the director and the supervisor, not only of the detection and the apprehension of the criminal, but of the prosecution, of course.

As Raymond Moley, who did the principal work in the Missouri Crime Survey, which has been adopted as a model by the National Crime Commission, says, "The elective county prosecutor is pretty much of an all-round man. The assistance he gets from the sheriff and the coroner is unimportant and he must serve as lawyer, detective, scribe, and at times as pathologist and psychiatrist." He must, of course, examine the witnesses and prepare his evidence. In most of the European countries, all of that is done by the police and the case is handed to him prepared for trial as in England the solicitor prepares his case for the barrister.

Sometimes I have found the prosecuting attorney must act not only as such, and as a help to the sheriff, but as judge and jury too. Permit me to relate one personal experience. That was back some fourteen years ago. It was when saloons were still open in Minnesota. You know my county adjoins North Dakota, just opposite Grand Forks county. I learned that there were gambling houses operating on my side of the river. I employed a couple of detectives to have them gather the necessary information. One night with the sheriff's force, we descended upon the two gambling houses. The sheriff, one of his deputies and I took one of them, and three other men under the charge of a deputy took the other. I remember as we walked up the stairs — it was on the second floor and we got up there without the warning that was customarily given —there, spread out before us, were eight or ten of these big poker tables—I don't know whether any of you have seen them or not— at the far end of the room a stud poker table, each table seated full of men, and surrounded by another group of those who had gone broke, no doubt; the air was blue with smoke and profanity, to say nothing of a number of drunks lying along the walls on either side. After we had corraled them all, I went down and telephoned the municipal judge. He was out of town. I telephoned the special municipal judge and he said he would be down but he didn't come. I learned later that he had stopped at the police station and found out what it was all about. There we were with 75 men on our hands. Not knowing what to do with them, no room in the jail, I called them up before me, acting now as judge and jury, one by one, taking their statements and taking their bail money—five dollars from each one of the gamblers, and if they didn't have that much we took what they had—and $50 to $100 from the men who were dealing at the tables, and ordered them all to report at the municipal court at ten

o'clock the next morning. We went home that night with some seven or eight hundred dollars in bail money. I went back next morning and attended municipal court at ten o'clock and the only one of the 75 men that showed up, the only man of the lot who kept his word, was a farmer from North Dakota. As I say, the prosecutor sometimes acts as judge and jury and as assistant to the sheriff, but after all his job primarily is the prosecution.

We have had much criticism of the administration of criminal justice. The Chief Justice of our national Supreme Court has called it a disgrace. I think, however, that he had in mind more especially conditions in the larger centers of population, because according to my observation, not only in my state but in neighboring states, the prosecution of crime is reasonably satisfactory, though not perfect by any means. It depends upon two factors, the man and the law.

We have been improving our laws constantly in late years. The most recent thing that came to my notice was an amendment adopted by the North Dakota Legislature this year of the law relating to challenges in criminal cases, putting the state on a parity with the defense. Our Legislature has not yet given us that. We are hoping for it. We are expecting further equalization of chances between the State and the defendant in the future.

There are, of course, a number of archaic forms in our criminal procedure. The grand jury is one. You have not much of that here. I understand under your statute you may file informations in practically all cases. Under our statute, we may file them only where the punishment does not exceed ten years. The grand jury is an outworn institution really. It was organized by Henry II. for the purpose of investigating crime. I think it was somewhere in the twelfth century. Now the investigation of crime is, of course, made by the state's attorney and the sheriff, and the grand jury merely acts on what those officers present to it, and find, or fail to find, the indictment accordingly. In fact, at one term in my county, the grand jury found 122 indictments on facts I presented to them. The next year they found at one term 120 indictments, all of which might just as well have been presented to the court by means of an information signed by the county attorney. It meant merely a matter of form. However, we have, as I say, some relief in that regard in Minnesota now. An attempt was made to get the last Legislature to extend the class of offenses which could be presented by information to include those punishable by twenty years' imprisonment, but did not succeed. We may get it yet. In fact, it is much better it seems to me to leave the filing of a charge to an informed and responsible public officer than to leave it to a body of untrained men and women who sit for a day or two or three and have no knowledge of the facts in the case brought before them except from the brief statements of the witnesses presented to them.

Some years ago, up in the northern part of my state, I was presenting a matter to a grand jury, and at one stage in the proceeding, when a witness testified to something in favor of the man being investigated, two or three jurors broke into applause. That is the way they felt about investigating crime.

But I must not take any more time except to mention just one

or two things relating to procedure. I have many of them noted but few are chosen.

One is that we should have the right, by reciprocal legislation between states, to compel a witness from one state to go to another to testify in a criminal case there pending. By reason of the fact that the Constitution requires that an accused shall be confronted by the witness against him, the State cannot, as the defendant, take depositions, but the witness must be personally present. A few years ago I tried a case in western Minnesota where two young women who had in their possession very valuable evidence left the state, and when I pleaded with them to come back from South Dakota just across the line into Minnesota to give that testimony they refused, and we were helpless.

Just this year Louisiana adopted such a law, and other states in the East have such laws.

One other thing I cannot forego mentioning, and that is that there should be provided a separate pleading and a separate trial of the issue of insanity. In a recent case, that is three or four years ago, a murder case that I was engaged in, the defendant's counsel did not know until after the State's case had been closed whether they would offer evidence as to the insanity of the defendant, or whether they would not. The general plea of not guilty puts in issue all of the allegations of the indictment and puts in issue accordingly the sanity of the defendant. Not only has the state no notice of what the defense is going to be, but what is more important, the question of the sanity or insanity of the defendant is not a fit subject for trial by a jury of laymen. The sanity or insanity of the defendant should not be mingled with the facts relating to guilt or innocence because that has nothing to do with guilt or innocence. If a man be insane, he cannot be guilty, for he has committed no crime under the law. We have in mind a quite recent case, the Remus case in Cincinnati. Every year or two years, we have applications to the courts in Minnesota for the release of murderers who were acquitted two or three years before on the ground of insanity. Now they have recovered; now they are ready to take their places again in society.

I have covered, in a way, most of what I had in mind, but after all, after everything has been said about the police and the sheriffs and the prosecuting attorneys and the jurors and the judges, the fact nevertheless remains that these are but the machinery which the people have set up for themselves. They are the representatives and the servants of the public and they cannot well do more than the public demands of them, or the public asks that they do. Generally speaking, the law enforcement machinery gets little help from the outside. The citizen is prone to sit back and let the law enforcement officers get along as best they can. Of course crime in the abstract is abhorred by every good citizen. But when a man comes into the toils of law, when a concrete case is presented, then much of the abstract support which the prosecutor has vanishes and there comes in its place a mistaken sympathy, a foolish and silly sentimentality, and if the accused have friends, the prosecutor is urged to let him off, or they may appeal to the court for leniency, to the parole board or pardon board for clemency, and if those appeals are not

sufficient, sometimes political pressure is tried,—but I am glad to say that political pressure seldom succeeds, at least out here in our country. It is nevertheless true that the public hampers the prosecution with hindrances of one sort or another a dozen times where it helps him once.

The public press is also a very important factor in the administration of justice. It can be of tremendous assistance, as much by what it omits to do as by what it does. I have had experience with a reporter sent out by a newspaper to cover a trial, a specialist in "human interest" feature stories, a "sob sister" in the vernacular of the press, to whom the merits of the case and the administration of justice meant nothing at all, and the sensational and the sentimental and the lurid meant everything. I have had experience, too, with newspapers who have fairly and accurately and fully reported crimes and criminal trials. They serve as educators of the public and are an aid. I have no objection to publicity of criminal matters in newspapers, but I think the newspapers owe it as a duty to their reading public and to the government to not report a trial in which the evidence is being presented in an orderly fashion, and in which the evidence is sufficient to warrant a conviction, not to report it in such fashion that the state will appear an ogre in pursuit of the defendant, but let them show the thing in true proportions, whatever that picture may be. Then it will be a help rather than a hindrance.

The greatest aid, I think, to the solution of the crime problem is a conscientious cooperation on the part of those who form the respectable stratum of society, by a strict observance of the laws that have been enacted, not only for their benefit, but for the benefit of their fellow men as well, and a course of conduct on their part that no one can construe as countenancing any violation, directly or otherwise, of any of the laws. If the respectable portion of society does not so conduct itself, we cannot well complain if the other portion of society persists in lawlessness and crime.

An active and intelligent support of the administration of criminal justice, and a real respect for the law on the part of those who have the intelligence and the strength of character to mold public opinion is the best immediate remedy for the crime situation that I know of.

WHEN IS A GRAIN GAMBLER?

HON. W. H. STUTSMAN

It is with considerable trepidation that I respond to President Lewis' invitation to read a paper before this association and in doing so discuss didactically the legal phases of a subject so complicated as grain speculation; but I am somewhat sustained in my self conceit by the thought that it is a subject the North Dakota lawyer does not often have occasion to delve into deeply, and hence that I may be able to get away with it, and even, perchance, advance some new idea—new to him, at any rate—and thus the more firmly establish my already brilliant reputation for legal profundity.

In discussing the question whether a given business transaction comes within the purview of a statute condemning certain conduct as gambling, or within the denunciation of legal principles refusing the aid of the courts to the enforcement of such transactions, let us first direct our attention to the evil sought to be reached and cured. A bet, which is synonmyous with wager, is defined by Bouvier to be:

> An agreement that some valuable thing or sum of money in contributing which all the parties take part, shall become the property of some one or more of them on the happening of some event which is at present uncertain.

Wagers, in general, by the common law, were lawful contracts, and in the time of Blackstone all wagers were recoverable which were not made upon games, or which were not such as were likely to disturb the public peace, or to encourage immorality, or such as would probably affect the interests, characters and feelings of persons not parties to the wager, or such as were contrary to sound policy or the general interests of the community. However, Blackstone tells us:

> That taken in any light gaming is an offense of the most alarming nature, tending by necessary consequence to promote public idleness, theft and debauchery *among those of a lower class;* and among persons of *superior rank* it hath frequently been attended with the sudden ruin and desolation of antient and opulent families, and abandoned prostitution of every principle of honor and virtue, and often hath ended in self murder. That to restrain this pernicious vice among *the inferior sort of people,* the statute 33 Hen. VIII c. 9, was made which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions therein specified, etc. (Book IV c. 15.)

Blackstone goes on to denounce gaming in high life and the bewail a passion:

> Which we seem to have inherited from our ancestors the antient Germans; whom Tacitus describes to have been bewitched with a spirit of play to a most exorbitant degree. "They addict themselves" says he, "to dice when sober, and as a serious employment with such a mad desire of winning

> or losing, that when stripped of everything else they will stake at last their liberty, and their very selves." * * * One would almost be tempted to think Tacitus was describing a modern Englishman.

He recites certain current statutes denouncing games, etc., and adds;

> But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another.

Blackstone's advice seems to have been acted upon, since 8 and 9 Vict. c. 109, sec. 18, altered the common law so as to make all wagering contracts void, and this is now the law in this country. In fact it will be found that in every instance it is the wagering element, the staking of money upon a chance, pursuant to the desire of winning something for nothing—or for very little—upon the happening of an uncertain event which is denounced by legislatures and courts and which is sought for in every suspicious or questionable transaction, whether in wheat, cotton or stocks, and the question sought to be answered in each case is, were the parties staking their money upon the happening of an uncertain event, in other words "betting"?

While Tacitus has described not only the modern Englishman but also the modern American, so far as the mad desire for winning is concerned, yet the modern American, whether he is a gentleman or merely one of the inferior sort of people mentiond by Blackstone, is not content with games of mere chance; even if he is imbued with such a mad desire of "winning or losing" (though most prefer to win only) that when stripped of everything else he would stake at last his liberty, yet he insists upon mixing his skill, his knowledge, his judgment, his foresight or his "hunch," with his other element of "chance," so that he finds the roulette wheel, the horse race, the poker table, the dancing dice too tame, and insufficient and unsatisfactory for his purpose, and he casts about for some wagering device which will permit him to exercise all these qualities of his, and he finds the futures market—and especially the future grain market—ready to his hand.

In the grain trade we find two sorts of transactions; the one involves the purchase and sale of grain for immediate delivery, and the other its purchase and sale for future delivery. The former we speak of as cash sales and the latter as future trading, or merely "futures." The future market grows legitimately out of the necessities of the grain trade. We need not stop here to consider what these are further than to say that for the purpose of handling the tremendous crops of the west and northwest grain exchanges have been established at Chicago, Minneapolis and other cities, in which the members, acting as brokers for the producer and consumer alike, have evolved a highly complicated and intensely intricate, and yet a well oiled and smoothly running, system of trading, whereby grain is bought and sold for future delivery according to certain fixed rules and regulations. For convenience these contracts are made performable on any day of a certain future month and contemplate the

delivery and acceptance of certain quantities of certain kinds and qualities of grain at certain prices at the time fixed for performance. Owing to the flexibility of these contracts and the continued existence of a market for all classes of grain, neither the purchaser nor the seller is compelled to await the arrival of the delivery day to close out his transaction, for he may go out into the open market at any time and enter into a counter transaction which will wipe out the one he has.

The futures market is extensively used by grain dealers, millers and others for the purpose of hedging. This is an operation whereby a dealer, having purchased or contracted for grain, insures himself against loss by selling a future; a miller, to insure himself a supply of grain at today's prices for future use, buys futures; a warehouseman, having sold stored grain insures himself against loss by buying futures; and so forth. These are all legitimate transactions involving the purchase or sale of actual grain. Yet the dealer who has sold futures against the grain he is shipping in from the country does not deliver it under his futures contract but sells it in the cash market and pulls in his hedge; the miller does not accept delivery of his future to furnish grain for his mill but buys his grain in the cash market and sells his future; the warehouseman does not actually accept delivery of his future to furnish grain to redeem his storage tickets with, but settles for them in cash and sells his future. So in practice no grain is delivered even under future contracts which are concededly bona fide deals in actual grain, but the trades are offset against each other and the differences paid in cash. So the gambler who craves the excitement of staking his "wits" along with his money goes into the futures market and pretends to buy and sell grain for future delivery, regardless of whether he needs any grain, has any place to put it or anything to pay for it with. As regards the technique of the transaction there is no difference between the betting of the gambler that wheat will go up—or down, as the case may be—and the purchase or sale of actual grain by the grain dealer. So it is easily perceived how splendidly the machinery of future trading is fitted to the uses and purposes of the gambler, who can go through all the motions of buying grain without buying any, of selling grain without selling any, merely paying his losses or taking his gains when the deals are closed.

But the gambler must not be confused with a third type of grain operator known as the "speculator," of whom it must be conceded there are very many in the grain trade, whose dealings involve immense sums of money and vast quantities of mythical wheat, and without whom the futures market admittedly would be in dire straights. His presence on the market is justified and defended by the bona fide grain men themselves on the theory that his operations tend to "broaden" the market and to prevent rapid fluctuations of prices and thus assist in the distribution of the crops by absorbing the excess dumped on the market at harvest time.

In this connection John G. McHugh, Secretary of the Minneapolis Chamber of Commerce, in a brochure entitled "Modern Grain Exchanges," dated June 1, 1922, makes a clever distinction between speculation and gambling, which, while I do not find it referred to by the courts as a legal distinction, or as one of the criteria for determining whether one is betting on the price fluctuations of grain

or not, should certainly have a bearing upon the economic question whether the speculator is a curse or a benefit. He says:

> There are many who consider that speculation and gambling are the same thing. The fact is that there is a marked distinction between the two. Speculation consists of the assumption of a risk which already exists, and must be assumed by some one. The risks assumed by fire insurance companies, etc., are in fact, speculative risks. As a result of the study of a vast number of cases, the insurance companies are able to estimate the risk with reasonable certainty, and to base their premiums upon these estimates. Speculation in grain in the same manner is the assumption of the speculative risk connected with the ownership of any kind of property. This risk already exists, and must be assumed by some one, either by those engaged in the actual distribution of the crop, or by a *useful* class known as speculators. As the average merchant is unwilling to assume the risk of fire which might destroy his property interests and prefers to shift his risk upon the fire insurance company, so also those engaged in the grain and milling business or in the manufacture of linseed oil prefer to shift the speculative risk connected with the ownership of grain, etc., to those who make a specialty of assuming these risks, as do the fire insurance companies in assuming the fire risk. * * * The speculator who is competent, financially and educationally, to engage in this line of work is performing precisely the same service that the fire insurance company performs, which assumes fire hazard on property generally.
>
> The gambler creates the risk for the purpose of assuming it, and this risk, when created, performs no useful service, whatever, and its assumption is wholly unnecessary. The customers of the proprietors of a gambling den, in playing various games of chance, are assuming a risk which performs no useful service. The bets made upon horse races, etc., are strictly gambling transactions, so, also, are the transactions in bucket shops, which are mere bets between the proprietor and the customer. If the customer wins, the proprietor loses, and the bucket shops are gambling dens of the worst character.

However, Mr. McHugh goes on to distinguish between the speculator who is competent and the one who is incompetent, justifying the existence of the former only:

> In all this we have considered speculation from the standpoint of those who are qualified financially and educationally to engage in this class of business, the same as the fire insurance companies are qualified financially and through wide experience to assume the fire risk. Unfortunately, a number of individuals engage from time to time in speculation, both in grain and real estate, who are not justified from any standpoint in assuming this risk. One of the greatest problems which presents itself to the recognized grain exchanges is to prevent these individuals from making use of the futures market for speculative purposes. While it is true that the speculative trades of these incompetent individuals, do in a

small measure "broaden" the market, and assist in the distribution of the crop, still the injury inflicted upon these individuals by their losses is out of all proportion to the service which their speculative trades perform in the crop distribution.

So it will be noted that even in modern times as well as "antient" some games are meant only for gentlemen or those of the upper classes, or in other words for the educationally and financially competent. But we must not make light of this distinction between the competent and the incompetent speculator, for we have the authority of the highest court in the land for it.

United States v. New York Coffee & Sugar Exchange, 44 Sup. Ct. 225, 263 U. S. 611, 68 L. Ed. 475, was an attempt on the part of the United States to enjoin the operation of the New York Sugar Exchange as a conspiracy in restraint of trade, growing out of a sensational fluctuation in the price of sugar in the spring of 1923. The action failed for want of evidence to connect the management of the Exchange with the disturbance in the market, but the court, in passing, and speaking through Chief Justice Taft, made this classification of future traders:

> Those who have studied the economic effect of such exchanges for contracts for future deliveries generally agree that they stabilize prices in the long run instead of promoting their fluctuation. Those who deal in futures are divided into three classes; First, those who use them to hedge, i. e., to insure themselves against loss by unfavorable changes in price at the time of actual delivery of what they have to sell or buy in their business; second, *legitimate capitalists,* who, exercising their *judgment* as to the conditions, purchase or sell for future delivery with a view of profit based on the law of supply and demand; and third, gamblers or irresponsible speculators, who buy or sell as upon the turn of a card.

In Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, which was a bill by the Chicago Board of Trade to enjoin certain alleged bucket shops from disseminating the board of trade quotations, the defense was urged that plaintiff, itself, was the greatest of all bucket shops, and the court, speaking through Mr. Justice Holmes, said:

> Of course, in a modern market, contracts are not confined to sales for immediate delivery. *People will endeavor to forecast the future,* and to make agreements according to their prophecy. Speculation of this kind *by competent men is the self adjustment of society to the probable.* Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain.

Are we not then forced to make this distinction between speculation which is permissible and that which is not: that the educationally and financially qualified—that is to say, the person who makes a sufficiently profound study of present and future market conditions to be able to form and exercise a sound judgment and who is financially able to pay for the grain he buys—may assume this risk already created and which somebody must bear, and so buy and sell futures with a view to profit based upon the law of supply and demand, without becoming a gambler? while the irresponsible speculator who buys and sells as upon the turn of a card, without any comprehension of the workings of the law of supply and demand, without any knowledge or study of market conditions, but in mere imitation of the strong, is a gambler?

Of course, we must not lose sight of the fact that the decisive test in determining whether in a given case one is gambling or trading legitimately is his intention. All future contracts on their face import actual delivery, but notwithstanding this the parties may, and often do, agree that no delivery shall take place but that they will settle their deal by a payment of differences. In all such cases the parties are merely betting upon the price fluctuations of the commodity dealt in. But it must not be assumed that because in actual practice contracts are settled that way the parties had agreed in all cases that there should be no delivery, and hence that they were gambling. Any intention short of one not to deliver is inconsistent with any of our legal definitions of wagering, and unless one harbors this definite intention not to deliver he is not gambling no matter what he may think he is doing. As an illustration, in Cleage v. Laidley, 149 F. 346, the defendant sought to escape liability by insisting that he did not intend to receive the grain he had bought but that he had intended to take and pay for *that portion which was forced upon him,* and the Circuit Court of Appeals held that he was not gambling.

In determining whether a futures contract is valid the court does not merely seek to ascertain whether the intention was to deliver or not, but it seeks to find out whether the possibility of delivery was within the contemplation of the parties and whether they were prepared for such a contingency. A trader, knowing that in practice he will not be called upon to deliver or to accept delivery because of the mechanics of the exchange which provide a method of offsetting contracts against each other, may not greatly concern himself with the question whether he is going to deliver or not, but it is vitally important that he have such a contingency in mind and be prepared to deliver or accept delivery in case it be required of him. And this is the reason why a rich man might legitimately speculate and a poor man not.

If Mr. Patten, with fifty years' experience in studying world conditions in the grain business, after exhausting all means at hand for estimating the present relationship of the supply to the demand and the probable future fluctuations, concludes that wheat will be higher next December and for the purpose of capitalizing this opinion decides to buy a million bushels of wheat for next December delivery, he places his order with his broker to buy that amount for him. He is reasonably sure that he will not be called upon to take and pay for one million bushels of wheat but knows that in all

likelihood he can close out his contract according to the rules of the Board of Trade whenever he feels that the price has gone as high as it will. However, he knows all the time that such a thing is possible as his being compelled to accept delivery whether he wishes to or not and his contract was made with that understanding. In other words when Mr. Patten made his contract he contemplated two alternatives: one that delivery might be forced upon him and the other that the contract might be settled by offset and the payment of differences. So that the real test is that the parties must contemplate delivery, *or the possibility of delivery.* If a trader is without means this is very persuasive evidence that he did not contemplate even the possibility of delivery.

As illustrative of this proposition let us take two cases from Iowa, decided not over a year apart by the same judges; First Nat. Bank v. Oskaloosa Packing Co. 23 N. W. 255, involved a deal in short ribs. The court, holding that the evidence sustained a verdict to the effect that the defendant was gambling, said:

> It is very clearly shown * * * that he at no time intended that the 700,000 pounds of short ribs should be delivered to him and be paid for by him. His evidence is strongly corroborative of the fact that it was no part of the business of the defendant to deal in options on the Chicago board of trade. The transaction, if a valid one, involved the payment of some $60,000 in performance of the contracts, and the packing company had no assets except such as was invested in its real estate, and the tools, implements and fixtures necessary to carry on its business.

Tomlin v. Callen, 28 N. W. 573, involved grain futures; the court, holding that the illegality of the transaction was not shown, said:

> It is a matter of general information that many ostensible transactions in grain are of a purely gambling and criminal character. The widespread ruin produced show them to be among the greatest of evils. Where their true character is discovered, courts should promptly condemn them, and hold them void. But they need to proceed with caution. In the movement of the grain of the country, contracts for future delivery are, to some extent, a necessity, and they are as legitimate as any other; and that, too, though the parties *may contemplate the possibility of a settlement by payment of differences.*

Nowhere is this proposition more clearly set forth than in a North Dakota case, John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164, where Judge Fisk, then a district judge sitting by request on the supreme court, in a situation where the defendant was clearly hedging but as he did not understand the technique of hedging he suffered heavy losses and when sued for the advances made claimed he was gambling, wrote the decision of the court, saying *inter alia*:

> The fact that the broker adjusts the two transactions through the clearing house by offsetting one against the other,

> instead of going through the formality of making and exacting a delivery of the actual grain, does not show the transaction to be a mere gambling one. The test is, did the parties have the legal right to demand and receive or deliver the actual wheat, or did they contemplate and agree that no actual wheat should be delivered? What the parties may have done, or what they may have contemplated doing in the matter of delivery of actual grain, is not controlling, but, rather, what they believed and contemplated they had a legal right to do under the contract in this regard, is the test. Any other rule would greatly hamper the millions of legitimate transactions taking place every week in the business world, and would do away with the great convenience of the clearing house. The essence of a gambling transaction is that the particular transaction shall contemplate no delivery, without reference to making of any other deal. * * * If an order to sell for future delivery is a gambling deal merely because the seller contemplates that he will later on buy the grain to fill the order, then "hedging" is impossible, and practically every trade on the boards of trade in the country is illegal. * * * The fact that one of the parties may intend that, in lieu of a delivery or acceptance of the grain, he may later on make a counter trade and offset the two legal contracts against each other will not operate to invalidate the transaction.

In the Christie case (*supra*) the United States Supreme Court says:

> The fact that contracts are satisfied in this way by set off and the payment of differences detracts in no degree from the good faith of the parties and if the parties know, when they make such contracts that *they are likely to have a chance to satisfy them in that way, and intend to make use of it,* that fact is perfectly consistent with a serious business purpose, and *an intent that the contract shall mean what it says.* * * * It is no less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired. Purchases made *with the understanding* that the contract will be settled by paying the differences between the contract and the market price at a certain time stand on different ground from the purchases made *merely with the expectation* that they will be satisfied by set off.

Speaking further upon the proportion of the legitimate to the illegal deals, the same court says:

> No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession, the less being needed the more rapid the circulation is.

Having shown the legal distinction between gambling and legitimate speculation, let us now approach the problem of telling them apart as a fact question. It must be held in mind that practically all of the cases in which this question arises are actions between brokers and their principals involving advancements and commissions, and the principal is permitted to testify that his purpose was to gamble and to make no deliveries. The principle of law laid down in these cases therefore has to do with the intention to deliver, and vary infrequently with the distinction between an intention not to deliver and the contemplation of a possibility that a delivery might not be necessary, but seldom, if ever, do these cases exclude the idea that such a deviation from an intention not to deliver would make the transaction legitimate. However, a wide lack of knowledge of the mechanics of future trading, on the part of many judges is disclosed in their attempts to establish criteria by which to determine the gambling character of the transaction, and many state courts, not unaffected by the popular distrust of future markets, have unduly stressed circumstances which actually have no bearing on the question; their suspicions being excited bv the very rules laid down by the exchanges in their efforts to restrict and prevent illegal trading. We need not leave our own state to find a striking example. In Dows v. Glaspell, 4 N. D. 251, 60 N. W. 60, Judge Corliss excoriated the grain gambler and the brokers in true swashbuckler style, saying:

> Illegality is seldom guilty of the consummate folly of flaunting its defiance of law in the face of public sentiment—of furnishing itself the evidence of its violation of law. To escape the penalties of breaking the law, it will always put on the "suits and trappings" of honest transactions. Mere wagering contracts invariably wear the garb of *bona fide* sales. This is common knowledge. Myriads of gambling operations are daily arranged by two interested brokers, who fatten on the folly of their dupes, in the decent and decorous habiliments of lawful business transactions. The naivete of a tribunal which in such cases should unquestionably take the semblance for the substance would, indeed, be pitiable, if it did not excite derision and contempt.

In this case the correspondence showed conclusively the defendant, "an attorney in full practice," was gambling to his broker's knowledge, and the foregoing tirade was perhaps justified, but many circumstances consistent with either an honest or an illegal purpose, and therefore of no importance either way as proof, were dragged forth as evidence to show defendant was gambling, one of which to our mind was uncalled for. One of the rules of the Duluth Board of Trade was that the party selling should deliver the property sold at the time specified, "unless the purchaser shall consent to accept or pay the difference in cash, when so requested by the seller. In all cases, however, the buyer shall have the right to demand the property, if he elects,"—a rule entirely consistent with legitimate trading, as, if the parties intended to gamble and not to require delivery, neither of them could invoke this rule, but Judge Corliss says:

> This rule confirms our views that these transactions were known by the plaintiff to be mere wagering deals. * * *

With the obvious purpose of covering up the gambling character of these operations, they establish a rule that there shall be a delivery unless both parties agree to dispense with it; knowing that both parties will always so agree.

In his criticism Judge Corliss fails to distinguish between an agreement made at the time the future contract is entered into and one made when it is about to be performed.

In Benson-Stabeck Co. v. Reservation Farmer's Grain Co. 205 P. 651, the supreme court of Montana held that the expression of a fear on the part of the commission firm that delivery would be forced upon them, was a circumstance which the jury could consider. This was error. The very fact that delivery might be forced on the buyer was proof positive that he was not gambling, for if he was he could not be compelled to take delivery. In this case the danger was obviated by switching the trade to a later month, which is always done when the delivery date arrives too soon. The "switch" may involve either a loss or a gain, not because the trader is gambling, but because of the spread between the quotations of the two months, which has nothing to do with any intention to gamble on his part, but which renders it impossible to make a new hedge excepting upon the new price. Hence, though the trader might make a profit or suffer a loss as a result of the "switch," this would not indicate that he was gambling.

Many other cases could be cited to show a judicial tendency to regard the most ordinary and consistent conduct of the legitimate trader as evidence of a gambling intent, and to forget that grain exchanges are perfectly legal institutions operating according to rules and regulations approved by the lawmaking bodies, and conducting their business in the legitimate performance of a highly important public function, but the foregoing will suffice.

The burden of proof is always on the parties asserting illegality and it is for them to show this notwithstanding the episode is clothed in the "decent and decorous habiliments of lawful business transactions."

The question, of course, is to be answered by a study of all the surrounding circumstances, and to justify findings, in the absence of admissions of the parties, that a transaction is illegal, the facts must be out of the ordinary, that is, inconsistent with a lawful purpose; a very slight deviation from the straight and narrow path may, however, prove sufficient to condemn the transaction. For instance, in James v. Clement, 223 F. 754, 95 C. C. A. 186, the broker wrote his principal to buy cotton on breaks in the market and to sell on bulges in the market, and stated that the conditions made the market a good "scalp." In Dows v. Glaspell (*supra*) the broker wrote: "We are very glad you had the pluck to hold on and believe that wheat is a purchase on all good breaks. Still, if you can get a good profit, we would advise you to close it out, taking chances of getting it back at cheaper figures." In Rogers v. Harricourt, (Neb.) 82 N. W. 21, the broker wrote: "The bears appear to have control of the market at the present time and will undoubtedly force prices lower next week, as everything appears to favor them at present * * * while we think the market may react, pos-

sibly enough to let you out, we have not got as much confidence as you appear to have." These, of course, are merely "come on" letters designed to encourage the trader in his intention to gamble, and can be counted on to evidence knowledge of that intention.

Maintenance by the broker of an "exchange" to enable persons to watch the stock market, telephone communication between living rooms in the hotel, where there was a "ticker," and a broker's office, and receipts showing the intention of a party to a stock contract, may be considered, say the court in Ballon v. Willey, 62 N. E. 1064, 180 Mass. 562, if unexplained, as being trade tools or appliances, justifying the same inferences of violation of law by the making of wagering contracts as are drawn in another class of cases from the use of beer pumps, or the possession of liquor glasses containing heeltaps.

Moreover, even apparently legitimate conduct sometimes becomes out of the ordinary, and courts permit appropriate deductions to be made from them. While the closing out of the transaction before the time for delivery is a common, if not universal practice (excepting in case of a "switch" to a subsequent month) consistent with legality (though at least one state—Massachusetts—makes this action *prima facie* proof of intent not to deliver) yet the supreme court of South Dakota, in Farmers' Elevator Co. v. Quinn-Shepherdson, 199 N. W. 201, remarked:

> It would seem that when the parties entered into a series of transactions in futures, intending at the time the transactions were made to deliver actual grain and then *changed their minds some seventy times* in closing out these transactions on the board of trade rather than delivering any actual grain, that in itself ought to be strong evidence of what the parties intended to do in the first place.

There was other overwhelming evidence in this case that the trader was gambling—and that the broker knew it; in fact, in practically all of the cases where these apparently fictitious compliances with rules consistent either with gambling or legitimate trading, are animadverted to by the court to emphasize the nature of the gambling transaction, there was sufficient other proof to make it gambling anyway; such as lack of financial strength which we shall discuss later.

In Biedler, etc. v. Coe Comm. Co. 102 N. W. 880, the supreme court of North Dakota says:

> Where there were no deliveries in numerous other trades and deliveries were the exception, and settlements upon the basis of market quotations the rule, it is not too much to require a party claiming rights under it to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of the grain.

In this case 50 trades were made without a single delivery, and no deliveries were made by the broker in any other trades at that point.

But the most striking and decisive test is whether the parties are financially able to make or accept delivery, if demanded or tendered.

Parties to these transactions may comply with all the rules and regulations of the exchange, may react properly to all the other tests, may even be engaged in the grain business, but if the large quantities of the grain traded in are out of all proportion to the ability of the trader to pay for, this is regarded as a strong circumstance throwing the transaction out of the ordinary—and tends to sustain the contention that only persons of means, those financially competent, should be permitted to deal in futures upon margins.

In the Quinn-Shepherdson case (*supra*) the manager of a small country elevator, which had handled less than 100,000 bushels of wheat bought 265,000 bushels for future delivery in some 70 trades, closing them all out before maturity.

In Atwater v. Manville (Wis.) 81 N. W. 985, the defendant had no means whatever, and yet in a period of four months, he made 300 trades, involving eight million bushels of wheat, 80,000 bushels of corn, one million pounds of short ribs, and $20,000 worth of lard.

In Rogers v. Merriott (*supra*) the court, after stating the defendant was scarce able financially to comply with plaintiff's demand for margins on a slight decline in the market, said: "To entertain the belief that he was able to pay at the current price for 20,000 bushels of wheat is simply preposterous. * * * Plaintiffs appear to be in no wise concerned as to the intention or ability of defendant to receive or pay for the commodity at the time it is deliverable."

In Watt v. Wickershal, 43 N. W. 259, involving a transaction in a small Nebraska town, the supreme court, comparing this case with Sprague v. Warren, 41 N. W. 1113, involving a clerk in a store, said: "In both cases the defendants were men whose residence, business, avocation and employment were such as to give notice to the person dealing or coming in contact in business relations with them that any purchases or sales which they might make, or desire to make, of grain or pork on the board of trade of Chicago, were mere wagers on the fluctuations in the value of such products."

The supreme court of Pennsylvania, in Kirkpatrick v. Bonsall, 72 Pa. St. 155, says:

> The "difference" requires the ownership of only a few hundred dollars, while the capital to complete the actual purchase or sale may be hundreds of thousands of dollars. Hence ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfill, and thus the apparent business in the particular trade is inflated and unreal, and, like a bubble, needs only to be pricked to disappear, often carrying down the *bona fide* dealer in the collapse. Such transactions are destructive to good morals and fair dealing and the best interests of the community.

In Flagg v. Baldwin, 38 N. J. Eq. 219, the decision turned upon the enormous disproportion between the extent of the transactions and the cash margin deposited, and the fact that the purchases were known to the brokers to be far beyond their customer's pecuniary ability.

There are certain types of transactions which stamp themselves

as gambling without further proof, and with these, of course, we do not concern ourselves. Puts and calls are specifically denounced by the statutes of Illinois and are held to be gambling *ipso facto* by all the courts and have been done away with by nearly all grain exchanges. Corners are unlawful as are all transactions tending to create or sustain them. Scalping is recognized as gambling, if for no other reason than because the fact that there is not time for delivery proves conclusively that delivery of no sort was in the contemplation of the parties. Stop loss orders are regarded as proof of intention to gamble though this is not necessarily always the case. The bucket shop, of course, is a gambling device, pure and simple—the operator of the bucket shop merely bets with you as to what the future price will be. He steals the quotations from the regular exchanges and these decide the bets.

It has been my purpose here merely to examine into the legal aspects of grain speculation and not to indulge in a discussion of the moral, ethical or economic phases of the subject. At that I have no brief for the speculator, rich or poor, educated or ignorant, but a somewhat profound study of the decisions impels me to the conclusion that courts, legislatures and even the lay public are disposed unjustly to impute to the practice of future trading the blame and responsibility for the evils and abuses that grow out of it, rather than to the persons who make use of the machinery of the futures market for their illegal ends; and that the remedy for these abuses lies not in prohibiting future trading, nor, in fact, in making intention to deliver the *sine quo non* of a valid futures contract, but to treat speculation by the competent as a legitimate occupation, and to hedge it about with restrictions and penalties that will effect the exclusion of the financially unfit: the tin-horn gambler, the corner drug clerk, the barber shop hanger-on and even the impatient disciple of Blackstone, eager for the immediate realization of his fond financial hopes and unable to endure stoically the tedium of waiting for the tardy incoming of his golden argosy.

In a recent issue of the Literary Digest I find this witty differentiation between gambling and speculation:

> If you bet on three kings, that's gambling;
> If you bet you can make three spades, that's entertainment;
> If you bet wheat will go up, that's big business.

There is sound philosophy in this statement, though it may not always turn out to be hilarious entertainment to make three spades; but if we can succeed in permitting only those capable of engaging in big business to bet wheat will go up, perhaps we will have solved the farm relief problem now bothering our statesmen.

SOME ASPECTS OF THE MINIMUM WAGE LAW

HON. PHILIP R. BANGS

In the legal protection of women, we are at the crossroads, and, by what has been done and what has been accomplished, we must now decide whether to continue to legislate for women or to treat them the same as men.

In discussing this question, I am going to confine my remarks to the Minimum Wage Law, insofar as it applies to adult women workers, of which type of legislation, commencing with the Massachusetts Act in 1912, only fifteen States and the District of Columbia and Porto Rico have passed laws.

The first question that comes to one's mind, is why did it become so necessary, commencing in 1912, to provide a minimum wage for women workers, when we realize that in 1880, one in seven women were workers, and in 1920, there had only been about a seven per cent increase, making about one in five women workers in 1920; also when we realize that in 1920 only about 21 per cent of the women were workers while 78 per cent of the men were workers, and, when I use the term "workers" I mean those gainfully occupied.

What was it that directed the attention of the people generally to the women, rather than the men? What was it that caused legislation to be enacted, for the benefit of women, rather than for men?

There had been no such influx of women into industry, to cause any particular agitation on that score, in fact statistics show that even during the War, when the men were drawn into service, there was no particular increase in the number of women workers, but rather during that period of time, there was a shifting of groups and women who formerly had been following domestic, personal service, and, agricultural pursuits, left them and went into factories, offices, the professions, trades, etc.

What actually happened, was that along about 1900, considerable was said by writers and others regarding the cost of living for a family of five and what was absolutely necessary in order to actually provide for such a family and what was necessary in order that the family might have a few advantages and comforts, and data was gathered together to show that the wages paid in many cases did not afford an adequate living, according to the standards fixed. This interest in wages and cost of living was aroused by reason of the increase in the retail prices, which between 1900 and 1910 rose about 25 per cent and as the wages did not increase immediately, this caused some suffering among the working classes.

This condition affected the men as well as the women but by reason of agitation against the exploiting of women in sweat-shops and factories and the stirring up of the public sentiment over the condition of women in industry, the attention of the public was focused on the women and that is one reason why the legislation that sprung up about that time, was for the benefit of the women, rather than the men.

There was still another reason why Minimum Wage Laws were urged and that was on account of the inequality of wages between women and men. No one apparently stopped to think why there was this difference in wages, and many, without thinking, urged that a women should receive the same wage as a man. There is no question but that the average wage per week, for all women is less than the average wage for all men. In fact, there is a difference of about 55 per cent, but it must be borne in mind that much of the skilled work for which high wages are paid, can only be done by men; that there are many more skilled laborers among the men than there are among the women; that women have home duties that interfere with their work; that on account of marriage, etc., their duration of employment is uncertain; that there is more illness among the women workers than among the men workers; that a great deal of the work for women is seasonal and necessarily fluctuates and lastly, that women will actually work for less than men.

This wage inequality cannot be eliminated by the signing of a legislative enactment. The remedy is not so simple. When women do the same work and the same character of work that the men do, with the same certainty of tenure and with the same degree of skill, then they will be entitled to the same wage, but until then, no amount of legislating on minimum wages is going to obtain for the women a man's wage.

There was one other thing that contributed to the enactment of minimum wage laws and that was the knowledge on the part of those who were urging the passage of such laws, that a minimum wage law was in violation of the right of freedom of contract guaranteed under the Constitution of the United States and that there was only one feasible way of getting around the Constitution and that was by making the law come within the police-power of the state and with that in mind, the laws were enacted for the women, on the theory that by reason of their condition in life and physical makeup, they required legal protection to safeguard their lives, health and morals. Just why there is any distinction made between men and women as to what they require for their health, is hard to see. They both certainly require the same necessities of life. Nor is there any grounds for the distinction between men and women, as to safeguarding their morals, for they are exposed to similar, if not identical temptations.

There were a few writers who at the beginning, realized that there was no real difference between men and women, at least none that would warrant the passage of a Minimum Wage Law in favor of one and not the other and these writers expressed the opinion that possibly the obstacle of the United States Constitution could be overcome, by declaring that all employment of both men and women, was affected with a public interest and therefore warranted the passage of special legislation, but no one seems to have quite had the nerve to very seriously advocate such a thing, but many were found willing to promote legislation in favor of the women and much public sentiment was aroused in their behalf.

Practically all that has been written on this question, has been written by persons who were prejudiced in favor of Minimum

Wage Laws, or by social workers, who distorted facts and saw only that which they wanted to see and forgot the rest.

Statistics and logical thinking quickly disproves the arguments made in favor of minimum wages and show to thinking people that the principle is fallacious and that the laws will not accomplish the object sought.

In 1880 there were 14.7 per cent of the women of the country employed in gainful occupations, as compared with 78.7 per cent of the men. There was a continual increase in both the women and men until 1910, when the peak was reached, with 23.4 per cent of the women employed and 81.3 per cent of the men and in 1920, the women had fallen to 21.1 per cent and the men to 78.2 per cent. In other words, there was a greater proportion of women employed just prior to the enactment of minimum wage laws than several years after.

The bulk of the women employed, were between the ages of sixteen and forty-four years old and of all the women employed in 1920, one in four of them were married women and of all the married women in the country, 9 per cent or one in eleven, were employed in some gainful occupation and according to the best information obtainable, the employment of married women has materially increased since 1920.

No one can probably definitely fix the causes of all these things, but one reason for the employment of married women and also the employment of younger women, is on account of the inadequacy of the wages of the family man to cover the cost of living, which has increased something like 70 per cent between 1915 and 1920, while wages throughout the country had only increased about 40 per cent. Then too, it's the trend of the times, for women to work now and to try to do those things that were formerly left for men to do.

This difference between prices and wages was not of any permanent nature however but was caused merely by the inability of the wage scale to adjust itself immediately to the rise in prices, however, commencing in 1918, wages started to go up and after 1920, the wage level reached the price level and there is now no such difference as there was in 1920. This adjustment, however, cannot in any way be credited to the Minimum Wage Laws, because it was general throughout the country and there were only fifteen States that had any minimum wage legislation.

Prior to the decision of the Supreme Court of the United States in the case of Adkins vs. Children's Hospital, 261 U. S. 525; 67 Lawyers Ed. 785, decided by the Supreme Court on April 9, 1923, fifteen States and the District of Columbia and Porto Rico had enacted Minimum Wage Laws and some of the State Courts had upheld the validity of such laws, on the theory that it was a proper exercise of the police-power of the state, in protecting and safeguarding the lives, health and morals of the women.

I am not going to attempt to define the term "police-power," for text-writers and Courts have been engaged in that pastime for many, many years and no definition has yet been given, that satisfied everyone, but generally speaking, police-power is another name for that portion of the sovereignty of the state not surrendered to

the Federal Government and it is the cloak behind which the Courts hide when on account of public opinion, they want to uphold a law which they know violates the Federal Constitution.

During this period of time, when there was such a wide range of difference between prices and wages, minimum wage legislation was enacted and public sentiment and opinion demanded that such legislation should be upheld and so the State Courts, swayed and influenced by this public sentiment, brushed aside all such obstacles as the Constitution of the United States and declared that Minimum Wage Laws which fixed a minimum wage for women employees. were valid under the police-power of the State.

Those people who were advocating these laws and the members of the Courts that upheld them, knew or must have known, that if such laws had been enacted for men, they would have been very promptly declared unconstitutional, but they all followed the dictates of public opinion and announced as facts, their conclusions, that by reason of the labor conditions and physical characteristics of women, it was necessary for them to have the protection of minimum wage laws, in order to safeguard their lives, health and morals. I am not now speaking of those laws which fix sanitary conditions or hours of labor but I am referring only to those laws, or the parts of these laws, that have to do with the fixing of a minimum wage for women.

It remained for the Supreme Court of the United States, in the well considered case of Adkins vs. Children's Hospital, cited above, to call a halt on this type of legislation and Justice Sutherland, in a strong opinion, speaking on behalf of a majority of the Court, held that a Minimum Wage Law of the District of Columbia, was in contravention of the Constitution of the United States and not a valid exercise of the police-power and therefore invalid, and in connection with the argument that the law was a valid exercise of the police-power, to protect the health and morals of women, Justice Sutherland made some very pertinent remarks, such as: "What is sufficient to supply the necessary costs of living for a woman worker and maintain her in good health and protect her morals, is obviously not a precise or unvarying sum, not even approximately so. The amount would depend upon a variety of circumstances: The individual temperament, habits of thrift, care, ability to buy necessaries intelligently, and whether the woman lives alone or with her family. To those who practice economy, a given sum will afford comforts while to those of contrary habits, the same sum will be wholly inadequate. The cooperative economies of the family group are not taken into account though they constitute an important consideration in estimating the cost of living, for it is obvious that the individual expense will be less in the case of a member of a family than in the case of one living alone. The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is certainly no such prevalent connection between the two, as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding the morals, the attempted classification, in our opinion, is without reasonable basis. No distinction can be made between women who work for others

and those who do not; nor is there grounds for distinction between women and men; for certainly if women require a minimum wage to preserve their morals, men require it to preserve their honesty.

The feature of this statute which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no casual connection with his business, or the contract, or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. The ethical right of every worker, man or woman, to a living wage, may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound, at all events, to furnish it. The moral requirement, implicit in every contract of employment, namely, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment and are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer, to buy food, he is morally entitled to obtain the worth of his money, but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission, power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power, that it cannot be allowed to stand under the Constitution of the United States.

Finally, it may be said that if, in the interest of the public welfare, the police-power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to

require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the 5th Amendment, this form of legisatioln shall be legally justified, the field for the operation of the police-power will have been widened to a great and dangerous degree. If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself: it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other."

In all of the legislation pertaining to minimum wages, one of the most common arguments advanced is the cost of living argument. This principle was established during the War, when prices were rising and is the reflex of arguments advanced on behalf of labor. If this is a true basis for the enactment of Minimum Wage Laws, then the converse should be true, viz., that when the cost of living declines, wages should be reduced, but the wage earners who were in favor of Minimum Wage Laws when the cost of living was rising, can see no justice in the proposition that there should be a reduction when the cost of living declines.

The Supreme Court of the United States since the Adkins case, has had occasion in later decisions, to refer to it and has, every time, affirmed its former decision.

The Supreme Court of the United States, in its later decisions, has affirmed the principle announced in the Adkins case, namely: "While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule and restraint the exception. The legislative authority to abridge it can be justified only by exceptional circumstances."

And as late as January 17, 1927, the Supreme Court of the United States affirmed the decision in the Adkins case, by Memorandum Opinion in the Arkansas case, reported in 71 Law. Ed. p. 25 and also by a Memorandum Opinion in an Arizona case, reported in 70 Law. Ed. 396.

Upon the authority of the Adkins case, the Federal District Court of Wisconsin, on August 18, 1924, held the Wisconsin Minimum Wage Law unconstitutional, insofar as it applied to adult women. 300 Fed. 991.

Our own Supreme Court has not as yet had an opportunity to express itself, as to the validity of the North Dakota Minimum Wage Law, as it applies to adult women workers.

There was one case up before the Supreme Court in 1921, reported in 182 N. W. 269, but that case involved only the validity of certain orders made by the Minimum Wage Bureau, which

orders were subsequently held by the District Court in proceedings had therein, to be invalid, on account of the method of promulgation, but the validity of the Minimum Wage Law itself was not involved.

In 1928, the Supreme Court had before it a case involving the hours of employment for females, 221 N. W. 883, but no mention of the Minimum Wage Law was made, except where the Court referred to the Adkins case and called attention to the fact that that case involved the right of the Legislature to fix a minimum wage and that the United States Supreme Court, in its decision, was very careful to distinguish between that kind of legislation and legislation fixing the hours for labor, and also called attention to the fact that the Adkins case recognized the right to fix the hours of labor for females, under the police-power.

So, at the present time, we have no decision, by our Supreme Court, or any Court, upon the validity of the North Dakota Minimum Wage Law, insofar as it affects adult women workers, but we do have a Minimum Wage Law, and rules have been promulgated by the Bureau, under that law and it is in operation in this State, despite the fact that its validity is very questionable.

The Massachusetts Minimum Wage Law, passed in 1912, is the only recommendatory law in the United States at the present time. The other fifteen or sixteen State Minimum Wage Laws, provide for compulsory enforcement of the minimum wage and since the Adkins case, their constitutionality is indeed questionable. In fact, the Massachusetts Minimum Wage Law, on account of it being entirely advisory in type, and not compulsory, is probably the only valid and constitutional Minimum Wage Law in the United States and any statute which attempts to establish minimum wages in the immediate future, and as long as there is no modification of the rule laid down in the Adkins case,, should be of a recommendatory, or advisory type, rather than compulsory.

In view of the decision in the Adkins case, what does the future hold in store for Minimum Wage Laws?

There may be some question as to the future for laws of the compulsory type, for while public opinion and sentiment caused laws of that kind to be enacted and caused State Courts to uphold their validity under the police-power of the State, nevertheless the Supreme Court of the United States called a halt early enough so that possibly thinking people will recover their sanity and will realize that legislation will not solve the problem, however, it's possible that in time the Adkins case may be reversed or ignored and once again, constitutional restraint and prohibition will be successfully overcome and conquered by that indefinable thing known as the police-power.

In view of the fact that these laws are here and may possibly increase in their scope, rather than diminish, let us turn to the North Dakota Minimum Wage Law and see what if anything, has been accomplished under it.

The first law to be enacted, was Chap. 181 of the Session Laws of 1917, known as "The Public Welfare Committee," and under that law, a slight interest was developed and sufficient done, so that the Legislature in 1919, felt justified in passing an out-and-out

Minimum Wage Law, which is Chap. 174 of the Session Laws of 1919, under which it was declared, among other things, that it should be unlawful to employ women in any occupation within the State for wages which are inadequate to supply the necessary costs of living and to maintain them in health.

In addition to wages, the law also made it unlawful to employ women or minors in any occupation for unreasonably long hours, or to employ them under such surroundings or conditions, sanitary or otherwise, as might be detrimental to their health or morals, or to employ minors in any occupation for unreasonably low wages, but as stated in the beginning, we are only concerned here with minimum wages and I have completely eliminated from my discussion the matter of hours, sanitary conditions, etc.

Under investigations made in North Dakota in 1919, it was determined that the average wage for women was $11.11 per week. It was also found that the small towns paid higher wages than the large towns and the investigators also found that in North Dakota for the year of 1919, the average cost of living was about $16.00 per week and on the data gathered, the investigators recommended that the minimum wage in North Dakota for women in offices, mercantile pursuits, etc., be a weekly wage of $16.25 and that laundry workers, chamber maids, kitchen help, etc., receive a weekly wage of $15.50. In April, 1920, conferences were had as a result of which recommendations were made and orders issued, fixing the weekly minimum wage for women in North Dakota at $17.50 for waitresses, $16.70 for chambermaids and kitchen help, $20.00 for office help and $16.50 for employees in manufacturing establishments, laundries and telephone offices, and $17.50 for employees in mercantile establishments.

In the spring of 1921, the North Dakota Supreme Court held that some of the orders fixing wages were invalid on account of the law not having been followed in the calling of the conferences and the issuing of the orders, so the Bureau, in 1921, instigated a new survey, with the idea of issuing new orders and by that survey, in 1921, it was found that the women of North Dakota were receiving an average weekly wage of $16.15.

The North Dakota Minimum Wage Law is not entitled to any credit for this increase, for the reason that it was not in actual operation during that period of time, its orders being the subject of litigation in the Courts. Also it's a matter of record that wages of women throughout the United States and wages of men also, have been on the increase since 1918 and have continued to increase, in fact, in December of 1927, the average weekly wage of all women in the United States was $17.34, and that of all men $29.35.

In 1922 the Bureau, on the new surveys, issued Orders fixing the weekly wage for women at an average of about $14.00 and at the time that those orders were issued, a survey disclosed that women were actually receiving in the State of North Dakota, weekly wages considerably in excess of the minimum wage.

Since 1922 the minimum wage orders in North Dakota have not been changed but during that period of time the average weekly wages have fluctuated and the payroll reports on file in the office of

the Department, show that in 1926, about 58 per cent of the women employed were receiving wages in excess of the minimum of $14.00 per week and in 1927 only 53 per cent were receiving wages in excess of the minimum. This may not prove the statement that the minimum tends to become the maximum wage, but it at least casts some doubt upon the benefits to be derived from a minimum wage and there is certainly no reasonable basis upon which one can reach the conclusion that the minimum wage law has in any way raised the wages of the women employees, for as a matter of fact, wages increased generally throughout the country, whether there were minimum wage laws in force or not and in a states where there were minimum wage laws enacted, wages fluctuated from year to year, the same as in other states.

In my study of the Minimum Wage Law, I have been somewhat handicapped in that most of the available written material has been prepared by people who were prejudiced in favor of the law, but in studying the matter, I have tried to separate the facts from the conclusions and have here presented to you what I consider an unbiased picture and while it may be too early in the life of the law to draw any definite conclusions, still I have formed a rather definite opinion:

That the Minimum Wage Laws were enacted by reason of a sentimental public interest, created by the rapid increase in cost of living and the failure of wages to increase as rapidly, and further agitated by the usual sympathetic appeal for women and children working in factories and sweat-shops.

That the Minimum Wage Law is a violation of the Constitutional provision guaranteeing freedom of contract and is an attempt to fix wages and is not sound fundamentally.

That by reason of public sentiment and opinion, the Courts may finally be influenced to hold that such laws are a valid exercise of the police-power, even though they know that it is a violent assumption to say that such laws are needed to safeguard the lives, health and morals of women.

That there has been a general increase in wages throughout the United States, but as only fifteen States have enacted minimum wage laws, no credit can be given to such laws for the increase in wages.

That no amount of legislation will obtain for women the same wages as men, as long as women are unable to do the same work, with the same degree of skill and efficiency as the men, and with the same assurance of permanency, for, to a large majority of the women employed in gainful occupations, a job is merely a stop-gap before marriage and no one employing them has any assurance that after they have learned the job and become of some real value, that they will remain on the job.

That the Minimum Wage Law has deprived many women of part-time jobs and small-pay jobs. These jobs made it possible for many women who were not experienced and who could not hold down regular jobs, to obtain employment and make sufficient to help them while they prepared themselves for better positions.

There is one instance that I am personally acquainted with, where a young lady had a position in a business establishment as operator of the telephone switchboard and also performed some other odd office work, for which work she received $35.00 a month and was amply paid for what she did and well satisfied, but on account of the Minimum Wage Law, she had to be let out and her work was divided up among the other office help without any increase of pay to them.

That as conditions become more settled, if there is an attempt to fix minimum wages at a level that will afford a living, the tendency will be to reduce wages to the level set by the Minimum Wage Law and the minimum wage will then become the maximum wage.

That the Massachusetts Minimum Wage Law, which is of an advisory and recommendatory type, instead of compulsory, is undoubtedly constitutional and has much of merit to recommend it, but there is no legislation or minimum wage law of any type, that is going to obtain for the women increased wages.

As I said in the beginning, in the legal protection of women, we are at the cross-roads. Which way shall we turn? One road leads towards more laws for women, and the other towards none except such as apply equally to men. If we honestly desire to advance the position of women, is not the latter road the one to take?

If needed, enact legislation for both men and women workers, but have it economically and legally sound and abreast of the times.

What women want is not protection, but the right to be recognized as wage earners; the right to be afforded the same opportunity as men to earn a living and when they do the same work, to receive the same pay.

REAL ESTATE MORTGAGE FORECLOSURES IN NORTH DAKOTA

HON. MACK V. TRAYNOR

I do not know just why President Lewis selected me to give this address. The only reason that I can think of is that he wanted me to do some much needed studying on a phase of the law that we all should be familiar with. I am not presumptuous enough to believe that I can tell any of you gentlemen anything about the law of real estate mortgage foreclosures that you do not already know, nor can I attempt, in the brief time allotted to me, to give any thorough treatise on the law covering this subject. This address must necessarily be somewhat incoherent and does not in any sense attempt to cover the law of real estate mortgage foreclosures in North Dakota. If, however, I should happen to hit upon some phase of the law some member of the Association may not know of, or some other member may have overlooked or forgotten, then my efforts will not have been in vain.

We have in this state two methods of real estate mortgage foreclosures, viz: Foreclosure by advertisement and foreclosure by action. The law is somewhat overlapping with reference to the two methods of foreclosure, but I deem it advisable to attempt to take them up separately.

FORECLOSURE BY ADVERTISEMENT

In 1919 the legislature passed a law requiring that in all foreclosure proceedings covering real property, either by action or advertisement, that before the action or proceeding is commenced a notice in writing shall be served more than thirty days prior to such foreclosure and served by registered mail addressed to the title owner of record at his last known postoffice address. Such notice shall describe the land, the date and amount of the mortgage, the amount due for principal, interest and taxes, and shall state that if the same is not paid within thirty days from the date of the notice that proceedings will be commenced to foreclose the mortgage. Our Supreme Court held in the case of Patterson Land Company versus Merchants' Bank of Napoleon, 55 N. D., 90, that this law did not apply to mortgages given prior to the passage of the act, and then in Chapter 143 of the Session Laws of 1927 the legislature also provided that this notice need not be given to mortgages executed prior to July 1st, 1919.

The legislature has seen fit to change the method of serving this notice before foreclosure at about every session of the legislature held since the law was originally passed. The legislature of 1921 provided that the notice should be served by registered mail addressed to the title owner according to the records in the office of the register of deeds at his or their postoffice address as shown by the records in the office of the register of deeds, and if not shown, then addressed to the owner at the postoffice nearest the land. The 1919 law was also amended in 1921 to provide that if an action or proceeding is not begun within ninety days after the date of such notice, that all proceedings shall be deemed discontinued. This was

amended again in 1925 so that the notice should be served by registered mail addressed to the title owner according to the records in the office of the register of deeds concerning and affecting the title to the premises described in such notice at his or their postoffice address as shown by such records, and if such address is not so shown, personal service upon such owner or owners proven by the certificate of the sheriff, or by the affidavit of the person serving the same, shall be sufficient, or if the sheriff's return shows that after diligent inquiry made for the purpose of serving such notice, he is unable to make service thereof upon the said title owner or owners of record within the county where the said land is situated, then and in such case, such notice shall not be required to be served upon such owner or owners whose postoffice address is not shown by such records in the office of the register of deeds.

The law was again amended in 1927 providing that service should be made by registered mail addressed to the title owner at his postoffice address, providing such postoffice address is shown in the chain of title of such real estate in the records of the register of deeds, but if such postoffice address is not shown, then the notice may be served by registered mail addressed to the title owner at the postoffice nearest to any part or tract of said real estate. The 1927 law provides further that if the title to such real estate is in the name of a deceased person that no service of the notice need be made, but if an administrator or executor of the estate of such deceased person has been appointed in the county in which such real estate is situated, such notice shall be served on such administrator or executor; provided further that personal service of such notice on such title owner or on the administrator or executor, wherever appointed, made in the manner provided for service of a summons, either within or without the state of North Dakota, shall be sufficient.

The question naturally arises as to which law would apply to a particular mortgage. In other words, what law would govern the service of the notice in the matter of the foreclosure of a mortgage given August 1st, 1925, or a mortgage given August 1st, 1927. Our Supreme Court has never decided this question, but it would seem that following the cases of E. J. Lander & Company versus Deemy, 46 N. D., 274, Brewer versus Forsberg, 53 N. D., 262, and Patterson Land Company versus Merchants' Bank of Napoleon, 55 N. D., 90, that the law in force at the time of the execution of the mortgage should control with reference to the service of the notice. On the other hand, it might be argued that the method of giving the notice is only a matter of procedure so that so long as the mortgage was executed subsequent to July 1st, 1919, and a notice was required, that the law in force at the time of the sending of the notice would control. We are not, however, going to attempt to state what the courts would hold, but it seems to us quite important that actual notice be given to the title owner of the land.

Prerequisites to Right to Foreclose

Of course, the first prerequisite is that the mortgage shall contain a power of sale and that there is a default in the terms and conditions of the mortgage. The mortgage must also have been duly recorded and, if assigned, all assignments must also be re-

corded. The agent or attorney foreclosing the mortgage must have a power of attorney from the mortgagee or assignee, and such power of attorney must be filed for record in the office of the register of deeds where said real estate is located before the day fixed for making the sale. No action or proceeding shall have been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or if any action or proceeding has been instituted, the same must have been discontinued or an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part.

FORECLOSURE PROCEEDINGS

After the thirty day period as provided in the notice before foreclosure has expired, then the publication of the notice of sale may be made. This must be made by publication once in each week for six consecutive weeks in a newspaper of general circulation printed and published in the county where the premises intended to be sold, or some part thereof, are situated, and if there is no such paper in said county, then in some newspaper published at the seat of government.

It has been held by our courts that six publications in six consecutive weeks, the last publication being the day before the sale, is sufficient.

Bailey versus Hendrickson, 25 N. D., 500.

Our statute at Section 8080 provides a form of notice which must be substantially complied with. In this state the rule has been stated by our court that in a foreclosure sale the statute is substantially complied with when the notice itself states facts correctly pertaining to the record, which record, if examined, would conclusively show the error in the notice, and, further, that the rule of substantial compliance applies instead of strict and literal compliance.

McCardia v. Billings, 10 N. D., 373; 87 N. W. 1008.

Kyllonen v. Acme Harvesting Machine Co., 48 N. D., 38, 182 N. W. 249.

The sale must be made at public auction between the hours of nine A. M. and the setting of the sun on that day, in the county in which the premises to be sold, or some part of them, are situated, and must be made by the sheriff, acting in person or by his deputy, to the highest bidder.

If the mortgaged premises consists of distinct farms, tracts or lots they must be sold separately, and no more farms, tracts or lots must be sold than shall be necessary to satisfy the amount due on such mortgage at the date of sale and the costs and expenses allowed by law.

Section 8082.

Our court has held that a sale of several tracts en masse is not void but voidable and must be attacked timely. It has been held further that an attack within the redemption period is a timely attack. Michael versus Grady, 52 N. D. 740; 204 N. W. 182.

It has been held further that where a party waited until sixteen months had elapsed since the sale and four months since the time for redemption had expired before questioning the sale that he had waived his right to set aside the sale for inadequacy of price and because of the irregularity in selling several tracts in one mass. Power versus Larabee, 3 N. D., 502; 57 N. W., 789. In the case of Michael versus Grady, supra, the court stated that the determining factor is whether or not prejudice is suffered by reason of the failure to comply with the statutory requirement.

It has further been held by our court that where the premises do not consist of distinct farms, parcels or lots, they need not be divided. Greene versus Newberry, 55 N. D., 783; 215 N. W., 273.

The mortgagee or his assigns may fairly and in good faith purchase the premises at such sale and the officer making the sale shall immediately give to the purchaser a certificate of sale containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. The costs and fees for making the sale.

Such certificate must be executed and acknowledged and must be recorded in the office of the register of deeds of the county where the real property is situated within sixty days from the date of sale. Section 8084.

In case the mortgage was executed subsequent to July 1st, 1919, the notice before foreclosure, together with affidavit of service thereon, must be recorded with the sheriff's certificate.

Costs and Fees for Making the Sale

The publication fees are controlled by statute, but what we are mostly interested in is the question of the attorney fees. Prior to the legislative session of 1919, the attorney fees in mortgage foreclosures was governed by Section 7792, which provides that when the amount of the debt secured by such mortgage or lien does not exceed $500.00 the fee shall be $25.00, and when the amount of the debt exceeds $500.00 and does not exceed $1000.00 the fee shall be $50.00, and when the amount of the debt exceeds $1000.00 and does not exceed $2000.00 the fee shall be $75.00, and when the amount of the debt exceeds $2000.00 the fee shall be $75.00 and in addition thereto 2% on the amount so secured in excess of $2000.00. The statute provides further that the fee shall not be allowed unless the foreclosure proceedings shall be conducted under the supervision of an attorney duly authorized to practice in the courts of this state and unless an attorney's affidavit relative to division of fees shall be filed in the office of the register of deeds prior to the time of sale stating that the full amount of such fees inures solely to the benefit of the attorney foreclosing the mortgage.

Chapter 130 of the Session Laws of 1919, however, provides that on the foreclosure of any lien or mortgage by advertisement attorney fees shall not exceed 10% of the principal sum actually due, and shall in no case exceed $25.00, and the sheriff fees shall not exceed $3.00. The question naturally arises as to whether or not

the 1919 law applies to mortgages executed prior to the passage of this law. No decision has been rendered on this subject by our Supreme Court and we believe that the majority of the attorneys follow the 1919 law in all foreclosures, regardless of the date of execution of the mortgage, although we have noticed that some attorneys still tax the attorney fees in accordance with Section 7792 in cases where the mortgage was executed prior to July 1st, 1919.

We will not attempt to state what our Supreme Court might rule on the question of which law would govern with reference to the mortgages executed prior to July 1st, 1919. Regardless of what the law might be, it is self-evident that a fee of $25.00 is not adequate for the foreclosure of any mortgage and that the only and proper thing for members of the Bar to do is to follow the schedule of fees as adopted by the State Bar Association when rendering a statement to clients.

RENTS AND PROFITS

Prior to July 1st, 1919, this was governed by Section 7762, which provided that the purchaser from the time of sale until a redemption and a redemptioner from the time of his redemption until another redemption is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. This was amended by Chapter 132 of the Session laws of 1919, which provides that the debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use and benefit of the property sold from the date of such sale until the expiration of the period of redemption.

Our Supreme Court has held, however, that the 1919 law is applicable only to mortgages executed and delivered after it became operative, and is inapplicable to mortgages executed and delivered prior to that time. First National Bank of Turtle Lake versus Bovey-Shute & Jackson, 48 N. D., 450; 191 N. W. 765

PERIOD OF REDEMPTION

This is controlled by Section 8085 of the 1913 Code and Section 7754 of the Supplement. Section 7754 provides that the judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale on paying the purchaser the amount of his purchase with 8% interest thereon, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest at the same rate on such amount; and if the purchaser is also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.

This Section was interpreted by our courts in the case of Styles versus Dickey, 22 N. D., 515; 134 N. W., 702. This case refers back to Section 7324 of the 1913 Code which provides as follows:

> "7324. Computation of time. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it is also excluded."

Our Code further provides that every Sunday is a holiday so that, therefore, in case a sale was held on Saturday, September 8th, 1928, the debtor or redemptioner would have to and including Monday, September 9th, 1929, within which to redeem because of the fact that the last day of redemption falls on Sunday, September 8th, 1929. In spite of the fact that the law seems to be very definite and set on this particular question, we have noticed sheriff deeds which some attorneys have caused to be issued on the last day of redemption.

Enjoining Foreclosures by Advertisement

A foreclosure by advertisement may be enjoined by the affidavit of the mortgagor, his agent or attorney showing to the satisfaction of the judge of the district court of the county where the mortgaged property is situated that the mortgagor has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due in the mortgage. The judge will order further that all further proceedings for the foreclosure shall be had in the district court properly having jurisdiction of the subject matter.

The courts are, as a rule, quite liberal in enjoining these foreclosures and the power to enjoin is discretionary and only disturbed for abuse. Beiseker versus Svendsgaard, 28 N. D., 366; 149 N. W. 352.

The order is granted ex parte. Counter affidavits are not allowed. McCarty versus Goodsman, 40 N. D., 220; 168 N. W. 721.

Our court has also interpreted this Section to mean that the term mortgagor includes within its meaning any person claiming title to the mortgaged premises under and in privity with the original mortgagor. Scott and Wheeler versus District Court, et al, 15 N. D., 259; 107 N. W., 61.

Security Bank v. Buttz, 21 N. D., 540; 131 N. W., 241.

Our court has quoted with approval the law to the effect that where a foreclosure by advertisement is enjoined the costs and expenses incurred therein are properly taxable as items of costs in the foreclosure action where the party prosecuting the foreclosure prevails in the action.

> "And as a general rule, a mortgagee who has been wrongfully enjoined from proceeding to sell mortgaged premises by advertisement is entitled to be reimbursed for the expenses occasioned by the injunctional order."

McCarty v. Goodsman, et al, 40 N. D., 220; 168 N. W., 721.

Foreclosure by Action

I have not attempted to cover the entire law of foreclosure by advertisement, nor can I attempt, in the brief time allotted to me, to cover the entire field of foreclosures by action. The law with reference to the notice before foreclosure applies to foreclosures by action as well as foreclosures by advertisement. The attorney must also have a power of attorney to foreclose and the possession of such power of attorney shall be alleged in the complaint. Default shall have occurred in the terms and conditions of the mortgage and

the mortgage must have been recorded and all assignments thereof recorded. There must be an allegation in the complaint that no action or proceeding shall have been instituted at law to recover the debt then remaining secured by the mortgage, or any part thereof; or if any action or proceeding has been instituted, that the same has been discontinued or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part. After judgment has been obtained, which judgment will provide for the sale of the mortgaged premises, or so much threof as may be sufficient to pay the amount adjudged to be due and the costs of sale, then special execution must be issued, but no levy or filing or service of notice of levy is necessary as in the case of a general execution.

Winslow vs. Klundt, 51 N. D., 808; 201 N. W., 169.

The sale must be made by a referee, sheriff or his deputy of the county or subdivision where the court in which the judgment is rendered is held, or other person appointed by the court for that purpose, and must be made in the county or subdivision where the premises, or some part thereof, are situated and shall be made upon the like notice and in the same manner as provided by law for the sale of real property upon execution. In other words, publication must be made in a newspaper of general circulation printed and published in the county or subdivision where the real property to be sold is situated, and that such publication must be once a week for at least 30 days prior to the making of such sale. In case there is no newspaper printed in such county, then the officer making such sale must cause advertisement to be made by posting a copy of such advertisement on the outer door of the court house or building where the district court of the county or subdivision was last held, and in five other places in the county. The sale must be held at the court house, if there is one in the county or subdivision in which said real estate is situated, and if there is no court house, then at the door of the house in which the district court was last held, and if there is no court house and no district court has been held in the county or subdivision, then at such place within the county or subdivision as the sheriff shall designate in his notice of sale.

The sale must be held and made at public auction to the highest bidder, between the hours of nine A. M., and four P. M. The judgment debtor, if present at the sale, may direct the order in which the property shall be sold, and the sheriff or other officer must follow such directions.

Our Supreme Court has held that Section 7719, Compiled Laws of 1919, requiring executions to be returned within 60 days is purely directory in so far as special execution under mortgage foreclosure is concerned.

Workman v. Salzer Lumber Company, 51 N. D. 280; 199 N. W. 769. In any event, Section 7750, Compiled Laws of 1913, provides for sale after the 60 day period in case of general executions when the sale has not been held on account of irregularities in giving notice thereof, or because of its postponement, and the officer shall in his return set forth the facts regarding such failure or postponement.

Upon such sale the purchaser is substituted to and acquires all the right, title and interest and claim of the judgment debtor to such real property; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In other cases the real property is subject to redemption and the officer gives the purchaser a certificate of sale containing: One, a particular description of the real property sold. Two, the price bid for each distinct lot or parcel. Three, the whole price bid. Four, when subject to redemption it must be so stated.

The certificates must be executed and acknowledged by the officer and must be recorded in the office of the register of deeds wherein such real property is situated within 60 days from the date of sale. Unlike foreclosure by advertisement, however, the notice before foreclosure is not recorded with the sheriff's certificate, but the law provides that the notice with proof of service shall be filed with the clerk of court at the time of filing the complaint.

The law with reference to the possession, rents and profits and use in occupation of the premises and also in regard to redemption is the same in foreclosure by action as in foreclosure by advertisement. Time, however, does not permit the writer to go into the subject of redemption or the manner in which redemption must be made.

Validating Provisions

We all may have made some mistakes in foreclosing mortgages, but we seem to have had some friends in the legislature who have been quite busy correcting our mistakes. In the 1925 Supplement we find two such provisions.

> "Section 8076a1. Validating prior sales. All sales of real estate made prior to the passage and approval of this act under executions issued pursuant to judgments entered in actions for the foreclosure of real estate mortages, are hereby declared to be legal and valid for all purposes, even though no power of attorney was filed for record in the office of the register of deeds of the county wherein said real estate was located prior to the day of sale of said real estate, provided such a power of attorney as is provided for in section 8075 of the Compiled Laws of North Dakota for 1913 was filed in the office of the clerk of the district court of the county in which such judgment was entered, prior to such date of sale. (Laws 1925, ch. 141, Section 2; Laws 1923, ch. 250, Section 2.) Mortgages 27 Cyc. 1450, 1695, 1732."

> "Section 8076a2. Same. All sales of real estate made under a mortgage foreclosure prior to the passage and approval of this act, are hereby declared legal and valid for all purposes, even though no power of attorney was filed for record in the office of the register of deeds of the county wherein said real estate was located, before the day of sale of said real estate, provided said power of attorney as is provided for in Section 8075 of the Compiled Laws of North Dakota for 1913 was filed for record in the office of the register of deeds of the county wherein said real estate is located, at or prior to the time fixed or appointed to make the sale.

(Laws 1925, ch. 141, Section 3.) Mortgages, 27 Cyc. 1450, 1695, 1732."

The legislature of 1927 passed the following validating provision with reference to mortgage foreclosures, to-wit:

Chapter 143. . . . . .

"2. All sales of real estate made or that may hereafter be made under a mortgage foreclosure of mortgages executed prior to July 1st, 1919, are hereby declared legal and valid for all purposes even though no notice of intention to foreclose has been given or served as provided in Chapter 131 of the Session Laws of 1919, as amended by Chapter 66 of the Session Laws of 1921, as amended by Chapter 142 of the Session Laws of 1925."

Chapter 276.

"That all legal publications of any kind or character, which prior to the 1st day of January, 1927, have been made in a newspaper other than a newspaper legally designated therefor under the provisions of Chapter 187 of Session Laws, 1919, and of the Initiated Measure relating to Official Newspapers approved November 2, 1920, are hereby declared legal and valid for all purposes."

Chapter 277.

"After six months from and after this act takes effect no action shall be commenced to set aside the foreclosure of a mortgage and no foreclosure of a mortgage shall thereafter be set aside, and no defense shall be interposed in an action based upon the foreclosure of such mortgage, by virtue of any defect in the form, substance, service or manner of service of the notice of intention to foreclose such mortgage, which mortgage has been foreclosed prior to the taking effect of this Act."

Chapter 279.

Par. 1.
"Any sale of real estate, made prior to the taking effect of this act, whether under execution or in foreclosure of a mortgage by advertisement, is hereby declared to be legal and valid for all purposes, even though the sheriff's certificate of sale, issued in completion of such sale, was not filed for record in the office of the register of deeds within sixty days after the date of such execution or foreclosure sale."

In the 1929 Session Laws we find the following validation provisions, to-wit:

Chapter 257.

"1. Sale of Real Estate at Foreclosure Made by Agent or Attorney. That all sales of real estate upon foreclosure made by an agent or attorney between July 1st, 1901, and July 1st, 1903, shall be valid for all purposes notwithstanding that a power of attorney authorizing such foreclosure by such agent or attorney was not procured nor filed in the office of the

register of deeds of the county wherein said real estate is located before the day fixed or appointed to make the sale or at all as then required by Chapter 132 of the Laws of 1901. Provided that the provisions of this act shall not apply to any action or proceeding now pending or heretofore had in any of the courts of this state in which notice of lis pendens shall have been recorded in the office of the register of deeds of the county in which such land is situated, prior to the passage of this act."

Chapter 258.

"1. All sales of real estate made under a mortgage foreclosure of mortgages prior to the passage and taking effect of this act are hereby declared legal and valid for all purposes, even though the power of attorney to foreclose was not recorded in the office of the register of deeds of the county wherein said real estate is located on or before the date of sale, providing the power of attorney to foreclose was executed before the date of sale, and is recorded in the office of the register of deeds of the county wherein said real estate is located within six months after the taking effect of this act."

This address or thesis does not purport to be in any manner complete on the law of real estate mortgage foreclosures in North Dakota, but all that we felt we could do or attempt to do in the brief space of time allotted to us was to hit a few of the high spots in regard to some phases of this question.