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Thomas Walsh

FEDERAL PROCEDURE

HON. THOMAS J. WALSH

MR. WALSH: Mr. Chairman, Mr. President, Members of the North Dakota Bar Association and their guests:

I beg to express to you my warm thanks for the cordial greeting extended and the presiding officer for the generous words spoken on my behalf.

I propose to talk to you this evening on a subject of immediate and paramount importance to the members of the legal profession, but by no means exclusively important to them. I refer to legislation which Congress has been asked for many years to approve, thus far unavailing; but which if enacted will authorize the Supreme Court of the United States to prescribe by general rules for the District Courts of the United States the "forms of process, writs, pleadings, motions, practice and procedure in actions at law." It contemplates the abrogation of the system which has been in vogue since the enactment of the Judiciary Act in 1789, thus having remained in existence without being disturbed for a period of 140 years. That act, as you will recall, provides that "the practice, pleadings, forms, and modes of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts of the United States, shall conform as near as may be to the practice, pleadings, forms, and modes of proceeding existing at the time in like causes in courts of record of the state within which such circuit and district courts are held, any rule of the court to the contrary notwithstanding."

A bill looking to the inauguration of the departure from the practice now prevailing has been pending before the Senate of the United States during my entire service, now some fourteen years, during all of which time it has been sponsored by the American Bar Association under the direction of His Honor Thomas W. Shelton, an eminent lawyer of Norfolk, Va., a member of the American Bar Association and for quite a number of years past the chairman of its committee on Uniform Judicial Procedure. Mr. Shelton is more or less familiar with the practice in the courts of England by virtue of his having made several visits to the country, to which, with a measure of pride, he traces his ancestry.

The novice has had some support. Mr. Shelton has circularized the courts and has secured endorsements to the bill to which

is so much attached from the Bar Associations of many states where he has made partial representations concerning its merits, as well as from Chambers of Commerce and women's clubs and various other organizations.

It has had some support from the secular press, much of which I think was obtained largely by roseate and reckless promises concerning its merits. Almost anyone who promises to eliminate the law's delays can get a hearing; that subject being one of the chronic complaints from Shakespeare's time and some centuries before.

It is claimed that the bill has two conspicuous merits; in the first place, that it will bring about uniformity in the practice and procedure as between the Federal Courts of the United States, and second, that the new system will simplify the procedure and thus contribute to expedition in the disposition of causes. Now if any such system were adopted it would unquestionably result in uniformity as between the Federal Courts, however much or little that kind of uniformity should be desired, and of course while there would be uniformity in the practice as between the Federal Courts in the various states there would be a lack of uniformity in the practice in Federal and State Courts in which the Federal Court sits, so that the practitioner instead of, as now, learning one system of practice and procedure, which he can follow in the Federal and State Courts alike, would be required to learn two systems of practice, so of course the system proposed would be great accommodation to those lawyers, relatively few in number, whose practice is confined almost exclusively to the Federal Courts, and who try cases in half a dozen states. The lawyer belonging to that class would be pleased to find in every state to which he went the same practice and procedure with which he is familiar in all the states, but to the lawyer, infinitely greater in number, who never goes beyond the boundaries of his state, it would be quite the reverse. I am for the hundred lawyers who stay at home as against the one who goes abroad.

It would of course be incumbent that every lawyer familiarize himself with two systems of practice and procedure instead of one, as is the case now. The young practitioner spends very many anxious moments because of his doubt with respect to what to do to get his case properly before the court and in accordance with the rules established by the courts or by the statutes. He is perfectly satisfied about the merits. That does not trouble him so much; it is how can he get his case before the courts that gives him the deepest concern, and if you charge him with the duty of learning two systems of practice you increase his troubles appreciably. The men in mature life and in middle age with

active minds might very properly and without a great deal of effort learn the two systems, but take the aged man and the man on the shady side of life, whose mind is not as active as it was, they would be troubled the same as the tyro. To bring these men over to the new system approximating the common law system in jurisdictions governed by a code system would be a task to which they are not equal, or if the new system were to follow the code system in a general way the old common law lawyer would have a job on his hands, or if it were some different system everbody would have to sweat. I am utterly unable to understand where the value comes in of uniformity in the practice between the various states as compared with the burden placed on the practitioner to learn a new system. Indeed, I don't know any good reason for uniformity. Our system in Montana differs in material respects from yours here in North Dakota but I cannot undertake to say that our system is better or reaches to justice with greater accuracy than in the State of North Dakota. What difference does it make to the lawyers in the State of North Dakota that we have a different system of practice in the State of Montana, except as to those lawyers who practice in these two states, and their number is relatively small.

But that is not the greatest evil. While the new system was being learned by the lawyers and its correct interpretation was being arrived at by the courts, many causes entirely worthy would be lost by reason of the fact that the practitioner failed to observe the requirements of the new system. He would not be familiar with it, but by virtue of custom and practice he would follow the old system and go wrong and get tripped up and his client would lose a meritorious cause. It is no less than a tragedy when a good cause of action is lost by reason of the fact that an attorney didn't observe the prescribed rule of practice, and when a meritorious defense becomes unavailing for exactly the same reason. I undertake to say that the financial disaster that would follow and be entailed would be incalculable.

It was at one time said that the statute of frauds had cost the King of England a subsidy, by which is meant that while the Court was finding out what it meant many lawsuits had been lost, but it was answered with respect to that that if it were true that the statute of frauds cost a subsidy it was worth two subsidies. I am unable to appreciate how this change would merit the loss of substantial commercial and financial interests.

But it is said that this new system would be so simple in character that the question of practice and procedure wouldn't arise; that the rules prescribed by the Supreme Court for the conducting of cases and the institution of suits would be so simple and plain

in their language that "he who runs would read" and understand. We are told that these will consist of a few simple rules so plain that no question of construction could arise and there would be no controversy to vex or annoy either the bar or bench. But I am sure that on reflection you will agree with me that the idea is purely chimerical. It has been regarded as axiomatic that it passes the ingenuity of the human mind to write a statute of considerable importance, much less a series of statutes, so plain and direct that controversy cannot possibly arise. Why the Constitution of the United States is as remarkable for clarity of diction and language as it is for the statesmanship which it expresses and yet after more than one hundred thirty-five years of study of the document we are still trying to find out what it means, as applied to a particular set of circumstances in application to conditions as they arise from time to time.

But we are not without express experience in this very matter. David Dudley Field was possessed of exactly the same idea with which the proponents of this alleged reform are enamored. He thought it would be an easy matter to approximate the common law plan of practice in a statute system that would be founded on a few simple rules and he tried to lay down those few simple rules in the form of a code of procedure for the state of New York. Now bear in mind that David Dudley Field was a towering figure at the American Bar, perhaps the ablest of the towering brothers of his profession at the time. He was recognized as an expert in the particular matter of codification. He not only devised the code of procedure of the State of New York, but he likewise drafted a civil code for New York. New York refused to adopt this but California adopted it and it became the basis of the North Dakota code. He was a genius in the framing of the simple propositions of law and the embodying of them in the form of a code. And so his code of civil procedure for the State of New York was adopted which he expected would eliminate the intricate and troublesome practice that had arisen under the common law system. Not only did it not eliminate them, but they arose in such volumes that it became necessary to get out a special series of reports embracing the decisions of the courts on questions of practice.

Before I pass that I want to refer to further claims made in connection with the uniformity contention. It is said that the practitioner now operates under two systems; that the system of practice in Federal Court is different from that in the State Courts because the statute prescribes that it shall conform only as near as may be and identity is impossible. It is said that in many respects the practice in Federal Court is different. That is

only partly true; the extent of the difference, if one is familiar with the two systems, is inconsequential. I think there is about a half page in Foster's Federal Practice in which a list of cases is given illustrating the difference. The difference in Federal Courts and State Courts can be mastered by any student of law in less than two hours, and they arise not by reason of the difference in the two systems but by reason of the difference in the constitution of the two classes of court. Take, for instance, the statute of change of venue. It is easy to understand that a statute of that kind cannot be made applicable to Federal procedure.

But it is said if this system should be adopted in the Federal Courts the State Courts will conform to the system of practice which prevails in Federal Court and so there will be an entire uniformity in both Federal and State Courts in the Union. But again we must discard the lesson of experience. That was the idea of David Dudley Field. He claimed that his plan was so simple that it would be adopted in every State of the Union. It was adopted in 32 of the 48 States, and one-third of the States of the Union, after seventy-five years of Code system, refused to have anything to do with it.

But more than that, it is said the new system will be practically the same in the institution and trial of actions at law as in actions in equity in Federal Courts, and that great success has attended the application of this system and that all State Courts will speedily adopt such a system. That system is extolled as perfection of simplicity if not of reason. But what reason is there for supposing that? Again the lessons of experience teach that States will do nothing of the kind. Those rules were adopted back in 1822 to govern the Federal Courts in suits of equity. Since that time, over a hundred years have elapsed, and yet there is but one State in the Union, as far as my information goes, whose practice in equity is founded on the practice in the Federal Courts. That is the State of Pennsylvania. They are said to have exactly the same system of procedure in equity as in the Federal Courts. So it is not reasonable to expect that the different States will abandon the practice with which they are familiar and adopt the new system because it is in vogue in the Federal Courts.

But I was speaking of the simplicity matter. The rules in equity are extolled as being perfectly simple and the conclusion to be derived from that is that no questions arise under them.

This matter was reported on by the Judiciary Committee of the Senate back in 1916, adversely. When the poll was taken

in the committee it appears that a majority of the committee favored the departure by a vote of nine to eight, but when the reports were drawn up and the arguments for and against were set up by the eight out of the seventeen members of the committee, they sent in the report of the minority which became the majority report and eight signed the report that was the views of the majority when the poll was taken.

In the report by Senator Sutherland from the State of Utah, now Associate Justice of the Supreme Court of the United States, there is listed an enormous number of cases in which questions of practice arose and were determined by various courts, as shown by the syllabi. The number was staggering, showing the enormity of the task. Many of the determinations were of no great consequence and were not determinative of the lawsuit in any way, but others were vital in character and disposed of the lawsuit for all time, or necessitated the institution of new suits and the report assumes without argument that all these troubles will disappear or at least be reduced to a minimum; in other words, the evil was shown and a remedy offered which was to be taken on faith alone. I have pointed out to you that we cannot get rid of the questions of practice by the new system.

Now I spoke of the Field Code of Procedure. It was adopted by a great many states speedily, and in every instance it was the work and object of those who prepared the system of practice to make the thing as simple as possibly could be done, and in each state revisions have been made from time to time of their codes of civil procedure, always actuated by a desire to make it so simple that no question of practice could arise. There were three revisions of the Code of Civil Procedure in the State of New York. I think that nobody contends now that it is so plain that controversies cannot arise.

The same thing with the rules in equity. When engaged in the practice I used Judge Shiras' book on Rules of Equity, and I have no doubt that all of you have made use of this same book. You will find collected there a list of cases, being adjudications on the rules indicated, that questions of practice have arisen. The idea of drafting rules that are so simple that no controversies can arise is perfectly chimerical. Every law college in the country requires from its students that they study the whole subject of equity procedure in at least a dozen different text books, indicating that they wish to have comparisons of the subject, too. Not included in this list are three great volumes of Dainell's Chancery Practice and Rules, nothing less. It compiles all the rules established in the English Courts of Chancery, and you can go back to find the application of rules, and there you find applications

without number in Dainell's and other works on Chancery practice. So I think if we have rules of the Supreme Court Justices established substituting a new and untried system for one which has been tried, and which has been settled to a very considerable extent by adjudications, I undertake to say that instead of the questions being eliminated they will be multiplied without end, until after years of trials and adjudications and settlement by the court of last resort, the Supreme Court of the United States.

But if the work should be undertaken I submit that the Supreme Court of the United States is by no means fit to prosecute that work. Why, the biographer of David Dudley Field says that the amount of labor he put on that code was simply prodigious and incredible in extent. The Supreme Court consists of old men and scarcely one of them have tried a cause in twenty-five years. Moreover there is not one, although all eminent lawyers and able, there is not one of them in the same class with David Dudley Field. What is the reason to think that they will succeed where he failed?

But the Supreme Court has not time to devote to such a stupendous task. There is no session of Congress that is not appealed to to relieve that Court from the burden that is placed upon it as the years go by. But more than that, I conceive that the promoters of this departure can have no idea of the extent and the magnitude of the labor they would lay upon the Supreme Court. Pick up any Code of Civil Procedure and see the infinite detail that must be provided for in order that the trial of lawsuits may go on with regularity in court and that justice may be done safely.

Let us see what the Supreme Court is asked to do. They would have to provide in the first place for the time in which action shall be commenced. This is a statute that appertains to the remedy and not to the substantive right. When may an action be begun governing real estate; upon a promissory note and other instrument in writing; upon an account; upon a tort, upon any of the infinite variety of cases; and then provision would have to be made for the tolling of the statute, and whether it runs against married women or idiots or other persons under disability, or under what circumstances the action could be revived after the statute had once run against it; and then it would have to provide for the parties, who would be plaintiff and who defendant, who might be joined in an action; whether the guarantor could be joined with the maker of a promissory note in a civil suit on the promissory note; and whether an action which was discontinued by the death of one of the parties could be revived, and who would or should be the successor of the departed party

to the action; and then having disposed of those things you have to have rules as to how an action shall be commenced, whether, as in my state by filing the complaint, or whether, as in your state, by the simple making or issuing of a summons signed by the attorney for the plaintiff, or if neither, as in many of the states, by the issuance of a summons by the clerk under seal, and after they determine that question, then the question of how service shall be made arises, whether by personally handing the summons to the defendant or whether it might be left under certain circumstances at his place of residence and, if so, with what members of the family; and then there would needs be a provision as to how service should be made on a corporation and what particular officer service could be properly made on; and with that taken care of a provision as to how service could be made by publication and in what circumstances and in what classes of cases and how; and then provision would of a necessity have to be made with regard to the pleadings, the filing thereof, verification thereof, and the general rules of pleadings, mistakes in pleadings, and amendment thereto, and when through with that we pass to the matters having to do with the issues, trial and judgment of civil cases; the mode of trial, and we come to the formation of the jury and who should be summoned as jurors and that will necessitate rules in respect to whether women should have opportunity to serve on juries; the qualifications of jurors, exemptions and so on down the list and clear through. Pick up your code, and as you go through it, ask yourself what particular sections can be eliminated that are going to govern the procedure in actions at law. But worse than that is the question of provisional remedies. What particular provisional remedies shall be provided for by the rules of the Supreme Court and is it going to prescribe? Some States of the Union have provisional remedies which are not allowed in others. Take arrest and bail; I don't know whether you have it here, but we have it in our state in limited cases, those in which fraud constitutes an element. In some states this remedy is looked upon with particular favor, and can be resorted to in a large number of instances and in other states it is allowed in a very restricted class of cases; for instance, the State of Iowa where it is considered violative of the constitutional principle against imprisonment for debt. Now when these rules are established providing for arrest and bail are they going to establish the rules of the States which are favorable to the remedy or the rules in those states where they look with disfavor on the remedy, or not at all? Then take the provisional remedy of attachment. You know the great diversity on attachment statutes of the various

states. They divide themselves into two great classes, the class in which attachment is issued in any action upon a debt founded on contract as in our state. But in your state that would not be permitted, and attachment can only issue when some element of fraud is involved or the debtor is attempting to dispose of his property with intent to defraud his creditors, or is attempting to leave the state, or is a non-resident of the state. That system was adopted from the State of New York. In California, from which our statute came, they would not tolerate the system in the State of New York, and in the State of New York they would not tolerate the system in Montana. I submit to any reasoning lawyer, who is familiar with the subject, that it passes the power of the Supreme Court, or any other body, to make a uniform system of rules that would at once be satisfactory to the states of Maine and New Mexico, North Dakota and Louisiana.

Now in addition to these considerations, addressing myself to the simplicity of the rules, were it not for the fact that one hundred years ago the Supreme Court was authorized to prescribe rules covering the procedure in actions in equity, I should assert, beyond a doubt, that there is no constitutional warrant for legislation of that character. I think that it has been very generally recognized as a principle of law, quite settled, that a rule of court in contravention of a statute is void. Why, the very act of 1789 provides that the practice in Federal Court shall be the same as in State Courts as near as may be, any rule of the court to the contrary notwithstanding.

I freely admit that if courts were created either by the constitution or statute and no provision was made whatever for the practice and procedure, that court would have the right and power, and it would be its duty, to prescribe rules under which causes could be brought in that court and how they should be contested and tried, but once the legislature steps in and says that it must be done so and so, there is no power in the court by its rules to set aside that statute. But bear in mind, that the Congress of the United States has legislated on this matter and has prescribed that the laws of the state in which the court sits shall prevail in Federal Courts, any rule to the contrary notwithstanding and so there is an act, but if there was no act, as I say, any Court would have the right to prescribe its own rules.

But that is a different thing, prescribing the rules of other courts. No one doubts that the Supreme Court of the United States has a perfect right to prescribe its own rules; not inconsistent with the statutes of the United States, and it is even held in my state that a statute which to any extent limits or restricts the power of a constitutional court is void. But it is not a ques-

tion of whether the Supreme Court can make rules for that Court. It is a question of whether it can make rules for some other Court. Now the legislature is asked, and it is proposed, that it transfer its power to make rules of practice from Congress and put it on the Supreme Court of the United States, an unwarranted delegation of power.

It is said that the power to make rules governing the trial of actions is not a legislative function at all; that it is inherent in the court and the courts cannot be deprived of that right, and that it is a usurpation on the part of the legislature to attempt to make rules as to how causes shall be brought and trials in courts conducted. Well, if it is a usurpation, it is a usurpation that long established custom and practice have sanctioned, for every state in the Union has legislated on the subject. Not only that, but the Congress has again and again legislated on the subject and, as I said, it seems to be thoroughly settled in our system that any rule of court contrary to a statute is void, indicating plainly that the power to prescribe rules of practice and procedure is reposed in the legislature and not in the courts.

But all must concede that the power goes no farther than that the courts may prescribe rules governing the procedure in the particular courts. The inherent power of the court goes no farther than to prescribe rules to be observed before it. The advocates of the departure must find authority in the Supreme Court, not for rules prescribing the practice before that tribunal, but before other courts, the inferior courts of the United States. It is said that such power comes from the fact that the Court of King's Bench had power to make rules governing the procedure and practice in the inferior courts of England. Such is the argument of Dean Pound in an article in a late number of the American Bar Association magazine. But the Court of King's Bench was a court of general jurisdiction. The Supreme Court of the United States is a court of limited jurisdiction, having by express provision of the constitution appellate powers only, except in cases involving ambassadors and other public ministers and consuls and those to which a state may be a party. It was so adjudicated in the famous Marbury v. Madison case, as you all know.

Now the Court of King's Bench is not only a court of general jurisdiction, but originally the only court in England. After the Parliament authorized the closing of the subordinate Court of Common Pleas and Exchequer, the Court acquired under an act of Parliament the power to govern subordinate tribunals, so they have supervisory jurisdiction. So by the constitutions of many of the states, as in my own state, the Supreme Court is

granted express supervisory jurisdiction over all inferior courts, and if they proceed in any way contrary to law and they cannot be reached by the ordinary writ of mandamus, certiorari, or prohibition, then the court will issue a writ of supervisory control, controlling the action of the lower court; but the United States Supreme Court has no such power. I think that in 13 of the States of the United States there is supervisory power in the Supreme Court. When they sought to establish this system in England no one contended that the Court of the King's Bench had inherent or implied power to regulate the practice in other courts, but the power was delegated to it to prescribe rules of practice in inferior courts. So here if the power is inherent in the Supreme Court you don't need legislation from Congress to prescribe the rules. The very fact that they come to Congress for such legislation indicates that the Supreme Court does not have the power without a grant from Congress and Congress cannot delegate power reposed in it by the constitution.

Now I have advanced this question of the constitutionality of the legislation asked rather as an interesting subject for academic consideration than as a basis for my objections to the legislation. I am opposed to it because I believe it is called for by no necessity whatever; that it is a perfectly michievous proposition entirely unsuited — however fit it may be for conditions in Great Britain—entirely unsuited to a vast country that stretches from Maine to California.

Now I desire to address myself to some of the attempts that have been made to gain support for this measure, or rather to discredit opposition to it, some of which to my mind are scarcely to be looked upon with favor, if, indeed, they are not open to reprehension.

I spoke about the propaganda of getting resolutions passed by Bar Associations and other organizations of that kind in favor of this resolution, instead of going before the committee of Congress and meeting the objections that are made to it, and discussing it as lawyers accustomed to debating questions before the forum called upon to determine them. But I shall refer to that presently.

Your distinguished guest, who, by the announcement of the chairman, is to address you tomorrow, has in the American Bar Association Journal of September, 1926, a very interesting article on the Rule-Making Power of the Courts, in which he argues with very much force, in his great learning, that the present system by which rules of practice are prescribed by legislatures is a usurpation, and that legislatures should desist from that course

and allow the rules to be prescribed by the courts, and then he passes to the particular question of the power of the Supreme Court of the United States to prescribe rules for the institution and trial of action in the District Courts of the United States, which he justifies upon the ground that the power is exercised by the Court of King's Bench of Great Britain, and then that jurist or writer continues: "The most vigorous attack on revival of the rule-making power is to be found in a recent address of Senator Walsh before the Bar Associations of Texas, Louisiana and Arkansas. He feels strongly that the proposal to govern procedure by rules of court rather than by statute is a menace of our institutions, and will lead to widespread and injurious confusion. But underlying his whole argument is a fallacious assumption that rules of court will substitute one elaborate, detailed, rigid, hard and fast code for another. Apparently he cannot conceive of procedure except as an elaborate, detailed system of more or less arbitrary precepts. Thinking of it thus, he holds rightly that it is better to keep the arbitrary system we have than to replace it by another that we shall have to learn. But all experience shows that while statutory procedure runs to details, becomes elaborate and overgrown, and is of necessity rigid and unyielding, procedure prescribed by rules of court tend continually to become simple, adapted to its purposes and adaptable by the simple process of judicial amendment to new situations and need of practice. If one doubt this let him compare any set of court rules with even the best of the codes of procedure. If new legislative codes and practice acts, of the sort familiar since 1847, were proposed, the things which Senator Walsh fears might well give us pause. But when he opposes regulation of procedure by rules of court, he invites these very things. For as things are now, legislative codes of procedure are the only resource of our lawmakers in a time when more effective judicial administration is urgently demanded. I deprecate new codes as much as he does. Hence I look with confidence to the tried alternative of return to the common-law powers of our Courts."

I will re-read: "The most vigorous attack on revival of the rule-making power is to be found in a recent address of Senator Walsh before the Bar Associations of Texas, Louisiana and Arkansas, etc." I find it very difficult to conceive how my attitude expressed very carefully as it was in the address, which must have been before the writer, could have been misunderstood. I have never complained, and have not tonight, about a practice system founded upon rules of court rather than on statutes; that is not what I am complaining about. If the Bar of the State of North Dakota believes that it can secure a better system of

practice through rules established by the Supreme Court of the State than it can by the legislative system then I say go to it. That is not what I am complaining about. What I am complaining about is the endeavor to force on the whole country a hard and fast set of rules throughout this broad land and however opposed the attorneys of the particular state may be to them or how contrary they may run to their idea. I say if the people and the Bar of the State of North Dakota desire to have their rules prescribed by the Supreme Court rather than by the legislature, I have no objection, but I warn you that you must not look for the splendid results which the proponents of the system say will result if such a system becomes effective. If the system under which rules are prescribed by the Supreme Court rather than the legislature is so superior, why is it that this system has not been adopted by the various states? I have been told that there are eight States in the Union in which the system prevails, the rules being prescribed by the Supreme Court rather than by the legislature. I do not know which they are, except that I know the system prevails in New Hampshire and you can scarcely tell the difference between the rules in New Hampshire and the Code of New York covering the same ground. If questions arise under statutes enacted by legislatures why will not the same questions arise under rules prescribed by the Supreme Court? I have not heard it said that justice is administered with greater dispatch in the State of New Hampshire than it is in the State of Massachusetts. I undertake to say that the Bar of the State of New Hampshire woudn't say their system brings more speedy results than in the State of Massachusetts or Connecticut, for instance. But that is not the question. The learned Dean entirely misconceives the nature of my objection to the measure, which is the prescribing of hard and fast rules for every state regardless of what their history and traditions may be.

There is another thing here to which I feel compelled to advert. I have been the subject of some little notice in the proceedings of the American Bar Association because of my opposition. The papers in the summer of 1926, when the Association was in session in Denver, carried the information that I was the subject of a good, brown roast by it. I was not present at the meeting but I wrote a letter to the editor of the Journal of the Association giving the history of the measure so favored by it as heretofore recited, the letter bringing from the editor the following comment:

"This is not the place to discuss the report to which Senator Walsh refers as 'unanswered.' The positions contended for by the Senator have been answered time and again in the reports

of the Committee on Uniform Judicial Procedure and elsewhere. See Annual Reports of the Association for 1923, 1924 and 1925.

"The fundamental point at issue is, who shall lay down the rules for methods by which the Judicial Department shall perform its independent functions? Shall these rules be imposed upon the Judicial Department by the Legislative Department or shall they be established by the Judicial Department through the promulgation of rules of court?"

Nothing said by me in the various addresses I have made on the subject justifies such a statement of my position, but I call attention to the fact that reference is made to the reports of the Committee for 1923, 1924 and 1925, as affording an answer to the argument I have addressed to you. I have made excerpts from some of the reports.

I read from the report of 1923:

"Senator Walsh expressed himself as being opposed to it for reasons hereinafter named. A majority of the Judiciary Committee and a majority of the Senators are in favor of it."

That was in 1923. It was rejected in 1916 by a majority of one and it again came to a vote in 1925 while the Bar Association and public have been told that a majority of the Senators were in favor of it. It was rejected in 1916 by a vote of nine to eight, Senators Gulberson, Chilton, Fletcher, Reed, Ashurst, Shields, Walsh, Smith (Ga.) and Cummins voting against the bill. In 1925 when it was said a majority favored the bill, Senators Borah, Sterling, Reed, Ashurst, Shields, Walsh, Stanley and Caraway, eight, voted against it and the following voted for it, Senators Ernst, Shortridge, Spencer, Butler, Means and Cummins, six. Senator Norris did not vote and Senator Overman was present but did not vote.

I continue:

"It is this personal influence, that is powerful enough to suppress the report."

That was the charge made against me, that by some parliamentary machinations or occult influence which I was able to assert on my associates on the Judiciary Committee I was able to suppress the report in that committee. At that very time another report was out. It was reported adversely in 1925, and in 1926 just before this statement was made it was reported out a third time; that time favorably, to which I shall refer later.

I continue: "It is this personal influence, that is powerful enough to suppress the report, to which it is desired to draw attention. The earnest and sustained efforts of your committee, supported by the most influential, industrial and commercial organizations, as well as lawyers and judges of weighty reputation, proved unavailing. Many State Bar Associations in formal resolutions requested the committee to report. . . . The way to bring about the passage of the bill is to impress upon the Senate that the judges and lawyers as well as commerce are entitled to and expect a report regardless of the personal wishes of a few influential Senators. . . . At the last session of Congress Senator Kellogg introduced the bill. A hearing was had on February 20, 1922, as heretofore reported, before a subcommittee composed of Senator Ernst, chairman, and Senators Cummins, Shortridge, Shields and Ashurst. There were also present Senators Colt, Overman and Spencer, who favored the bill, and Thomas J. Walsh of Montana, who opposed it because of the inconvenience a change in pleadings and procedure would cause to lawyers. The bill was suppressed in the sub-committee, although a majority of the whole committee favored it. . . . Both Senate and House favor it by a large majority. Both Senators Overman and Culberson, the senior minority members, have been patrons of the bill."

I call your attention to the fact that Senator Culberson voted against the bill, Senator Overman not voting. On January 5, 1925, Senator Overman being present when the vote was taken did not vote at all; both Senators Overman and Culberson were presented as being patrons of the bill.

"A majority of the Senators and Members of the House favor the measure and have frankly so expressed themselves. They have promised to give immediate attention when a report is made by the Judiciary Committee. But they further express themselves as helpless so long as the Judiciary Committee keeps the bill from the floor of the Senate, otherwise it would have been passed regardless of a certain individual opposition that has always been and always will be opposed to it. . . . While objections are rare, it will serve a useful purpose to make reply to the few offered in the Senate to the Bar Association's program. They seem to revolve around the political fear of inconveniencing lawyers, instead of facilitating the administration of justice and benefiting litigants. One objection was to any change in the federal or state practice at all because some lawyers might be inconvenienced in having to learn a new system."

That is the total of the answer that was made to the report of 1916, which I prepared and in a general line with what I have been talking to you tonight about.

"The second objection was that the small practitioner and the country lawyer could not afford to learn the new system for the few cases he would command. This connotes a spirit of selfishness and lack of patriotism unjust to the lawyers of small practice, who have always stood for the best in American life and its advancement because they had the time as well as the disposition to give thought to purely public matters."

In 1924, 1925 and 1926 the same statement in substance was reported, and then occurs this expression: "There ought to be some way of overcoming a personal legislative influence of a character that can defeat a majority, the public will and the administration of justice by smothering bills in committee.

"Many State Bar Associations in formal resolutions requested the committee to report. A copy of the resolution adopted by the Bar Associations of Illinois, Virginia and Pennsylvania will be found as an appendix to this report. The State Bar Associations of California, Georgia, Arkansas, Indiana, Louisiana, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Washington, Wisconsin and Wyoming also adopted it in substantially the same form. Forty-five State Bar Associations have endorsed the program. The way to bring about the passage of the bill is to impress upon the Senate that the judges and lawyers as well as commerce are entitled to and expect a report regardless of the personal wishes of a few influential Senators. It is difficult to believe that the request will not be respected if the right of petition and the theory of representative democracy still exists in the American government."

In 1925 the statement is in substance repeated and we have here two Senators known as being patrons of the bill who did not vote for it.

In 1926 it came up, (it was never smothered in the committee) with the following result: For the bill Senators Cummins, Overman, Neely, Goff, Harreld, Deneed, Means, Ernst, and against the bill Senators Walsh, Ashurst, Caraway, King, Reed and Borah.

So far from the bill being repressed in the committee it was actually reported out favorably in the month of June, 1926, and

it remained on the calendar all of 1926 without any member of the Senate being sufficiently interested to call it up and have it acted upon, and yet it is said in another statement, that I have here, that something like ninety Senators are in favor of the measure. The vote on this last bill includes Cummins, who voted against it in 1916. It includes Senators Overman, Neely and Harreld, who expressed themselves to the effect that they voted with mental reservations for the measure; that they saw no merit in it, but felt obligated to vote for it because the probabilities are the same thing will occur again, and the bill will go on the calendar of the Senate and when the committee reports there will not be a half dozen in the Senate to listen. They will simply ask how the committee reported on this.

Now I have taken another way of finding out just how the Judiciary stands on the matter. Instead of getting resolutions passed by Chambers of Commerce, Credit Men's Associations, etc., I sent a copy of the address I made at the Tri-State Bar Association at Texarkana to the Chief Justice and each of the Associate Justices of the Supreme Court and every Circuit and District Judge in the United States, asking them, after reading my views about the matter, to give an expression of their attitude concerning the bill. I did not get a letter from all of the Justices of the Supreme Court. The Chief Justice promptly and courteously wrote me he had been ill, and that as soon as he was able to do it he would look the matter over and write me; but I did not get any further communication from him. So likewise no reply came from Justice Sanford. All the other gentlemen replied. I suppose that if to any audience in this section of the country the question was propounded "who are the two most liberal-minded members of the Supreme Court," the answer would come promptly, "Justice Brandeis and Justice Holmes." I read the letter of Mr. Justice Brandeis:

(*Personal*)

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

May 14, 1926.

My dear Senator:

Replying to yours of today, I am unreservedly against the

measure. Ten years ago—before my experience on the Court, I thought otherwise.

I shall be glad to talk with you at your convenience.

Cordially,
(*Signed*)
LOUIS D. BRANDEIS.

Senator Thomas J. Walsh.

Here is the letter of Mr. Justice Holmes:

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

May 22, 1926.

My dear Senator:

In answer to your letter and speech with regard to authorizing the Supreme Court to make rules concerning practice and procedure, I must say that I have not been able to convince myself that it is desirable to make the attempt. Even assuming that it is limited so as to conclude some larger fields such as the statute of limitations, I see the objections much more clearly than I see the possible, I hesitate to say probable, advantage.

Very sincerely yours,
(*Signed*)
O. W. HOLMES.

Honorable Thomas J. Walsh.

The judges who answered numbered in all 46. Twenty-seven declared themselves unqualifiedly against the change; 19 were in favor of the change. That includes the Judge of this District, as my recollection serves me, Judge Miller. I want to read to you the letter from the Judge of the District Court at Norfolk, Va., the home of Mr. Shelton, the public advocate of the bill.

JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT
NORFOLK, VA.

May 12, 1926.

Hon. Thomas J. Walsh,
United States Senate,
Washington, D. C.

My dear Senator Walsh:

I have your letter of the 14th.

I know of no demand (with one or two exceptions) on the part of the Virginia lawyers who practice in the Federal Courts

for the passage of the so-called Procedural Bill. Personally I should regret to see it pass.

Yours very truly,
(*Signed*)
D. LAWRENCE GROVER.

I want to read another letter to you from the Judge of the District Court of the Southern District of Illinois:

Chambers of
JUDGE LOUIS FITZ HENRY
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BLOOMINGTON, ILLINOIS

May 22, 1926.

My dear Senator:

Your recent note, enclosing copy of your letter to the Chief Justice and a copy of the bill to give the Supreme Court of the United States authority to make and publish rules in common law actions (S477), received.

When I was in the House, I felt disposed to advocate the passage of just such a bill, and appreciate the fact that it would be very advantageous in many respects to have a system of rules governing common law actions in the United States Courts. My experience on the bench has had the effect of mellowing my former ambition in this regard.

In the very populous centers, where there are many Federal practitioners, it might be desirable to have a distinctive system of common law pleading, but in the less populous districts, where the practitioner only comes into the Federal Court occasionally, it would add increased confusion.

It is amazing how helpless many of the leading practitioners in the State Courts find themselves when appearing in a Federal Court in equity cases, due to their lack of familiarity with the equity rules. If a new system of common law pleading were devised, it would result in confusion further confounded.

If you have an extra copy of your Texarkana speech, I will appreciate it very much if you will send me one.

Very respectfully,
(*Signed*)
LOUIS FITZ HENRY.

Hon. Thomas J. Walsh,
United States Senate,
Washington, D. C.

I take occasion to say that members of the Bar of the State of North Dakota have had the same experience. When I was engaged in the practice of law it was not an uncommon thing for lawyers from the country towns to come in and engage me to assist them in equity cases in Federal Court, lawyers of skill and ability who were entirely unfamiliar with the practice in equity court and who were not willing to tackle the matter under the rules in equity that they extol as being so simple that no one can go awry, and I undertake to say that if the bill becomes a law, effect of it will be that the practice in Federal Court in actions at law, as it has always been in action in equity, will become a special charge and will be controlled by a few at the head of the profession.

PRESIDENT MCINTYRE: Senator, it is needless for me to say that we appreciate this message from you and we thank you for presenting a subject in which we, as lawyers, are vitally interested. I wish to thank you on behalf of the Association.

What is your pleasure, gnetlemen?

MR. BANGS: At this time I want to move that Senator Walsh be made an honorary member of this Association.

MR. WINEMAN: I second the motion.

MR. PRESIDENT: Are there any remarks? If not, those in favor of the motion will signify by saying "aye." Those opposed. (None.) I have the honor, Senator, to greet you as a member in good standing of the North Dakota Bar Association.

SENATOR WALSH: I am sure I appreciate the honor.

SESSION OF SEPTEMBER 7TH, 1927, 9:30 A. M.

PRESIDENT: You will please come to order. The hour for convening has passed and we must resume the work if we are going to finish. Please rise and the invocation will be asked by Rev. Chas. H. Collett of St. Paul's Episcopal Church of this city.

REV. COLLETT: Let the work that is being done here be in the presence of God. We are about God's business.

Almighty God, who hast created man in Thine own image; grant to us grace to contend fearlessly with evil, and to make no peace with oppression; and, that we may reverently use our freedom, help us to employ it in the maintenance of justice among men and among nations.

And we pray Thee, O Father, to grant and to continue to us a succession of lawyers, legislators and leaders who have been

taught the wisdom of Thy Kingdom. Endow the President and members of Congress, state and city legislators, courts and lawyers, with a right understanding, a pure purpose and sound speech; enable them to rise above self-seeking and partisan zeal into the larger sentiments of public good and human brotherhood. Purge our political and legal life of all evil. Inspire us with self-restraint and calmness, and with the endeavor to get Thy will done upon earth. Amen.

PRESIDENT: I think that instead of beginning where we left off last night—there is not a sufficient number present to take up that matter of the amendment to the Constitution, we would not have a legal vote if it requires two-thirds of those registered. As there are 121 registered it would require a vote of 81—

MR. WENZEL: A hundred and ten are registered.

PRESIDENT: That would require 65 or 70 affirmative votes—I think we will finish up the committee reports that we did not take up yesterday and I will ask the Secretary to read the report of the Committee on Law Enforcement. Mr. Iver Acker, chairman of the Committee on Law Enforcement is in the hospital. Last evening we looked up our correspondence and we find a letter was received from him last Saturday or Sunday and that he is yet at Rochester and the Secretary will read the report.

REPORT OF COMMITTEE ON LAW ENFORCEMENT

On account of the apparent increase in crime, a demand for more effective law enforcement has been voiced throughout the nation. Articles have been published in the leading magazines concerning the problem of curbing the activities of criminals. Laws modeled on the Baumes Law of New York have been enacted in a number of States, including North Dakota, to segregate the habitual criminal. There seems to be a unanimity of opinion everywhere that crime has increased, and various causes have been assigned as the reasons therefor. The abandonment of the simple life and the demand for luxuries among even the humblest of our citizens, is undoubtedly the main reason for the increase in crime.

True it is, that the desire for pleasure has become the main theme in the lives of many people. In this age of syncopated music, suggestive moving pictures and automotive vehicles, the minds of old and young are often diverted from things worth while. Old and young are pleasure bent. Undoubtedly crimes are committed to buy automobiles and to pay for entertainments which everyone now demands. A loose, cynical view of morality

seems to obtain in all walks of life. It even seems that it is no longer considered a shame or disgrace to be sent to jail or to the penitentiary.

It must be the aim of our public schools to teach the fundamental virtues of honesty and morality cherished by our forefathers. It has been estimated that there are twenty-five million children in the United States of school age, who receive no religious training in parochial schools or Sunday schools. The teaching of Christianity, morality, right living and right thinking, is required to mold and build character, and to develop a conscience. Parental responsibility has, to a large extent, broken down. Many parents seem to think that it is the duty of police officers to guard the morals of their children, and that they have no responsibility in the matter.

It has been suggested by a member of the committee, that our people are insufficiently interested in the affairs of the government; that many fail to understand even the most fundamental principles of government, and he suggests that public meetings should be held at least once a year in every hamlet and village, and in every school house, for a general discussion of duties of citizenship. Unless public sentiment actively favors law enforcement, lawlessness will prevail. This is especially true in the enforcement of sumptuary and moral laws, such for example, the prohibition law. As long as the public is indifferent, the bootlegger is difficult to apprehend, no matter how zealous and conscientious the officers may be to enforce the prohibition law.

Prior to the adoption of the 18th Amendment to our National Constitution, a campaign for temperance and abstinence from intoxicating liquor was vigorously carried on. Young and old were taught the evils of intemperance, but as soon as the 18th Amendment had been tacked on to the Constitution, the advocates of prohibition rested on their oars. And they have been resting ever since. It seems that they believed that upon the adoption of said amendment, abstinence from the use of intoxicating liquor would follow as night the day.

The enforcement of state and national prohibition will not be effective until the people of our state and nation learn to recognize that the physical and moral welfare of the youth of our land is being jeopardized by the liquor vendor. On account of the bootlegger, and on account of the hip-pocket flask, public dances are becoming an intolerable nuisance. At public dances, boys and girls are often enticed to drink. As a State's Attorney, the chairman of your committee has often marveled at the indifference of parents towards this deplorable situation.

Your committee, therefore, recommends that in every county in North Dakota, public meetings be held in schools and churches to educate our people to the vital need of law observance.

To combat lawlessness, every effort must be made to apprehend the violator and to inflict punishment that will deter him and others from breaking the law. Certainty of apprehension, and certainty of punishment are effective preventatives of crime. Ease of escape is an inducement to crime. Here in North Dakota escape after a bank or store has been looted, is not difficult, because roads lead in four directions. The automobile has made escape comparatively easy for yeggs and other criminals who seasonly infest the state. Not many sheriffs have the necessary training to make criminal investigations, and the funds at the disposal of the state's attorney and the sheriff are usually very limited. The result is, that if a criminal is not immediately apprehended after the commission of a crime, he often entirely escapes punishment. To meet this situation, not only in North Dakota, but in every state in the union, it is necessary to create a state bureau of criminal investigation and apprehension. Minnesota has recently enacted such a law, and your committee recommends the enactment of a similar law in North Dakota.

Respectfully submitted,
I. A. ACKER,
Chairman.

PRESIDENT: With reference to the last recommendation in the report of the Law Enforcement Committee, I think that recommendation is covered in the report of the Committee on Criminal Law, of which Attorney General Shafer is chairman and it will probably come up more properly under that committee's report, as I think the Attorney General has covered that more thoroughly in his resolution. I just mention this so that the members may know that this matter will come up later. What is your pleasure with reference to the report.

MR. BANGS: I move that we accept the report and that it be placed on file.

PRESIDENT: It is moved that the report be accepted and placed on file. Is there a second to the motion?

MR. FRED TRAYNOR: I second the motion.

PRESIDENT: A motion has been made by Mr. Bangs and seconded by Fred Traynor that the report be accepted and placed on file. Are there any remarks? If not, those in favor will signify by saying "aye." Those objecting "no." The motion is carried.

Is Judge Pollock over yet. If not we will take up the report of the Committee on Internal Affairs by Mr. Fred Traynor.

REPORT OF COMMITTEE ON INTERNAL AFFAIRS

Your Committee on Internal Affairs begs leave to report as follows:

The membership of this committee is composed of the following: Fred J. Traynor, Chairman, Devils Lake, N. D.; Torger Sinness, Vice Chairman, Devils Lake, N. D.; J. J. Kehoe, Cando; John A. Stormon, Rolla; H. C. DePuy, Grafton; E. E. Fletcher, Langdon; John Knauf, Jamestown; R. C. Morton, Carrington; P. W. Lanier, Jamestown; R. J. Roberts, Lakota.

It has not, however, been convenient to have any meeting of the entire committee. It has not been found necessary to have any meeting of the full membership of the committee.

Briefly stated, the function of the committee seems to be, to consider and adjust grievances or complaints against members of the Bar.

These complaints are usually made either to the president or the secretary of the Association, or to the secretary of the State Bar Board, who, in turn, forwards them to the chairman of the Internal Affairs Committee.

Up to the time of the preparation of this report, the chairman of this committee has received complaints against nineteen members of the Bar of the State of North Dakota and since then two additional complaints against one of the nineteen. In so far as anything at all has been done regarding the same it has, as a rule, been done by the chairman of the committee. In each instance the chairman has made investigation of the complaint with a view to determining its merit and, if advisable, to effect an adjustment.

The chairman is pleased to report that of the nineteen complaints submitted to his committee none have disclosed facts sufficient to warrant submission of a complaint thereon to the State Bar Board. Most of the complaints, when investigated, have proved to be of such trivial nature as not even to justify referring the same to the other members of the committee. Most of the complaints have covered alleged failure of the attorney to account or render report upon small collection items. In so far as the actions of the attorneys complained against on these matters may be criticized at all, it is largely on the point of negligence or inattention to business, or lack of system in doing business.

In one or two cases complaint was made as to the fees charged by the attorney complained against. In the last analysis these resolved themselves into disputes between the attorney and the client as to just what the agreement was. In each instance the chairman endeavored to bring about an adjustment.

In two of the complaints the attorneys were accused of improperly handling litigation in the sense that there was too long delay and lack of results. These, however, proved to be complaints without good foundation.

The most serious complaint submitted to your committee was one referred to it by the State Bar Board. The State Bar Board itself had investigated the complaint and taken a very considerable amount of testimony thereon, and had recommended disbarment proceedings. Disbarment proceedings were in fact instituted, but the judge before whom it was tried made findings and conclusions exonerating the accused. The Bar Board then appealed to the Supreme Court but the Supreme Court failed to disbar, and referred the matter to the Federal Court, feeling that it was a matter that should have that court's attention. The Bar Board then submitted the record to this committee, with the suggestion that the State Bar Association should devise some form of discipline which might be effective and which would at least establish a precedent. The matter just above referred to was, by your chairman, referred to the Honorable John Knauf and the Honorable P. W. Lanier, members of this committee, for consideration. After a study of the record, they advised that it would be unwise to make or even attempt any further proceedings in regard to the present charges. Your chairman concurred in this disposition of the matter and no further action was taken thereon.

Manifestly it would be improper to mention any names of those complained against. Likewise it would be improper to specify the details of each complaint with any degree of particularity which might in any way identify the party complained against. Should any member of this Association desire definite information as to any one of the nineteen complaints referred to, he may obtain such information from the chairman of this committee. Should the members of the State Bar Board wish to present to this Association for its action the matter which this committee declined to take action upon, or should any other members desire to discuss any of the complaints herein referred to, we suggest that the same be done in executive sessions.

Respectfully submitted,
FRED J. TRAYNOR,
Chairman.

PRESIDENT: Are there any recommendations of any kind, Fred, to the Association?

MR. TRAYNOR: I had not thought to make any recommendations except that I think the chairman of this committee should be furnished with stationery of the Association and postage. I think they should take care of the postage because there is a considerable amount of correspondence in connection with it and I think it only fair to the chairman of the committee that he be furnished with at least that, and it will give more dignity to that correspondence.

PRESIDENT: I want to say of Mr. Traynor's committee that it is one committee that requires more work than most of you realize. I didn't realize until this past year the amount of correspondence that come to me as President, which I referred to Mr. Traynor's committee, and I thought I knew something about human nature. I got a few sidelights on some of the complaints. One chap came all the way from Minneapolis to see me and talk over what he thought was a legitimate complaint against an attorney. After talking with him I think I convinced him that he had no cause for complaint. It was simply a question of a matter of fees and a legitimate dispute, and I pointed out to him that he had a legal remedy. You have heard the report. What is your pleasure with reference to it?

MR. BENSON: I move the adoption of the report.

MR. DEVANEY: I second the motion.

PRESIDENT: You have heard the motion; are there remarks? If not, those in favor will signify by saying "aye." (Aye.) Those opposed "no." The motion is carried.

Mr. Campbell, we will take up your report.

MR. CAMPBELL: Members of the Bar Association: At the outset I want to call attention to the fact that as a chairman of a Bar Association Committee I am a novice. This is my first experience in that respect, and I started with the committee and this work full of interest. I had no conception what the business of a chairman of a committee was and what the position or duty of the chairman was. I want to give you some of my experiences. First I talked with the members of the committee on Uniform State Laws expecting them to be enthusiastic in the matter, and work with me, feeling that with the support of that committee the chairman could accomplish considerable. I called two or three meetings. They failed to meet and so when the demand came from your secretary for a report I asked for

a meeting with reference to preparing that report, but I had to prepare one myself, to tell the truth. I came to feel about a Bar Association committee like—your have heard the story about the man who was aroused from his reflections by hearing a dog howl and howl. Deciding to find out what was the matter with the pup he finally located the dog's owner. The dog continued to howl and howl, and he asked the owner what was the matter with the dog. "Oh," said the owner, "simply laziness." "Well," said the man, "who ever heard of laziness making a dog howl." "Oh," said the owner, "you don't understand; that dog is sitting on a sand burr." I have been unable to get the sand burr from under that committee. Whether you can make it work, I don't know.

Another experience I had. After I had prepared the report I really thought it was a work of art. I appreciated myself considerably. I sent a copy to all the members of the committee and asked for their suggestions and approval and two members said "first class." They heartily agreed with everything in it. Some of the others freely confessed that they never looked at it. I sent it to Secretary Wenzel and the next thing I knew a portion of it was printed in Bar Briefs by our Secretary and in commenting on it he said it is "an extended report to which justice cannot be done in the limited space at our disposal." So I came to the conclusion that really the desire was not an extended report so I refrain from reading to you that jewel of mine; that magnificent report, and made up my mind just to talk to you.

Another experience I had as chairman. First I went to see a former chairman and he said to me, when talking over this matter, he said, "Campbell, don't you know what a chairman is? If a chairman wants anything done he has got to do it himself," and so I came to a full appreciation of the work of a chairman of a Bar Association committee. I can realize how, after coming to attend the Bar Association meetings, members feel themselves in general converted to the matter of the work of the Bar Association. They come away with enthusiasm and a worthy inspiration of what could be accomplished. As chairman I had those magnificent ideals in mind, but since my experience I will say that I am a sadder but wiser man.

Mr. Thorpe comes in and makes a recommendation to your Bar Association that the membership of the committees be reduced so that the chairman won't have to be accused of discourtesy because he does not confer with all of them, and goes on and tries to do something when they will not confer with him.

Another thing that I found in connection with my work was that perhaps I didn't know my place in this uniform law work.

There were a number of committees and there were the members of the conference on uniform laws. They were working under instructions from the chairman of the Legislative committee. I was to be chairman of the State Bar Committee on Uniform Laws and I found they were to have a meeting of the Legislative Committee and I felt that if I called a meeting that perhaps I might be accused of overstepping the bounds and that perhaps that should be left as a matter of courtesy to somebody else and that it was better to let him call that meeting.

Now, gentlemen, I hardly think it is necessary for me to call your attention to the fact that there seem to be two things that the American Bar Association and legal fraternity as a whole regard above all others; that is two movements, one is this uniform state law movement, thirty-five or so years old, a child of the American Bar Association, and the other is the restatement of the law. There is a demand for uniformity of law and I don't need to enter into any contest with Senator Walsh's address of last night because the matter he was discussing was the matter of uniform procedure rather than uniformity of substantive law. You know that we are working constantly to maintain our institutions; to maintain our fundamentals. We recognize the fact that the theory upon which the American Government was founded is the greatest and best the world has ever known. We want to maintain and preserve it intact and send it on to the future. You recognize the fact that we may call this nation a dual nation in a sense. Let me read to you the statement of Justice Brewer of the Supreme Court to give you some conception:

"We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the state can interfere therewith, and there are others in which the state is supreme and in respect to them, the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently in this duty oftentimes of great delicacy and difficulty."

With that conception let me quote to you what President Coolidge has to say:

"If we are to maintain the nation and its government institutions with a fair semblance of the principles on which they are founded, two policies must be supported. First, the principle of

local self-government in harmony with the needs of each state. This means that in general the states should not surrender, but retain their sovereignty and keep control of their own government. Second, a policy of local reflections of nation-wide opinion."

Now, turning to the complaint of Senator Long, former president of the American Bar Association, he says this:

"That even balance has been very much disturbed in recent years and there is a disposition to disturb it still more, a disposition instead of having forty-eight states and a National Government to have a National Government and forty-eight provinces. This dual form of government, so described by Justice Brewer, is being gradually modified, and attempted to be modified by a number of amendments that have been offered."

In my opinion, local self-government is imperiled, not only by reason of these amendments that are proposed, but by reason of something that is going on without any amendment, that is concentrating power in Washington and taking it from the states.

Referring to the same thing, Senator Borah says:

"The right, the authority of the people, to manage and control their own affairs of an immediate and local nature, affairs peculiar to the community or the state, is a right beyond all price. There is nothing for which the people can afford to exchange it. It is the only real democratic principle found in our entire structure of government. It means more to the happiness, to the dignity and power of those Lincoln lovingly styled "the common people" than any other right or privilege they are permitted to enjoy. Destroy it and the average citizen becomes the victim of bureaucratic interference, tortured with the persistent leering upon the affairs of his daily life and burdened and exploited by its chronic inefficiency and habitual waste. If there ever was a real struggle for popular rule, for the preservation of the popular voice in politics and governmental affairs, it is involved in this effort to reserve and preserve for the people back home the right to control and administer their own local affairs in accordance with local wisdom and local conditions."

Now, gentlemen, the first thing that we need to know in connection with the work of the Uniform Law committee, is that we really desire uniformity and in what respect we desire it. You will realize that if local self-government is not maintained the power so to do will atrophy. You who are seated around, in this community and elsewhere, ask the voters to have an interest in the government and ask them to get out and vote. Now, in order to maintain this you realize you have got to keep them

interested in government and they must know something about the government and you have got to maintain the local self government, you can't allow those things to go to Washington or else the voter will vote less and less. So the first question is, do we want to maintain the dual theory; if we do, we must stand for the rights of the states and local government in affairs belonging to it.

I take it for granted that these things are generally conceded. We desire to maintain our Constitutional form of government. We desire to continue this government in its dual form, National (Federal) and Local (State). We desire each to function to the full extent in its proper and appropriate sphere. We desire to maintain the principle of local self government and not permit the power and ability to exercise the functions of local self-government to atrophy through lack of exercise. That uniformity of law as between the various states in respect to those things wherein the citizens of the various states come in contact is not only desirable but absolutely necessary. The uniform state law movement is the child of the American Bar Association. All of the states including our own are participating in the conference of commissioners on uniform state laws. That this Association and its members are behind and supporting the movement must be conceded, from the fact that this Association has appointed a committee on uniform state laws. At this point would arise the questions which I desire to bring to the attention of this Association. Proposed uniform state laws are presented by the National Conference of Commissioners and approved by the American Bar Association. Are we to assume therefore as your committee that this selection, preparation and approval is conclusive as respects this Association and its committee, both as respects desire and necessity of uniformity with reference to a particular subject and as respects the nature, form and contents of the particular act. Should we answer this in the affirmative, then it is the duty and work of your committee to proceed with an effort to have each and every one of these acts adopted in the State of North Dakota and made part of our law. In view of the fact that we are somewhat behind in the adoption of the acts it is an enormous work.

Should we answer this question in the negative and conclude that the question of desirability and necessity of uniformity with reference to any particular subject, and the form and content of the legislative action is to be determined by us locally, then it should readily appear to you that selection of the particular subject upon which uniformity is desired and approval of the form of legislation in North Dakota is to be determined by somebody.

As chairman of your Committee on Uniform State Laws I therefore propound this inquiry: Is it your desire that this committee, a small percentage of this body, upon its own judgment select the subject upon which we desire uniformity of legislation and form and control of legislation; or is it your desire that the Association functioning as a whole determine these matters; first, desirability and necessity of uniformity on any particular subject; second, form and content of legislative act for enactment. These matters should be determined. If your Association should determine that we accept the judgment of the Conference of Commissioners and the American Bar Association, then your committee's work would be outlined as an effort to procure enactment of legislation on each and all proposed uniform laws. Should you determine that uniformity is desirable on some but not on all; then a means and method of obtaining this selection from your Association must be provided.

In the absence of your decision as an Association involving the selection of the particular acts; then selection must be made by some other body. Perhaps your committee. This would appear to be rather a heavy responsibility to entrust to such a limited number, but such may be your intent. We will have another meeting of the Association before the next regular legislative session and your chairman feels that these matters should be decided by the Association. In view of your action with reference to the report from the Committee on Public Utilities, your Committee on Uniform State Laws feels that you have at least evidenced the desire for uniform legislation in the form of a Uniform Public Utilities Act. I call your attention to the fact that there is not always a consensus of opinion among the members of this Association either as to the desire or the necessity for uniformity with reference to any particular subject or the form of legislation; and since the meeting of your Association last August, it seems to be the thought of your committee that in its report at the coming session, a year in which no legislature meets, to present to you for determination the question of subjects as to which uniformity is desired on your part and then at the following legislative session to proceed with its efforts for the enactment of such uniform laws. This effort to secure uniform state laws is a work in which cooperation and assistance of every member of this Association is required. The value and importance must be brought to the attention of the members of the legislature and to the public, and this can only be done through the membership scattered throughout the state; and in the preparation of the acts with regard to form and content, cooperation together with the counsel and advice of the various and sundry interests to be effected by such legislation should be secured.

REPORT OF COMMITTEE ON UNIFORM STATE LAWS

Your committee can report some work and effort, but little in the form of accomplishment for which it claims credit. The committee feels that the purpose and work of the National Conference of Commissioners on Uniform State Laws is really of more consequence and importance than most of us realize. We doubt if the members of our profession, our legislature, public officials and citizens appreciate the necessity of uniformity of law throughout these United States in matters wherein the several states and their inhabitants come in contact. If we would avoid that which in the eyes of many are the dangers of centralized power and authority and the recognized trend in that direction; and avoid government by boards, commissions, and similar agencies in those matters in which we are capable of and should have the right of local self government; and if we are to continue the active participation and interest of the governed at its highest point of effectiveness, local self government "consent of governed" must be continued. If we would maintain and continue here our dual system of a strong Federal Government combined with local self government, one of our very fundamentals, we must give more attention to the essential of uniformity, the purpose and work of the National Conference and to the means of securing in those matters wherein it is desirable, uniformity of law as between the states.

That there is this lack of interest and lack of familiarity with this effort for uniformity is apparent to your committee. Except here and there, with reference to particular matters your committee finds that the incentive necessary to the sacrifice and work of accomplishment even among members of your committee is lacking. We feel, as a result of our efforts, that we must find some means of arousing interest and getting behind this effort some agency, as to whom the necessary effort is not a complete sacrifice. It would seem apparent that we cannot dump all of these proposed acts in the form as prepared by the National Conference at one time and without regard to our existing state of law on the various subjects, and the effect of these acts upon the same, and ask their enactment. It would no doubt be too much to ask your Committee on Legislation to study and consider all of these proposed acts in the light of existing law with a view to harmonizing the acts therewith, to redraw them and put them in a form for enactment and present them to the Legislature for passage. This would appear to be necessary. One or even two members of our committee, and perhaps the whole, would hesitate as representatives of this body to select one or two, less

than all of these acts, determine changes necessary to harmonize and fit them in with our existing body of laws and present them to the Legislature for adoption. Such conduct would require a considerable conceit and egotism on the part of any one individual, and it is conceded your chairman, who we understand is deemed responsible for the accomplishment of a Bar Association Committee or its lack, has an ample amount of both.

We must arouse interest of our members and the public. With a view to arousing such interest we wish to remind this body and its members that the National Conference of Committeemen meets annually. They have a handbook and report of their proceedings printed and as far as their finances will permit are glad to place in the hands of any that are interested these reports; printed forms of any of their proposed uniform acts; and with reference to many of the acts pamphlets setting forth reasons for enactment, advantages from adoption, etc. Your committee has secured a small number of the printed copies of each of the proposed acts and some of the literature mentioned, and will gladly furnish members or others interested therewith.

Your committee desired to call attention to the organization of the National Conference and North Dakota's present relation thereto. This, we feel, is an item that should be corrected. The commissioners are appointed from the several states by authority of the legislature or in the absence of such by the executive authority; and in the case of the failure of each by the President of the Bar Association. There are usually three commissioners. In North Dakota up to the present time we have no legislative authority with reference to their appointment. The commissioners have heretofore been appointed by the Governor. As a result, their work, their time and even their actual expenses have been and must be met by the Commissioners themselves. One of the first proposed acts desired is the legislative authority for the appointment of the Commissioners, with provision at least for payment of their expenses, and if possible some allowance for their time and work, a very considerable amount of which is contemplated and required, if the work is to be carried on successfully. Your committee recommends that an effort be made, in which all of the various uniform law agencies and their representatives in this state cooperate, at the next session of t' Legislature to secure an act for the appointment of North Dakota Commissioners and with it some appropriation or provision to meet at least their expenses.

Your committee was desirous of securing, and spent some effort in an attempt to have presented and enacted in the last session, legislative authority for the appointment of Commission-

ers and provision for their expenses, etc. The effort consisted mostly in correspondence, suggesting submission and enactment of such act; but the same was neither proposed or adopted. Responses evidenced misconstruction of its effort as one to reimburse former Commissioners for past services, not approved; conceding, however, the necessity of provision for meeting of future expenses of the Commissioners. Former President C. L. Young very appropriately remarks: "The State should be well represented at these conferences and it cannot be expected that year after year appointees will defray their expenses out of their own pockets." And, by the way, attendance is not all that is required of these Commissioners; approved acts must be put into form of proposed bills for presentation to and presented to the Legislature. As hereinafter they must be harmonized and fitted into our system, and then followed through to passage and approval. One of the Commissioners writes: "It will be impossible for me personally to visit the Legislature this Session or to go to any expense in going to Bismarck in connection with my duties as a member of the Commission on Uniform Laws. My reasons are these: 1. So far I have paid all of my expenses ***there having been no fund out of which the same could have been paid. No other member of the Commission appeared except myself. Had I not gone the state would have been unrepresented. You can therefore see that before the state can expect men to put in very much time and work of this kind, some provision will have to be made for the payment of expenses. I do not suppose that any attorneys who would be named for the Commission would expect to receive compensation for their services, but few men can afford to throw in their time and their expenses as well. I know I cannot. This leads me to suggest that your second proposition referred to in your letter ought to meet with a generous response by the members of the Legislature. I shall, of course, talk to the members of the Legislature of this district and shall hope that something may be done in the matter."

Perhaps we should remind you of the work of these Commissioners and their method of operation. When it is deemed advisable by the General Conference, and possibly by an authorized agency of that Conference acting between Sessions to have uniformity of legislation upon any subject, the matter is referred to a Committee of Commissioners. This committee finds it necessary to study the various laws of the various states and submit a proposed uniform act. The members of this committee have to prepare themselves by study of the situation in the various sections, familiarizing themselves with the existing law and existing conditions and prepare the proposed act, attending meet-

ings and conferences, perhaps several, of the committee therefor, undoubtedly at some considerable expense. Their proposed act is then presented at the meeting of the General Conference and if satisfactory approved. It then goes before a meeting of the American Bar Association and receives its approval. Then it comes to the Commissioners in the several states and they are presumed to put forth the effort to secure its adoption in their respective states. It would appear to your committee that if these commissioners are appointed by authority of the legislature and the state through its legislature becomes sufficiently interested in the movement to meet the expense of these Commissioners (things paid for are deemed of value) that thereby will be secured an interest which will bring about valuable cooperation on the part of our legislature and public officials.

Your committee recommends that an effort be made to secure if possible active cooperation, the united effort, of the various agencies and their members. It seems that it is becoming more and more of a habit for all of us to "pass the buck" and especially in matters wherein any incentive for personal sacrifice and labor is absent. There should be no suggested enroachment upon functions or work of one agency by another, or of one committee by another. In securing the adoption of these acts as approved it is generally considered inadvisable to dump them on the Legislature as a whole; in all 42 acts. Selection must be made and responsibility for such selection should be laid. It is deemed inadvisable without study and consideration of our existing body of statute law to present to the Legislature any of the proposed acts by merely submitting the printed form furnished by the Conference. The act must be put in shape for proposal on the floor as a bill, etc., changes, if any, in the act itself and repeals or changes, etc., in existing law, if any, in order that the same may harmonize must be determined and made. Some method must be devised therefor. This work involves necessarily some sacrifice and expense. Your committee, failing to secure meetings, made an effort to do this by correspondence and accomplished nothing. Hon. A. G. Divet, a member of this Association of very high standing and large experience in the legislative work of our state at the 1925 meeting of this Association said: "I wish everybody would get in mind this. The Legislature didn't reject those laws because of any inherent defects in them but because a careful study for five or six days developed about five or six points in which the legislation would come in conflict with other laws of the state, and no provision was made for correcting or bringing them in harmony and the only way these uniform acts can ever be brought successfully into our codifica-

tion or into our system will be when the time has come and we can have a new codification and then the whole system of the law can be arranged in such a way that the Uniform Acts will fit." In a letter to your committee, Mr. Divet says, "All I can say is that several times during my legislative experience Uniform Acts, meritorious in themselves, have been presented for adoption by our Legislature. Some of them have been adopted with some fear and trembling; others have been rejected because examination of them disclosed that they either came in conflict with or dangerously near being in conflict with other provisions of law that should not be repealed or the repeal of which would leave defects in existing law and that no provision was made for guarding against such dangers in connection with the adoption of the Uniform Act," and with reference to the Uniform Corporate Certificate Act he says, "The Judiciary Committee took the matter up and upon looking into the general law of the subject observed that it would necessitate five or six separate amendment bills in order to put the act in operation and not interfere with established statutory provisions, that it was not desired to interfere with. There were probably a half dozen more possibilities that were not called to our attention. There was no objection to the act itself but no one wanted to assume the responsibility of injecting it into our law without a much more careful study of the existing law than could be given it." In connection with the preparation for submission of the bill, he says: "You ask how this might be overcome except by a codification. I do not know. The only thing that occurs to me would be the employment of some experienced man, several months in advance of the legislative session, to make a study of the acts in connection with the existing laws."

Hon. C. L. Young says with reference to the statements of Mr. Divet: "I know this criticism has been made by Legislators with reference to Uniform Acts. The only solution is the suggestion made by Mr. Divet that where it is desired that Uniform Acts be given consideration in the Legislative Assembly the acts should, before the convening of the Legislature, be considered by members of that body or by some responsible group whose judgment would have prestige with the Legislature so that necessary changes in existing laws may be concurrently recommended. It is very seldom that one of these so-called acts can be engrafted in toto upon the body of our statutory laws. I think if you have any measure that you really believe vitally important you should see that it is fitted to our state before it is presented to any Legislature for introduction it might entail the introduction of other bills or it may be that statutory changes can be incor-

porated in the measure itself." Somebody must do this work and somebody must undertake and assume the initiative and responsibility for its being done. There really seems to be a thought and suggestion, discovered in our efforts, that all of this work and effort is at least to be initiated and the responsibility therefor placed upon our unremunerated Commissioners.

This will give you some idea of the amount and nature of the work that must be undertaken and done in connection with presentation of these Uniform Acts to the Legislature for enactment. Your committee believes that if there can be a coordination of these various agencies and a means by which some of the acts more desirable are selected for presentation, some individual or individuals can be secured to make this necessary study, prepare the acts, submit it to the organization, have the organization approve it and then proceed with the work necessary for its enactment with the stamp of that organization's approval.

It is the view of some of us that the difference between a section and a committee exists in the ability and power of the section to bring within its ranks, cooperating with it in the activity and undertaking, in a sense forming a separate but subordinate organization responsible to this Association, persons and agencies outside of the Association. If this view of a section is correct your committee would recommend that such be created. We take it that the proposed sections of our Association are identical with the proposed sections of the American Bar Association. Our reasons for asserting that such is the intent and purport of a section, as distinguished from a committee consists in the provisions of Article 4 of the American Bar Association Constitution with reference to sections; providing that they have a Chairman, Vice-Chairman, Secretary, Treasurer and a Counsel; have power to adopt By-laws for the regulations of its functions not inconsistent with the Constitution and By-laws of the Association and subject to the approval of the Executive Committee of the Association; that qualifications for membership in any section may be determined by the section itself and shall be defined in its own By-laws; that action taken by a section must be approved by the Association before the same shall become effective.

Our efforts disclosed on the part of some workers a fear and danger of enroachment. We quote one chairman of one of the various comittees: "I am anxious that there should be a meeting at an early date and a program laid out, but of course our committee can hardly take the lead in the matter as the other committees and members of the National Conference are primarily responsible for arranging these matters." This chairman also

felt that the activity of his committee should be confined to participation "in the work by your attendance on any meetings that may be called by members of the National Conference of your state." Another suggestion made was that one of these committees "is not in the first instance supposed to take the initiative in the matter of calling meetings, etc. This condition does exist but we must handle it in the most diplomatic way possible." And again it was suggested to your committee that there might be a confusion of function of some of our own committees; that the Uniform State Law Committee should determine what acts are to be presented and the form in which to be presented, etc., and that when the recommendations were once made our legislative committee should carry on the balance of the work. And finally it was suggested that the efforts of all of us be confined to the securing of the enactment of motor vehicle code in which the Safety Council was interested and was working. Your committee was informed of the activity of the Legislative Committee of the National Conference and expected that through that source, the work of our unremunerated Commissioners, a conference of all would be arranged to enter upon the work and accomplishment of selection, preparation and introduction and final passage and approval of the acts or some of them as proposed by that committee. So far as we are informed they called no meeting or conference. The result of our activity was no meeting or conference; no acts selected, prepared, presented or adopted except the Motor Acts.

We are pleased to report that the efforts of the North Dakota Safety Council, organized as a result of a conference of all interested called by Governor Sorlie, and in which many, if not all, the members of our various Uniform State Law Agencies and Committees willingly cooperated resulted in the preparation, submission, adoption and approval of three of the Uniform Laws; Motor Vehicle Anti-Theft Act; Motor Vehicle Registration Act and Motor Vehicle Act regulating the operation of vehicles. This accomplishment of the Safety Council we feel the natural consequence of interest and organized, united effort.

In conclusion in an effort to advance this work in the future we call attention to our membership to the remaining 31 acts not yet enacted in North Dakota:

Acknowledgement Act, Foreign; Bills of Lading Act, Child Labor Act, Conditional Sales Act, Extradition of Persons of Unsound Mind Act, Federal Tax Lien Registration Act, Firearms Act, Foreign Depositions Act, Interparty Agreement Act, Land Registration Act, Marriage and Marriage License Act, Motor Vehicle Operators' and Chauffeurs' License Act, Occupational

Diseases Act, Proof of Statutes Act, Sales of Act Amendment, Warehouse Receipts Act Amendments, Wills Act, Foreign Executed, Wills Act, Foreign Probated, Arbitration Act, Chattel Mortgage Act, Cold Storage Act, Criminal Extradition Act, Fiduciaries Act, Flag Act, Fraudulent Conveyance Act, Joint Obligations Act, Limited Partnership Act, Marriage Evasion Act, Partnership Act, Stock Transfer Act, Vital Statistics Act, Workmen's Compensation Act, Written Obligations Act.

In conclusion we sum up our recommendations as follows:

1. Secure enactment of Legislative authority for appointment of Commissioners and means to at least cover their expenses.

2. Authority for organization by our committee of a Section on Uniform Laws.

3. Examination of proposed acts by members interested in any of them and their recommendations to the committee with reference thereto.

PAUL CAMPBELL,
Chairman.

MR. STUTSMAN: I move that the report be received and printed.

MR. TEMPLE: I second the motion.

MR. BRONSON: Just a word, because I must be brief, but the importance of the Committee on Uniform State Laws must not be overlooked by the Association and the services that Paul Campbell has rendered during the past year, even though he operated as sole member of the committee, should not be overlooked. Paul has been very active. I have a file in my office full of letters received from Paul and I know that he has written to a host of lawyers in this State and you must remember that there was adopted at the last session of the Legislature three Uniform State Laws, making eleven that have now been adopted. For many years I was chairman of the Committee on Uniform State Laws and I know the importance of the matter and we are generally familiar with the extent of the work required. The committee should be continued and I think the Association should commend Paul for his efforts. Paul has been an active member. So I heartily support the motion that the report received be printed in the proceedings and that we commend Paul for his activities.

PRESIDENT: I presume that the fact that we now have in this state eleven of these uniform laws is due largely to the Asso-

ciation and the committee in years past and I think that constitutes proof that it is an active committee.

MR. POLLOCK: As one of the Commissioners and the only one who has for the last two years been present at the National Bar Associations both at Denver and recently at Buffalo, I want to heartily second the words of Judge Bronson and Paul's report which you have heard. I just got back from the National Bar Association, and I think the State of North Dakota ought to be able to pay the expenses of the delegates to the conference. I don't know why the other members of the Commission were not there, but I can possibly guess that the amount of service and the expenses of going away from home does grate on the good nature of the commissioners. I wish that the members of the Bar could have heard or could have sat as we did for one week and see how they work on that commission. They do not present a report in one year and have it adopted. Sometimes the report has been before various committees for seven, eight or nine years before that report is turned over to the National Bar Association for adoption. For instance, at the last session in Buffalo, we passed on what is known as the Uniform Mortgage Act, but it is with the understanding that it is not to be presented to any Legislature for one year because it is to be published and sent out, and it certainly will come in for observation and criticisms when the bill gets before the various Legislatures. The work of the Uniform Law Commission is careful; it is exacting, and they call for information from all over the country, and so I think it very proper that the members of the North Dakota Bar Association become thoroughly imbued with the possibilities, do what is right, not intrench on the affairs of other states, and yet remember that we are a part of the whole nation. A man starting from one state in an automobile would be glad to know beforehand how many different states through which he passes have uniform laws and that he does not have to know the laws of several states. I am glad to see that the Legislature passed the uniform motor vehicle act and other uniform acts.

PRESIDENT: Are there any further remarks?

MR. BRONSON: I want to add a word or two with reference to the question of a legislative act providing for compensation. Personally I am not exercised about it at all. For many years, seven or eight years prior to the present year, I have been a member of the Congressional Commission on uniform state laws. I feel that it is more or less inevitable that a lawyer in his profession must necessarily serve in public service here and there gratuitously, and as long as the Legislature makes no provision in that regard we should not stress that fact so I do not stress it

as at all important to provide either fees or expenses for attending these meetings. This year I was on the way to Buffalo, I had made reservations, but I was detained here and in Detroit on a case, otherwise I would have been there. I doubt sometimes the wisdom of the Association directly promulgating the movement of securing legislation. It would be better for the commission on uniform laws, and I would rather see the matter approached with the idea of providing legislative authority by getting a number of men into the legislature who would on their own motion introduce the legislation; otherwise this Association cannot take the broad outstanding attitude that this Association shall continue to furnish some of its members to perform that public service at their own cost or at the expense of members who can serve.

PRESIDENT: Are there any further remarks? If not, as many as are in favor of the motion that the report be filed and printed with an expression of appreciation to Mr. Campbell for his work on the committee say "aye." (Aye.) Motion is carried.

Judge Pollock, we will now ask for your report on Ethics of Bench and Bar.

JUDGE POLLOCK: I might say with reference to that, I have corresponded with the various members of the committee and as far as I could learn there was no amendment that they desired to be made, and our report will be that the rules already adopted are for the present sufficient to carry us over and if we observe those rules we will do well.

PRESIDENT: You have no amendments to propose?

MR. POLLOCK: No.

PRESIDENT: Mr. Secretary, have you the report on Public Utilities?

SECRETARY: I have, Mr. President.

PRESIDENT: Will you read that report?

REPORT OF COMMITTEE ON PUBLIC UTILITIES

To the North Dakota Bar Association:

Your Committee on Public Utilities begs leave to report as follows:

At the 1927 Session of the Legislature, we were instrumental in drafting and securing the enactment of the following legislation:

Chapter 231: An act authorizing and empowering the Board of Railroad Commissioners to appoint examiners for the purpose of holding hearings, and prescribing the powers and duties of such examiners. The purpose of this bill was, briefly, to relieve the Board of Railroad Commissioners of a part of the burden in connection with the many hearings which are required to be held and permitting more expeditious service on the part of said Board. The work of the Board of Railroad Commissioners has grown, until it is almost impossible for the various members of the Board to hold all the hearings necessary to accommodate the public. A great many are merely formal and can be decided upon the record made at the hearing, and do not require the personal presence of any member of the Board. The bill, therefore, permits the Board to appoint as an examiner, to take the testimony and make the record, the Special Assistant Attorney General, appointed by the Attorney General as Commerce Counsel for the Board, the Chief Statistician, or the Chief Engineer. It is of course required that all the proceedings at which the examiner sits, shall be taken in shorthand by a stenographer, reduced to writing and with the exhibits introduced, certified to the Board. Upon the same, the Board may render its decision. Permission is however given, to take further testimony, if deemed advisable.

Chapter 232: An act authorizing the Board of Railroad Commissioners to require the extension of electric transmission lines and service furnished thereby, to cities, towns, villages and the inhabitants thereof, within or contiguous to the territory served by such lines, and to fix the rates and charges therefor. Heretofore the Board has merely had power to permit Public Utilities of the kind mentioned, to make extensions and had no power to require such extensions no matter how well able the utilities might be to make the same, or how great the need of the public might be therefor. The value of this act is obvious, and needs no explanation.

Chapter 234: Is in conformity to the recommendation of the Association and merely provides for the fixing of rates, by the Board of Railroad Commissioners, upon all fuel, including lignite, after a full and fair investigation, the repeal of the statutory rate for transporting lignite and restoring to the Board of Railroad Commissioners the full power and authority over such rates. Such investigation has been commenced and several hearings have been held.

Chapter 235: Is an act requiring public utilities to obtain from the Board of Railroad Commissioners, certificates of public convenience and necessity, before beginning the construction or

operation of public utilities plants or systems, or the exercise of any rights or privileges under any franchise issued after the enactment of the law, or under any franchise granted before the enactment of the law, where such franchise has not been exercised or has been suspended or discontinued for more than one year. The purpose of this act is to prevent duplication of service to the detriment both of the utility owners and the public. It is well recognized that no community in this state is large enough to support two utilities of the same kind, and at the same time receive the maximum of efficient service. This should be self-evident.

Chapter 236: Is but an amendment of a former law. Under the law as it existed prior to the taking effect of this act, fifteen consumers or purchasers or prospective consumers or purchasers of heat, gas, electricity, water or telephone service, might, by a written complaint, compel the Board of Railroad Commissioners to hold a hearing in a community where there are hundreds and perhaps thousands of users, which hearing might, and sometimes did, result in thousands of dollars of expense, which would in the ultimate end, be paid for by the public either through taxation or through rates paid for service. As amended by this bill, before the Board can be compelled to hold such hearing, the complaint must be signed by at least 10 per cent of the actual consumers or purchasers of the service. This of course does not prevent the Board from holding a hearing on a petition of a smaller number, if in its opinion, the same should be held.

Chapter 233: Merely relates to the establishment of railroad crossings, and vacation or relocation thereof, and is for the use of the Highway Commission or others interested in the establishment of good roads, and the elimination of dangerous crossings.

Chapter 197: Is an amendment of Chapter 255 of the Session Laws of 1923. The effect of this amendment is merely to provide a method by which municipalities may sell and dispose of their electric light plants. Prior to the enactment of this law, there was no method of procedure provided for the same.

Recommendations

Your committee recommends for the future, less legislation and more cooperation between the utilities and the public. Such cooperation cannot be secured until there is a better understanding of public utilities by the general public. To secure such understanding would seem to be a duty resting upon the public utilities, which duty they can best perform by taking the general public more into their confidence, granting a larger degree of courteous service, together with intelligent publicity.

We recommend the adoption by this state, together with other states, of a uniform public utilities act. It is a fact well known to lawyers acquainted with utility litigation, that the laws of this state, relating to that subject, are at best a hodge-podge. A great many sections of the law are unworkable, others not understandable, and more are useless. What is true of this state is true of many other states. A special committee of the National Association of Railroad Commissioners is working upon this at the present time, and a tentative draft of such a law has been prepared, copies of which have been submitted to various members of this committee. We believe that a special study of this should be made, by a sub-committee, composed of not more than three members. A larger committee would not do the work. If found feasible and workable, when applied to conditions as they exist in this state, we believe that this Association should cooperate in securing its enactment. This would be a benefit not only to the utilities operating in many states, but to the general public and particularly to the attorneys who have to do with utility litigation in various state jurisdictions.

We recommend the repeal of Section 139 of our State Constitution, in order that local franchises may be abolished and there be substituted for the same, indeterminate permits, to be issued by the Board of Railroad Commissioners, upon petition and after hearing. Until such section of the Constitution is repealed, the same cannot be done. It should be a well recognized fact that present day business conditions have outgrown local franchises. Local prejudices, politics and factionalism, are a deterrent to utility development. We personally know of instances in the state at the present time, where the public is being deprived of more efficient and cheaper service because of the attitude of local boards in refusing to approve the transfer of a franchise, which action has been brought about through agitation of certain individuals, based upon selfish motives, not in connection with service.

We recommend that the Board of Railroad Commissioners be, by law, given authority to require physical connection between electric utilities, where the same appears to the Board to be feasible and can be done without any damaging results to either utility. This, of course, with usual right of appeal. There are high tension electric lines in this state, which are in close proximity, being, in some instances, within one mile of each other. At other places, there are high tension electric lines within a very short distance of an individually owned utility plant. If physical connection as above should be made, it would insure to the public, in that community, continuous service and the patrons would not

be inconvenienced by any temporary break in the plant from which they are regularly receiving their service. In time, this would also perhaps result in High-Line distribution of electric current, with a saving to the public through the elimination of local generating plant operation.

In conclusion, we recommend to the incoming officers of this Association, that the membership of the committee be reduced to a number which will permit cooperation on the part of the entire committee, and eliminate any seeming discourtesy on the part of the chairman in attempting to perform the work of the committee without consultation with the entire membership.

Respectfully submitted,
JOHN THORPE,
Chairman.

PRESIDENT: From experience of the committee every recommendation adopted consists of a change. I am sorry that Mr. Thorpe is not here. John has given us the result of his experience as Assistant Attorney General. I think that a great deal of John's work was taken up by public utilities questions and his recommendations require serious consideration. What is your pleasure with reference to the report? His recommendations, to summarize, are more cooperation between the public utilities and the people; uniformity of law on utilities; third, the repeal of Section 139 of the Constitution under which local franchises are granted; fourth, giving the Board of Railroad Commissioners authority to compel physical connection between different transmission lines where it appears to the board to be feasible, and fifth, reduction of the membership of the committee.

MR. OWENS: I move that the report be accepted and filed, except that portion with reference to reduction of the committee. That part is not included in the motion, but I move that portion be referred to the executive committee.

MR. BANGS: I think that we can all agree with the motion that the report be accepted and filed, but I would ask Mr. Owens this: Would it not be well in view of the importance of the report and recommendations to either have the matter discussed further or to refer it to the executive committee of the Bar? Take just one proposition that is recommended "that the Board of Railroad Commissioners be by law given authority to require physical connection between electric utilities, where the same appears to the Board to be feasible and can be done without damaging results to either utility." I don't know just what that means. I don't know whether it means general connections or whether it means that standy-by service can be given in case of breakdowns. It is possible that with so broad a recommendation

we will be making a recommendation to the effect that one utility can sap another. We don't want to do that. We don't want to go on record that one utility may sap the initiative and life of another.

MEMBER: I suggest that be put in the form of a motion.

MR. BANGS: I will move that the report be accepted and that the recommendations therein contained be left to the executive committee.

MR. FEETHAM: Second the motion.

MR. BANGS: I want to say in support of the motion that if Mr. Milhollan is going to be on the Board of Railroad Commissioners perpetually it might be safe but we are likely to have changes in our Railroad Commissioners where we are liable to get three farmers on the Board without experience and only one expert and if that situation arises, and the law gives too much room, we might lose our electric utilities—

MR. PRESIDENT: Is there a second to either motion?

MR. FEETHAM: I seconded Mr. Bangs' motion.

PRESIDENT: It has been moved and seconded that the report be filed and accepted and published and that the recommendations therein be referred to the executive committee.

MR. OWENS: In explanation of my motion, I think that the committee intended to place recommendations before us which were eventually to become state laws granting to the Board power and authority which it does not now have, but which is nevertheless exercised under conditions that do exist. There were instances in the State of North Dakota where two utilities go to the same town, especially high lines and telephone lines, and they will have physical connections and one will be getting energy from the other, but there is no power in the governmental functioning body to compel this. For instance, in the western part of the state there is physical connection between utility companies and certain municipalities. The municipality is distributing electricity and the company is generating it. There is no power of the Board to supervise this. Another instance is where a small company is buying electricity of a larger company. The Railroad Board has no power of supervising the parties, and I take it that the purpose of this committee was that supervisory powers in these instances should be granted to the Railroad Board which is now supervising utilities. There is no objection on my part that the recommendations in the report be left to the committee

for further investigation or to the executive committee but my idea is that it should be referred to the Legislative Committee.

PRESIDENT: Public Utilities is a standing committee and there is no legislative session till after the Association meets next year.

MR. BANGS: I suggested the executive committee because they discuss matters more than any other committee. You will notice there is a recommendation that Section 139 of the Constitution be repealed. There may be a serious difficulty in getting the repeal of Section 139 but the executive committee in taking this up might evolve some method without the repeal of 139, that is, give the Railroad Commission certain powers when lines are being built. They may have power to regulate where a company has difficulty and interferes with other lines. I want to refer it to that committee because that committee takes up matters carefully.

MR. CAMPBELL: I notice that the committee recommends the adoption of a uniform act with reference to public utilities and I believe the conference of the American Bar Association is arranging laws. That is an able body and we will in that way get an opportunity to bring the matter before this Bar Association and thus advance the legislation whether through the Legislative Committee or any other. The thought that it is a uniform act should be an urge and affect these various matters.

MR. POLLOCK: I wish to state that the commission did adopt such a measure as this at the last session but it will not be brought before the Bar till next year.

PRESIDENT: Any further remarks; if not, those in favor of the motion which has been seconded will signify by saying "aye." (Aye.) Any opposed? (No voice.) The motion is carried.

PRESIDENT: Dean Cockerill, will you come forward and introduce our present distinguished visitor to the Association at this time. I am not acquainted with the gentleman and prefer to give you the honors.

DEAN COCKERILL: The chairman has just ordered me to introduce Dean Pound of the Harvard Law School. I took Professor Cooley with me a moment ago and we thought we would go to the hotel and bring him up here. You all know Dean Pound by reputation. Perhaps not so many of us know him personally but there are a few Harvard graduates here who know him personally, and I know that all of us will want to see and

hear him this afternoon. I now have the pleasure of introducing to you at this time, Dean Pound. (Applause.)

DEAN POUND: Mr. President, I am informed that nothing more is required of me than to stand up and move about like a panoramic camera till I am seen by the entire audience—(applause)—I am scheduled to talk this afternoon and there is some suggestion this evening, and you have all that ahead of you. It might be like the young man who committed the tactical error of entering into a discussion on literature with a literary man. The conversation turned to the matter of dialectic poetry. He said, "Why, I enjoy dialectic poetry, but," he said, "I got ahold of some dialectic poetry by this guy Chaucer. Now, really, that man Chaucer carries it too far." I don't want to carry it too far so I make a bow and sit down. (Applause.)

PRESIDENT: Dean Pound, we feel highly honored to have you with us, I assure you.

We have a larger attendance now since the Dean's remarks and I wish to call your attention to the fact that the Dean will be with us at the banquet tonight and I wish to urge upon all who have not yet secured their tickets to do so before noon.

We will now hear the report of the committee on the Morgan Memorial by Tracy Bangs.

MR. BANGS: Mr. President, and gentlemen of the convention. Some of the older members will have a clearer recollection of Judge Morgan than the young men who have come into the Bar in the past few years. It was in 1881 that David E. Morgan came from the State of Wisconsin into the Territory of Dakota. He located at Grand Forks and practiced law there a few years and then he moved to Devils Lake. While he lived there he was placed on the District Bench and later on the Supreme Bench of the State. It is no reflection on any of the men who have served on the trial and appellate bench to say: There never has been a man in the Territory or State who had the universal love given him by those who came in contact with him that was given Judge Morgan. He was beloved because of his friendliness. He had learned that the way to have a friend was to be a friend. As a trial judge he was ideal. We older men who have tried cases in his Court know that there never was a time when at the end of a trial is was possible for the jury to say that Judge Morgan believed either this way or that way with respect to the merits of the case. He conducted himself as a judge and not as an assistant to either litigant both in civil and criminal cases. As a judge of the Supreme Court he was just as excellent a judge as he was a trial judge. He was always courteous, honest and fair, always

industrious and always anxious to learn all that he could about cases brought before the court. He gave unstintingly of his time and effort. He was a man of high moral character and never reached that point, that is sometimes reached by those of high moral character, where they believe it permissable for them to commit any crime if the object is to make some one else do right. The Judge believed that doing right was not so important that it required the commission of offenses to compel it. He was a man, who, when he died, when he passed away, left a place that cannot be filled. I do not mean to say that just as good men or just as able men have not sat on the bench. In a few years we who were acquainted with him will pass on and a new generation will come in and Judge Morgan will be in a way forgotten, but for those who knew him it is impossible for anyone to come and take his place. It cannot be done. There are friends with whom we are acquainted who pass on, whose place can be filled, but he was such a man that there was no supplying the place made vacant when he passed on.

There was a committee appointed after his death with the idea of having a Morgan memorial, and different plans were discussed, but we all realized how Judge Morgan objected to anything ostentatious, and we knew he would not want, could he have told us his desire, that anything out of the ordinary should be done for him or in his memory. Knowing his great love for law, and feeling that nothing in life, except his personal friends, so occupied his mind and heart as his deeds on the Bench, we felt that a painting of Judge Morgan, hanging in the Chambers of our Supreme Court would be the most fitting memorial for him and one that would appeal to him. If from somewhere above the spirit of Judge Morgan looks down on us, and if it could speak, I am satisfied it would say, "Nothing, my brother lawyers, will be so satisfactory to me as to have my portrait rest always in the Hall of Justice, I have done my labors and I have tried to do justice between man and man." And so your committee submits today its final report in this painting of Judge Morgan.

(Painting covered with American Flag unveiled.)

PRESIDENT: What is your pleasure, gentlemen?

MR. BRONSON: In view of the beautiful tribute that has just now been rendered by Mr. Bangs concerning Chief Justice Morgan, and in view of the fact that he was presiding as Chief Justice of the Supreme Court when he passed way, whereupon the Court immediately, in view of his high outstanding service to this State, adjourned out of respect, I move you, Mr. Chairman, that

this Association approve in full the report rendered by the committee by a unanimous rising vote.

MR. LIBBY: I second the motion.

PRESIDENT: Are there any remarks? If not, all those in favor of the motion will signify by rising. (Audience rises.) You may be seated, gentlemen.

Will you, Mr. Bangs, consider a motion in order that the painting be presented to the Supreme Court framed?

MR. BANGS: I will say that the committee has on hand sufficient funds for a frame and that the reason it is not framed now is that it was received too late, and I move you that the committee be instructed to have the picture properly framed and presented to the Supreme Court for hanging in the Chambers of the Supreme Court.

MR. CUPLER: I will second the motion.

PRESIDENT: All those in favor of the motion signify by saying "aye." Motion carried.

I presume a motion will be in order to discharge the committee from further service. This committee has served for several years and I know they have been to a lot of work and have performed a real service in the suitable testimonial to Judge Morgan. I shall entertain such a motion.

MR. GOSS: Heretofore during the session some reference has been made to the fact that Judge Morgan was chosen as a Justice whose picture should be used by Corpus Juris and I was wondering if it would not be wise if provision was made for this committee to supervise that.

PRESIDENT: I have no objection—Mr. Bangs is present—if he will take it upon himself, that we authorize and request him to see that a suitable picture of Judge Morgan is furnished Corpus Juris.

MR. BANGS: I would suggest that the committee not be put out of existence until it has paid its bills.

PRESIDENT: We will now proceed with our routine work and take up the report on Criminal Law by Attorney General Shafer.

MR. SHAFER: Mr. President, ladies and gentlemen of the Bar Association. I am under the impression that we are a little behind schedule with the morning's program and that we are still to have the privilege of hearing other addresses. In delivering this report I will try to confine the report to a rapid reading of

the written report. You have not had the opportunity that you have had in respect to the other reports in that the report was not printed in Bar Briefs. It was not written in time and in view of the experience that the Committee on Uniform State Laws had at the hands of the Secretary I am glad I didn't get it to him in time to make any comments on this report.

REPORT OF COMMITTEE ON CRIMINAL LAW

Your Committee on Criminal Law held one meeting since its appointment and agreed to submit the following report to the Association. Before outlining the recommendations of the Committee for new legislation touching the subject of Criminal Law, the Committee deems it worth while to report to the Association the results of the progress made in Criminal Law Reform since the last meeting of this Association. It will be recalled that last year, the regular Committee on Criminal Law did not function, but in its place, a conference of State's Attorneys was held in connection with the State Bar Association meeting, which conference submitted a report to the Association, the major portion of which was accepted with approval. Later, a Committee on Legislation representing the State's Attorneys, submitted to the Legislature various bills designed to carry out the recommendations so reported to the Association. The following measures were adopted by the last Session of the Legislature, substantially carrying into effect certain definite recommendations for changes in Criminal Law of the State.

First: House Bill No. 127 (Chapter 126, Laws '27) was enacted providing for increased penalties for habitual criminals. This Act was patterned as the so-called "Baumes Law" of New York, only it is not so severe in its provisions. It provides that any person convicted of a felony in this state, after having previously been convicted of two felonies, shall be liable to a maximum punishment of twice the imprisonment or penalty prescribed by law for a first conviction of said offense; and it further provides that any person who commits a felony within this State after having been convicted of three or more felonies, shall be liable to a maximum punishment of life imprisonment, in the discretion of the Court. There is no question in the minds of the Committee that the passage of this law and its enforcement will have a salutary effect upon the activities of habitual criminals in this state.

Second: House Bill No. 128 (Chapter 219, Laws '27) was adopted, amending Section 10833, C. L. 1913, providing that where defendants are jointly charged with crime, such defendants may have separate trials only in the discretion of the trial court.

Third: House Bill No. 132 (Chapter 180, Laws '27) was adopted, being a measure to enact the so-called Uniform Motor Vehicle Anti-Theft Act substantially without amendment. This law is now in operation, and the Motor Vehicle Department is engaged in registering titles to about 175,000 automobiles and trucks in North Dakota. When this work is completed, which will be about January 1st, the State will have a complete and accurate record covering the titles of all motor vehicles owned in this State, and all transfers of such vehicles. North Dakota is in the front rank of all the States now in this class of protective legislation.

Fourth: House Bill No. 135 (Chapter 220, Laws '27) being a bill to amend Section 10605, C. L. 1913, relating to the taking of testimony in preliminary hearings, was passed. It relates to the matter of the State furnishing to defendants transcripts of testimony taken in preliminary hearings, and is not of particular importance.

Fifth: House Bill No. 136 (Chapter 121, Laws '27) was adopted, being a bill to amend and re-enact Section 3382, C. L. 1913, relating to State's Attorneys' Contingent Funds. This law increases the minimum amount which County Commissioners are required to transfer to the credit of the State's Attorneys' Contingent Fund and grades such minimum amount according to population. The net result of this law will be to give the State's Attorneys a substantial fund to use for law enforcement purposes, which fund is badly needed in many counties.

Sixth: House Bill No. 138 (Chapter 218, Laws '27) was adopted. It is a bill to amend and re-enact Sections 10804 and 10805, C. L. 1913, relating to peremptory challenges in criminal cases. The effect of the amendment was to increase the number of peremptory challenges of the prosecution in criminal cases to the same number as that to which the defendant is entitled.

Seventh: Senate Bill No. 62 (Chapter 217, Laws '27) was adopted, being an amendment to Section 10994, C. L. 1913, relating to the time in which appeals in criminal cases must be taken and completed. It provides, in substance, that an appeal from a judgment of conviction in a criminal case must be taken within three months from date of its rendition. The appellant must complete such appeal within six months after the date of judgment, provided that the appellant may upon notice to the State secure an extension of such time of not more than three months upon application to the District Court; and thereafter further extension may only be granted by the Supreme Court upon like application and notice. Failure to so complete the record of

appeal, results in the appeal being deemed dismissed. This law is considered to be a very important improvement upon the old procedure governing this subject, which, as lawyers know, was subject to great abuse, and resulted in many criminal cases becoming stalled between the District Court and Supreme Court for long periods of time, not infrequently several years.

Eighth: Senate Bill No. 64, being a measure to amend and re-enact Section 11002, C. L. 1913, was passed. This Act requires the Clerk of the District Court to certify to the Supreme Court within 10 days after the filing of a notice of appeal in a criminal case, the record of such appeal. This is a companion measure to Senate Bill No. 62 above referred to, and is intended to facilitate the operation of said Senate Bill No. 62, by requiring the record of all appeals pending in District Courts to be certified to the Supreme Court during the pendency thereof. Thus, a central record will hereafter exist in the office of the Clerk of the Supreme Court of all pending and uncompleted appeals in criminal cases in the State.

Ninth: Senate Bill No. 63 (Chapter 215, Laws '27) being an amendment of Section 10766, C. L. 1913, was adopted. It relates to the procedure in criminal cases where a joint affidavit of prejudice is filed against the Judge and County. The effect of this law is to relieve the Court of the mandatory duty of changing the place of trial in criminal cases where a joint affidavit otherwise known as a "double-barreled affidavit" of prejudice is filed, and to allow the Court to pass upon the merits of such application for change in so far as the same applies to the County.

It will be observed at a glance that most of the foregoing laws that were adopted by the last Session of the Legislature mark very important changes in matters of criminal procedure in this state, and that such laws follow substantially the recommendations of the State Bar Association last year in respect to the particular changes covered thereby. The Committee feels that the Bar Association is to be congratulated upon its success in securing the adoption of these several Acts.

As a Legislative program for the next Session of the Legislature, your Committee desires to recommend the adoption of the following measures:

First: A bill to amend Section 8441, C. L. 1913, re-defining the crime of Crimnial Conspiracy to provide that it shall be a felony for persons to conspire to commit an act, which if committed, would constitute a felony. Under the present definition

of this crime, all conspiracies, regardlesss of the character of the act conspired to be done, constitutes only a misdemeanor.

Second: A bill creating a new statutory crime to be known as "Aggravated Assault and Battery." This act to provide that in cases of aggravated assault and battery, the penalty shall consist of a fine or not more than $1,000.00, or imprisonment in the county jail for not more than one year, or both such fine and imprisonment. This change is needed to take care of that class of assaults where grevious bodily harm is intended or inflicted, without the use of a dangerous or deadly weapon. Our neighboring states, Montana, South Dakota, Minnesota and Iowa have long ago passed similar statutes to take care of this class of crimes.

Third: A bill to restore capital punishment in North Dakota as a penalty for first degree murder. It is the opinion of your Committee that crime conditions in North Dakota have not reached that point of improvement where it is safe to do without the restraining influence of the extreme penalty. In recent years, North Dakota has become an inviting field for the operation of the professional criminals of the country; men who will not hesitate to take human life as a means to promote their profession of robbery and burglary in this state. A bill to restore capital punishment was submitted to the last Session of the Legislature, but was defeated, evidently for the reason that it did not appear to the majority of the Legislature that public sentiment favored the restoration of capital punishment in North Dakota at this time.

Fourth: A bill creating a jury commission to serve in lieu of the present system in selecting persons qualified for jury service. A comprehensive measure embodying what appears to be the best features of similar laws existing in other states, was introduced in the last Legislature as House Bill No. 131. Your Committee has examined this bill, and recommends its approval by this Association. It is the settled judgment of all practicing lawyers, as well as many others, that our present system is especially weak as regards the character and qualifications of the persons often selected for jury service. Our present system tends rather to result in the selection of persons for jury service by lot or chance rather than on the basis of special qualifications, and in some jurisdictions it is complained that professional juror evil exists in malignant form. It is conceded that the efficiency of our judicial system depends in a large measure, upon the character of juries that are chosen to decide the issues submitted to them in legal controversies, and that every effort should be made to select the best qualified persons available, both as to character and intelligence for this service. It is the opinion of your Com-

mittee that a jury commission of especially qualified persons appointed by the District Court could and would select a better class of citizens for jury service than now result from our present system. Your Committee believes that the experience of the Federal Courts, where the jury commissioner principle of selecting jurors is employed, completely demonstrates the superiority of this system over the method now employed in the State Courts.

Fifth: A bill to create a State Board of Criminal Identification and Investigation is earnestly recommended. Such a measure was recommended to the last Legislature by the State's Attorneys' Association and introduced in the form of House Bill No. 129. Your Committee has examined this bill and recommends its adoption in principle. Briefly stated, such proposed measure contains the following provisions: It provides for a State Bureau of Identification and Investigation consisting of the Governor, Attorney General and the Warden of the Penitentiary. This Bureau shall be authorized to appoint a director of the Bureau of Criminal Investigation, who, in turn, may appoint three deputies and a clerk. The powers of such Bureau, given in the language of the bill, is as follows:

"It shall be the duty of the Director of Criminal Investigations, and of the deputies acting under his supervision, direction and control:

1. To investigate such felonious crimes committed in this State, as shall be assigned to the Bureau of Criminal Investigation by the Attorney General, for the purpose of detecting, apprehending, arresting and securing the conviction of the perpetrator or perpetrators of such felonious crime or crimes, and such director and his deputies shall possess all the powers of police officers anywhere in the State.

2. To cooperate with the police officers of the various counties and cities of this state, and with the police and peace officers of others states in apprehending and arresting fugitive criminals charged with the commission of felonious crimes.

3. To prevent the commission of felonious crimes by tracing, locating or arresting yeggs, burglars, holdup men, robbers and transient and professional criminals, and so far as possible, to protect life and property from criminal acts.

The Clerk shall, under the supervision and direction of the Director of the Bureau of Criminal Investigations, have charge of the office, and shall establish and maintain such equipment, files and records, as shall be necessary for the efficient conduct of said Bureau of Criminal Investigations."

There has been a good deal of discussion throughout the United States recently upon the necessity of reforms in criminal law and criminal procedure, and the importance of improving the machinery that exists for the administration of criminal justice. Most of such discussion and study has centered around questions of trial procedure and punishment of criminals; and but little consideration has been given to the problem of improving our methods of preventing crime and apprehending criminals. The administration of criminal justice logically divides itself into three classes of governmental activity: (1st.) the apprehension of criminals; (2nd.) trial of persons accused; and (3rd.) the punishment of convicted persons. It is the opinion of your Committee that existing agencies for the administration of the first function above named, that of the apprehension of the criminal, is altogether inadequate to meet the demands of modern conditions, and that attention should be centered upon methods of improvement in the administration of that important function. Your Committee believes that the next step to be taken in the direction of perfecting our method of apprehending criminals is the establishment and maintenance of a central state authority vested with general powers of supervision and co-ordination of the activities of the police officers of the State. It occurs to us, that a Bureau of Criminal Identification and Investigation would perform the following important service:

First: It could establish and maintain a central office of information and identification relating to crimes and criminals. At the present time neither the State nor any municipality maintains any Bureau of Information. In these days of good roads and motor vehicle transportation, it is comparatively easy for criminals of all classes, and particularly professional criminals, to travel rapidly from one part of the state to another, or go without the state in a few hours, with the result that in a large percentage of cases, where felonious crimes are committed, the perpetrators succeed in escaping from the locality in which the crime is committed, and become fugitives from justice. This being the case, the problem of apprehending such criminals becomes one of expert investigation and intelligent pursuit, and in solving such problem, accurate information as to identity and description of the fugitives, including finger prints and other personal data becomes a factor of great importance. Further, under modern conditions, a large percentage of the professional criminal class succeed in escaping to another state, thus making the problem of their apprehension one of interstate character, and involves the efficient and active cooperation of the officers and police agencies of other states. There is now located at the State

Penitentiary, the nucleus of a Bureau of Criminal Identification, including finger print data, Bertillion measurements, etc., for the use of the Institution. The services of this department of the Penitentiary could easily be expanded, and made an important service to all police officers of the State in their daily hunt for law violators. The time has come when the state should make an intelligent effort to identify and label all persons who follow the profession of crime as a business and all persons with criminal records.

Second: It could co-ordinate the efforts of the police officers of the various counties and cities of the state in apprehending fugitives and cooperate with like agencies in other states, in not only securing the arrest of fugitives that have fled to another state, but assist other states in apprehending fugitives who resort to this state as a place of hiding. The problem of dealing with the modern professional criminal is no longer a local problem, but one that mutually affects the interests of all the states, and it is of utmost importance that each state have a central agency vested with authority to work with like departments in other states in dealing with the common problem of apprehending escaped criminals.

Third: It could assist local police officers in investigating felonious crimes and apprehending the guilty parties in unusual cases by furnishing expert officers versed in crime detection and in finger print methods. Serious crimes are constantly being committed in the State, the solution of which baffle local officials, and the guilty parties succeed in escaping from the locality where the crime is committed. Very often the local police officials lack the experience and knowledge necessary to cope with the ingenuity of the professionals who perpetrated the crime, and in such cases the prompt assistance of men trained in crime detection and in pursuit of criminals is absolutely necessary to the apprehension and conviction of the guilty parties. It is an obvious encouragement to the professional criminals who roam to and fro through the state at will, committing burglaries and robberies each season, and sometimes murder, when they know that they are only required to outwit or escape from the local officials in order to effect, what generally proves to be a successful escape, from detection and arrest. In so far as it is possible to do it, the state government should provide the means and facilities for the prompt and effective pursuit of all criminals by officers equipped with the knowledge and experience necessary to enable them to succeed in the undertaking.

By the way, you folks have noticed the apparently successful bank robbery committed at Verona, where last year the bank

was robbed and a man killed. At ten o'clock in the morning three men, unmasked, walked into the bank, held up the official, and took $3000.00, walked out of the bank and got into a taxi and in a few minutes they were outside of La Moure County. There was probably no police force there, and during the night they possibly passed beyond the borders of North Dakota and got into Minnesota and in another day they can be in another state. I might say that last year out of thirteen bank robberies—all of which were successful in so far as entering into a bank and overcoming the officer and escaping with the money was concerned—out of the thirteen in twelve of the cases the bandits were successful in escaping from the state and in ten of the thirteen cases the bandits evaded arrest and apprehension and as far as we know not even successful identification.

The bill that was introduced in the last Session of the Legislature, being House Bill No. 129, did not receive much support from the Committee on Judiciary, to which it was referred for consideration. Two main objections were offered against its passage, as follows: (1) There was considerable sentiment against creating any new boards or bureaus in the State Government; and (2) the expense necessary to maintain such a bureau on an effective basis.

It may be conceded as a wise general policy that the functions of the government should not be further expanded through the creation of additional boards or bureaus, and that this state has, perhaps, already expanded its functions far beyond the point which the government can efficiently maintain, or afford to support. On the other hand, it must be conceded by all thoughtful persons, that the primary function for which all government exists, is the protection of the lives, liberties and property of the people, and that whenever the lives and property of the citizens are jeopardized by criminals, or others, who prey upon society, the government should establish and maintain such agencies as may be necessary to protect life and property. It is also, I think, generally conceded that both life and property in North Dakota is constantly in danger on account of the depredations of certain classes of criminals, and that our present police system has failed to adequately meet this crime situation. It is the judgment of your Committee, that this important need should be met, and if necessary, by the creation of the instrumentalities best suited for the purpose, and that the fact that the State may have in the past, or may in the future, create boards or bureaus for purposes other than that of preserving life and property, should not be the cause of a neglectful policy on the part of the government with respect to the crime problem. It is true, that such a

bureau as is here recommended, will cost a substantial amount of money to efficiently maintain and operate, but we submit that when the state is willing, as it has been in the past and is now, to spend hundreds of thousands of dollars in industrial and business experiments of doubtful wisdom, and large sums annually in performing functions of relatively less importance than the importance of adequate police protection, we ought not to shrink from the expense that experience has proven is necessary to properly protect society from the depredations of criminals.

While the idea of a State Bureau of Criminal Investigation is somewhat new, its adoption has been widely advocated by authorities on criminal law reform, and at least one State, Minnesota, has created such a Bureau. At its last Session of the Legislature, the State of Minnesota adopted Chapter 224 of the Session Laws for 1927, providing a Bureau of Criminal Apprehension. The Bureau so provided for is created in the office of the Attorney General, and is placed under the direction of a Superintendent who is appointed by the Governor. It provides for the employment of a staff of skilled and unskilled employees of not exceeding twelve in number, who shall serve under the direction and supervision of the Superintendent. This Bureau has no direct police authority and its primary function seems to be to install and maintain a complete system of identification pertaining to crimes and criminals, and to disseminate such information among the police officers of the state and other states for the purpose of facilitating such officers in their efforts to apprehend escaped criminals. It requires all Sheriffs and police officers to make complete reports of matters of criminal information to the State Bureau, which information is assembled and recorded for future use. It provides that the Superintendent may from time to time conduct police schools for the training of police officers in modern methods of crime detection, identification, and apprehension. It also provides that such Bureau shall cooperate with and exchange information with similar organizations in other states.

It is the view of your Committee that the establishment and maintenance of a Bureau of Criminal Identification and Information is an important step in the right direction, and is, perhaps, the most important service that a State agency could render; but it is also our opinion that the members of the staff of such Bureau should be vested with general police powers, so that, in emergency cases, they could themselves take up and conduct the pursuit of fugitive criminals.

Your Committee has outlined its views at some length on this subject for the purpose of emphasizing its importance, and in the

hopes that it may thereby stimulate a careful consideration and study of the proposal on the part of all citizens of the state. There is no doubt that our present police methods are altogether inadequate to deal with the professional criminal problem, and that the public will be forced in time to reform and improve its police system. Perhaps, the idea of the creation and operation of a State Bureau as herein recommended does not offer an improvement in our system; but if not, it remains for those who are familiar with the problem to offer a better suggestion to meet this particular weakness in our law enforcement machinery.

Your Committee respectfully submits this report together with its recommendation to the Association for its consideration and approval.

GEO. F. SHAFER,
Chairman of the Committee
on Criminal Law.

MEMBER: I move the adoption of the report.

PRESIDENT: The adoption of the report is moved. Is there a second to the motion?

MEMBER: I second the motion.

MR. CUTHBERT: It seems to me after listening to the report of the learned Attorney General that it covers a very wide field and I for one as a general practitioner, and as a man who for years has legitimately tried to keep some of our citizens out of the penitentiary, should not like to see the report adopted without meditation and discussion. I have all respect for the State's Attorneys but I don't believe in a plan by which they are trying to make it so easy that all they have to do is to bring in a man and charge him with a crime, and then place upon him the burden of proof to sustain his innocence, because it will relieve their work and reduce the duties which stand and go with the office of State's Attorney. It just occurs to me, not only as a member of the bar, but as a citizen of a country where we pride ourselves on being a free people, that before we adopt the fads and methods of European autocracies that we should be careful about taking steps in the direction of their systems. Some of the things that the Attorney General recommends I approve. I should heartily be in favor of a State Constabulary. The whole movement over this Country is not so much lately a movement to catch *the* victim as to get *a* victim. To my mind it is not a question of hanging innocent men but the important thing is the preservation and protection of the principles that are sacred to the Anglo-Saxon race. The State's Attorneys don't have things come their way, but are told to come across with the proof in

this State. They now want to put the burden of proof on the man arrested, and they are not a bit particular about whom they arrest. I am getting scared that they might pick me up one of these days, and I am not so sure that I could prove my innocence. I still want to preserve the valuable presumption of innocence. I would like to say something more about the State's Attorneys, but if I do I am afraid that I would discover I could not remain a Christian and a friend to some of the State's Attorneys, so I quit.

My purpose in rising was to impress on this assembly and particularly the lawyers here who represent the great common people, their clients, to ask that the committee report be not adopted until we have had the time to read and discuss it further. There is no Legislatve Session until after the next annual meeting of this Association and I therefore move that the report be printed in the proceedings and not adopted.

MR. PRESIDENT: You move that as a substitute motion?

MR. CUTHBERT: Yes.

MR. TRACY BANGS: I arise to second Mr. Cuthbert's motion and in seconding it, if you will permit, I wish to say just a word. I am not speaking as one who occupies the position of trying to keep down the population of the jails but as one who for a great many years has been a prosecuting officer. I want to say that the matter referred to in the Attorney General's report and the recommendations made are of supreme importance; they call for legislative action and there will be no session of the Legislature until after the meeting of this Bar Association so that there is no crying necessity just at this time to put ourselves on record either for or against the recommendations made by the Attorney General or his committee. I do not feel, in view of the fact that we have time before the next session, that we should be asked at this time to put ourselves on record. The report was not printed in Bar Briefs and no one has had an opportunity to read the report. All that we know of the recommendations, and the reasons for the recommendations, is the rapid reading of the report here this morning, rapid because necessary in order to get the matter before the Association. It seems to me that under those circumstances we can well defer final action on this report until each one of us has had an opportunity to study the report and fully make up our minds as to where we stand on the different features, and particularly on the different recommendations. I think we all have the desire to make the apprehension and conviction of the criminal more certain than in the past. We have different ideas with respect

to that, but I think all agree that one of the great faults is the failure of the peace officer to catch the criminals. We have got ample laws to take care of them after they have been apprehended and after conviction. We have grown up to the idea that all officers must carry on their duties as cheaply as possible and when he next comes up for election he must be able to say, "I only spent so much money during my term." My idea is not that we bring up a lot of new laws but that the general attitude of the public be changed; that the laws we have are sufficient for the prosecution of criminals, if apprehended. In California the Legislature passed laws such as recommended by the Attorney General for the speeding up of criminal proescutions. Before the laws went into effect two killings occurred in Los Angeles and in one case there was a conviction within two months and in the other in three months, so that the olds laws were ample and sufficient for a speedy trial.

Let us not shove this thing through this Bar Association without proper consideration. I don't beleve that the Attorney General desires his report shoved through the Bar Association without every one of us giving it careful study and consideration and before discussing each feature fully, and that can be done by the time we have the next meeting of this Bar.

JUDGE GOSS: I recall that a year ago at Bismarck the Attorney General and the State's Attorneys were in session when they made a report of something like 18 amendments. We have, in the Legislative Committee report made at this session, and in the Attorney General's report just made here, received the information that about half of these have become law. I might say right here that this report does not anywhere mention the matter Mr. Cuthbert referred to—the change in the presumption of innocence. There is no such change made in this report. There was such a report a year ago and it was taken out by the Bar Association. It is not a question either of the old cry of protecting the common people. It is not the common people that are invading our state and pulling bank robberies. You never hear of the common people doing stunts of that kind. It is for the protection of the common people who find it necessary in counties like mine, Ward, to organize vigilance committees because there is no circulating constabulary as proposed, and where they propose to arm with shotguns and buckshot against depredations in all small towns of the state. The Bankers Association a year ago donated pistols to the chiefs of police and other police officers of nearly all the cities. It is not against the common people that the banks which have suffered robberies have taken the lead for years in agitating what is presented in

the Attorney General's report. And the Attorney General, by the way, is an executive officer of the state. So I say that is not the question, and it has no place here in this discussion, the principle of protecting the common people. It is simply a question of protecting the state against vagabonds that conduct robberies and murders and escape in a ratio of twelve to one. Experience is the best teacher, and I am talking from experience now. Tracy made reference to the conviction in Los Angeles, California, of two men for murder. Yes, and one escaped, and that one was apprehended in the City of Minot, doing business forty feet from the police station. He was one of the convicted murderers from Los Angeles who happened to be apprehended by a police officer who simply noticed by mere accident from a photograph received the likeness, and he walked in on the man and the man told him if he had been armed "you would never have got me." I mention this because is brings home concretely the very necessity of a bureau of identification and the necessity of organizing a bureau for pursuit. And while I am on the subject I believe there is some objection offered to capital punishment, mostly on the ground that life imprisonment meets the need. I want to say there is no such animal. I speak from my own experience. After juries convict, or pleas of guilty have been entered for murder in the first degree, I myself have sentenced men to life imprisonment in the state penitentiary and not one has ever served the sentence by half. There is no such thing as life imprisonment. If you will study the statistics, the average life imprisonment means eight to ten years where they have a Board of Pardons as we have in this State. Perhaps I could modify my statement "by half" until half of the life expectancy. Life imprisonment means half of the life expectancy no matter how cold blooded and how aggravated, and every murder in the first degree is a murder designed in cold blood, deliberately, something there is no apology for. We are speaking about capital punishment. It is a matter of State policy whether you are going to execute or send a man to state prison on the average of a dozen years. I feel deeply on this subject. I feel heartily in sympathy with the Attorney General's office and I have experience as a State's Attorney. It is not a question of sentiment. Our sentiments should go in favor of protection of the people and the banks.

MR. CUTHBERT: I think the address of Judge Goss presents clearly what I said; that this matter needs further discussion. I share with the learned ex-judge some of his ideas. For twenty years we have been trying to get a constabulary; but I don't share the hysteria that has taken possession of my learned friend,

ordinarily calm. I don't believe in being driven like dumb animals through the woods because somebody robs a bank. Banks were robbed five hundred years ago and crime is not any worse than it was twenty years ago. All I want is time to discuss the various proposals and sort out such as we are willing to recommend and such as we are not. I am in favor of capital punishment but I am not in favor of destroying the fundamentals of government that are ingratiated in us and that make us different from the serfs of Europe because somebody held up a bank.

PRESIDENT: The chair will refuse to recognize any further speakers at this time—

MR. FEETHAM: Mr. President.

PRESIDENT: I cannot recognize anyone now.

MR. FEETHAM: I think I have something constructive and I would like about five minutes.

PRESIDENT: I am sorry, Mr. Feetham, but I cannot give you time for it now, we must get on with the arranged program. At this time, members of the convention, I have the pleasure to present to you Professor Fowler V. Harper of the University Law School, who will address you on the subject "Science in the Application of Law."

SCIENTIC METHOD IN THE APPLICATION OF LAW

I.

To lawyers, these are years of great consequence and significance. It is not even necessary to be intimately connected with the bar to detect movements of far reaching effect, and tendencies, no doubt tardy, but nevertheless timely. Lawyers, as a group, long dormant and even docile factors in society, seem to be awakening to the power which is theirs, as well as to responsibilities and opportunities for effective public service.

It must be a source of great gratification to Dean Pound to see measures of reform and ideas which he has for many years advocated, gradually evolving and commanding the attention of those interested in the development of the law. We are witnessing a series of reforms which indicate how accurate were the visions of those prophets who nourished them in the days of their infancy. The program to secure uniformity in certain branches of the law has touched an acute economic problem and has met, to a wide extent, the demands arising out of increased transportation facilities and general commercial and industrial activities. The reorganization of our methods of procedure is alleviating

the congestion of judicial business and helping to remove the general dissatisfaction bound to result from tedious delays and inefficient handling of litigation.

But from the very nature of many of these movements, further problems are presenting themselves. The great work of the American Law Institute after all is but an effort to put in convenient and available form the dogmas of the law, for it concerns itself exclusively with the logical consistency of those dogmas.

The new social philosophy indicates the growth of sociological theory and its effect upon those who make and administer law, but it is exactly here, as it seems to me, that the limitations of the present legal order and the equipment of that order appear obvious. The trouble lies where it is so often to be found, in the difficulties encountered in the application of theories which the best legal minds of the age do not hesitate to espouse. It is precisely this difficulty that lends such plausible speciousness to the skepticism of those who resist any effort to impose philosophical idealism into legal practice. There is great weight to the objection that theory which does not work and which cannot be applied is useless.

The problem, then, is in the application of the new and twentieth century legal theory to the materials with which the law must deal. Here it is that the law has fallen down, and here it is that a share of the popular unrest and dissatisfaction with courts of law has its roots. In short, except in certain exceptional branches, law is not producing desirable results and, on the whole, is far behind progress made in every other field of knowledge. Law is not scientific in any sense within the modern meaning of the term and in the light of theories which juristic philosophy itself has developed. It is not scientific because its method is not the method of science.

In the editorial column of a current technical journal it is flaunted at the legal profession that "the lawyer is not even recognized as a scientist." This is not only a challenge to the lawyer to take stock of his methods, but it indicates the gulf that has already separated the law from disciplines with which it should be working hand in hand. If, as Pearson has said, the scientific method is one and the same in all branches, and that method is the method "of all logically trained minds," it must be obvious that jurists must not confine their logic to the technique of developing the dogmas of the law if law is to keep abreast of other sciences which, to a large extent, deal with the same materials.

Lawyers have begun to recognize the dependence which law must eventually place upon the social and allied sciences. We

are all entrenched in the philosophic position that law, after all, is primarily but one of many agencies for social control and that its ends must be sought in the welfare of the social group. Law is the product of a civilization, and the social order must be the mistress which the law seeks to serve. We believe that our society can be moulded and developed to conform to our political and social ideals. Neither social nor individual fatalism is popular. In fact, up-to-date sociological theories are at the opposite pole from fatalism. As lawyers we have faith that law can be consciously employed to assist in the realization of desired social ends. We cannot fail, then, to recognize and to formulate those ends or to employ machinery and methods best calculated to intelligently engineer the attainment of them. In this, there must be no failure to take salutory advantage of discoveries and progress made by researches in other fields of endeavor.

It has been a great many years since Mr. Justice Holmes voiced the sentiment that ultimately science must prevail in law, as elsewhere. "I have in mind," he said, "an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy."

But just what have the social and allied exact sciences to offer the law and of what significance is their work to the immediate application of law? Again, is it possible with the legal materials which we have at hand for law to avail itself of achievments in these fields? These are the practical questions which seduce the interest of those whose work and experience brings them into actual contact with the functioning of the legal system. It is the answer, in part, to such questions that a body such as this may be presumed to be directly interested, and it is toward the possible answer to these queries that I shall venture to direct your attention at this time.

II.

The relationship between law and sociology must be obvious. The sociologist, in examining the effects of social institutions upon the individual is vitally interested in the law, as a mechanism controlling human conduct. The law, looking toward the attainment of social ends, cannot afford to ignore the findings of the sociologist. But sociology now claims for its own many phases of human knowledge which we had grown accustomed to think of as belonging exclusively to other sciences.

Thus the overlapping of sociology and biology has given rise to a social biology developing a technique peculiar to itself. One has only to think of one phase of this relationship to recognize its significance for the law. Eugenics, drawing both from sociological and genetical knowledge must be subjected to the service of the law to insure the intelligent application and administration of much of our modern legislation, of which the sterilization of mental defectives statutes constitute but one of many examples.

There is little need to remind a group of lawyers how heavily the law leans upon economics. The direct contacts of the two are so common as to be obvious to anyone who has come in contact with utilities commissions and their rate-making activities. But there is the equally important, if indirect contact of the two through sociological processes which has given rise to the science of human ecology which concerns itself with the study of the spatial groupings of persons and of human institutions.

What pathology, psychiatry, psychotherapy, endocrinology and behavioristic psychology have done for the law is not easy to say for the reason that lawyers and those who apply law have not yet learned how to make proper use of this knowledge. Behaviorism especially has made a strong appeal to social scientists because it has directed psychology away from older shibboleths of consciousness and instincts, and has objectified the study of human behavior by insisting upon the examination of acts and conducts, without the older over emphasis upon the central nervous system. It is more interested in external conduct than in psychic states. It has the distinct advantage of basing its conclusions, like the exact sciences which it emulates, upon demonstrable evidence, in other words upon facts.

The effect which such investigation will have upon sociology and law can be readily detected from some of the premises which behaviorism has set up. If men decide that the human organism should behave in such and such a way, they must arrange situations of such and such kinds. "It is the business of behavioristic psychology to be able to predict and to control human activity." It has as its objective to be able, once given the stimulus, to predict the response, or from the given reaction, to derive the stimulus that called out such a reaction. At present when society wants to get rid of certain reactions, or when it attempts to substitute one reaction for another, it goes about it blindly with no scientific or rational basis for predicting the results. Behaviorism attacks the problem of furnishing the grounds for such prediction.

Psychopathology and psychiatry are making remarkable contributions to the totality of knowledge which the law should utilize. Vast quantities of statistics are being compiled in the effort to study the effect upon delinquency of emotional instability and other psychopathic conditions. It is now possible to interpret pathological reactions in terms of thought processes which are lucid and familiar to the ordinary psychologist and to work out methods of treatment which are both simple and effective. It must be remembered that the methods employed here also are those of the exact scientists. These newer schools all have the advantage of demonstrating their findings by observations in concrete cases. There can be but one result, and that result is observable progress. Their technique is being perfected and older methods of guesswork and introspection have been abandoned. The methods employed are the best advocates of this type of study and lawyers can no longer afford to ignore these fields. Rational men cannot refuse to believe in demonstrable facts. Methods of research in these sciences establish for them a *res ipsa loquitur* situation. Indeed, the evidence is such as not merely to warrant a reasonable belief in the ultimate findings established, but to compel such belief by all logically trained minds.

In its attitude toward crime, more than anywhere else the law has been constantly guilty of refusing to take cognizance of scientific materials. As Clarence Darrow has concluded, after a life full of experience with criminals, "If doctors and scientists had been no wiser than lawyers, judges, legislatures and the public, the world would still be punishing imbeciles, the insane, the inferior and the sick; and treating human ailments with incantations, witchcraft, force and magic. We would still be driving devils out of the sick and into the swine."

Surely the older programs of treating the criminal have failed. Can there be any sound reason, then, why science should not have its opportunity here to solve the problem as it has been permitted to solve so many problems elsewhere? Are there grounds to justify an intelligent profession in clinging to a tradition and to an outgrown order which has proven so inadequate when materials for reasonable progress are available? As a recent social historian has observed, "We have built up a vast body of saving knowledge in the last century which would, in all probability, be relatively adequate to equip man to deal with the unparalleled complexities and the difficult problems of contemporary society; yet little of this is actually available for practical exploitation because of the paralyzing influence of the octopus of the past."

The integration of the various social sciences and some of the exact sciences into a formidable array of scholars, specialists and research workers is swiftly taking place. The American Association for the Advancement of Science brings together men interested in different fields to map out common grounds for cooperation. The Social Science Research Council has undertaken a definite program of sociological investigation. A movement is afoot to secure the establishment of a standardized statistical service to "present a sum total of social efforts as expressed through all public and private social work, institutions and agencies." Journals representing the combined interests of various branches of scientific effort are developing a literature rich in materials suitable for the assimilation of the law. Only the lawyer, however, is tardy in coworking in these common vineyards.

The peculiar job for the lawyer is to work out some effective method of utilizing this material and subjecting it to the service of the law. The law must not only coordinate and apply this knowledge, but it must keep in constant contact with these kindred fields to take quick and immediate advantage of what further progress is made. There must be some scientific method of correlating and adjusting this matter so that it can be brought to bear upon legal problems as the lawyer and the court meet them. Having attempted to suggest to you some of the phases of the law which are intimately touched by other sciences dealing with human life and human conduct, together with some idea of the vast quantities of materials that are being accumulated in various fields, I shall now have the temerity to suggest some avenues through which this constantly growing stream of scientific data and knowledge can be directed in an orderly manner, into the proper legal channels.

III.

The lawyer knows well enough that whatever progress is to be made in the administration and application of law must come through the orderly changes and growth that comes from within the institution itself. The profession has always regarded without seriousness sweeping and revolutionary programs suggested by the layman in his enthusiasm for attaining results which he has reason to believe desirable, but with vague notions as to proper processes to attain them. We know that criminal justice is not likely to be reformed by an immediate elimination of the jury system, or by a wholesale discarding of rules of evidence, or by a complete substitution of specialists and scientists for judges and courts. We further have reason to believe that it is

unlikely that legislatures will suddenly turn over to psychologists the entire treatment and control of the delinquent members of society. We are pretty sure that it will be some time before sociologists will constitute a majority in both houses of the General Assembly. On the civil side, we are confident that courts will continue to feel it their duty to impose upon the public their notion of reasonableness regarding statutes which threaten liberty and property without due process of law and acts which curtail, to some extent, the liberty of contract of certain economic groups. It is not to be expected that in the very near future the consumer and the public utility will cease to submit their disputes to the judgment of a court of law as to the existing or proposed rates for certain commodities, when the question of confiscation is involved.

Whatever immediate use is to be made of science and the information and knowledge which the scientist is compiling must be made available to the processes of law through existing and familiar common law doctrines. It has been demonstrated that this is not a possibility so remote that it does not justify your thoughtful consideration. I shall remind you that nineteen years ago the Supreme Court of the United States, in a memorable decision, announced that it would "take judicial cognizance of all matters of general knowledge." There is nothing particularly startling in this enunciation of a time honored legal doctrine, but when it is made, as here, to include some several hundred pages of statistical and sociological data, it takes on a new significance. The sociological brief, as introduced by now Mr. Justice Brandeis, involves but an old method of making available to courts new and scientific facts. It can be presumed that the "general knowledge" includes all matters which are scientifically demonstrable. Thus the theory of judicial notice may be employed to present to a judge matters that are peculiarly available to the scientist only without doing violence to any of the traditional and cherished conceptions of our law. In other words, a court may be advised of matters, which, were he a scientist, would be easily within his grasp and probably within his knowledge.

But the statistical brief has limitations. It has not proven to be the great boon that some had hoped for the accurate solution of socio-legal problems. Chief among the drawbacks is the fact that the parties to the litigation are doing the advising. Science is employed for partisan ends, and thus loses much of its value. It is no longer science. It is thus, not strange that in subsequent cases involving the constitutionality of social legislation both sides to the controversy have employed this device to apparently excellent advantage. In other words, there is a strong

tendency to reduce the value and accuracy of this type of information to that of expert testimony, which always elicits a skeptical shrug from the lawyer.

Nevertheless the defect here is not with the scientific value of technical information, nor yet with the theory of judicial notice, but with the unscientific manner of employing scientific knowledge. Such knowledge is of the utmost value to the courts if some method were devised of presenting the same to them.

The second doctrine, and necessary complement to the theory of judicial notice which contains tremendous possibilities for the improved application of scientific materials to legal controversies, is the control that the judge exercises over the jury. It is elementary that a new trial may be granted, at the discretion of the court, when the verdict is contrary to the weight of evidence, as reasonable men must weigh that evidence. Verdicts may even be directed when, in view of the facts of the case, the court would be obligated to grant a new trial in case of an adverse verdict. The jury will not be permitted to return an unreasonable verdict, in the light of facts and evidence available to it. All matters of judicial notice may be considered as constituent parts of the factual situation to be adjudicated. Thus technical advice to the judge may be as well employed to counteract an obviously incorrect verdict, as to justify a reversal of the findings of the legislature when a statute is under examination respecting its constitutionality. Scientific data and facts which the notorious constitution of the jury would render unavailing, may in such manner be directly brought to bear upon the results of legal controversies.

Even in criminal cases, in spite of our traditional dogmas as to double jeopardy, by simple legislative manipulation, the control of the judge over the jury may correct many of the evils of the jury trial. Notoriously the court, in criminal cases, has been inadequately clothed with power, but under such statutes as those in Massachusetts which make possible a verdict of "not guilty, by reason of insanity," it is possible for the court to direct a verdict for the defendant and still commit the delinquent to an institution for years or for life. Thus information which would, in many instances be discarded or disregarded by a jury, may be used by the judge to correct an otherwise erroneous verdict.

The final phase of such a problem is the exact nature of the instrumentality or agency through which this material, so widely scattered and uncoordinated and related to practical legal problems, can reach the court. Realizing that generalizations upon so specific an issue often accomplish nothing, I have chosen to

offer a concrete proposal, which, while undoubtedly defective and inadequate, may commend itself to you by its practicability and economy.

Obviously the task of adjusting and correlating the work of the separate sciences so that it may be brought to bear directly to achieve the ends of law must be done by lawyers, with an eye to the specific and technical facilities of the legal system. I know of no place where this could be done more expeditiously and more economically than in the State University Law School. There and perhaps there alone conditions are ideal for research and the atmosphere free, for the most part, from political and class pressure.

As to the other fields involved, it must be remembered that the state is already paying salaries to men, in each science, who are presumably skilled and well qualified in the technique of their respective disciplines. Those of us at the Law School are in close and immediate contact with these men and their laboratories of work. Cooperation is not only possible, but coordinated work is invited by the conditions. These men are engaged in the double task of teaching and conducting and directing researches. Science, as a whole, and the individual himself profit from this work. So does the University, and, it follows, the state. But this latter profit is indirect. Why should not the state demand that it be entitled to the direct and immediate advantage of this time and research, by some regular and systematic direction and organization thereof? In other words, may not the state demand first consideration in the direction which the research work of its scientists and professors shall take?

This could be attained by the creation of a bureau which we may describe as a Bureau of Legal and Legislative Research. At the head of this bureau, directing and organizing the work, should be a lawyer, probably a professor in the Law School. A man of broad training and scientific insight, with some reduction of teaching hours, could direct the entire activities of such a board. Members of the bureau should include the heads of the different departments of the University which could lend active assistance. A definite number of hours of research per week could be demanded of these men, or their departments, which would in no way interfere with their teaching duties, nor increase the amount of work which they are expected to do under present conditions. Among their number should be included the head of the medical school, the head of the biology department, the head of the psychology department, the heads of the chemistry department, of the physics department, of the sociology department, and of

the department of economics. A statistician must also be included in the list as must be some members of the Agricultural College at Fargo. The time that these men now spend in research, commendable but promiscuous and unrelated to the particular needs of the state and community, could be directed along lines which could be made immediately or ultimately serviceable to the law-making and law administration facilities of the state.

By far sighted and intelligent direction, an immediate program could be instituted which, by organized work could prepare material to have a direct bearing upon present and future problems of law and legislation in this state. Material could be accumulated and data obtained and filed which would always be available to subserve the ends of the legislature and the courts. Studies of comparative legislation could be continually under way and the results of the same observed and evaluated, so that North Dakota might profit by the mistakes and successes of other states as well as from her own experience. The state would have its experts working directly in its service and devoting their entire time and effort to the working out of its local problems and to acquisition of a scientific foundation for their wise solution.

This bureau could act in an advisory capacity to the legislature and to the courts. In the first capacity, it could certainly render inestimable service in investigating social conditions and making recommendations as to their alleviation. It could work upon the crime problem, treatment of criminals and measures for a systematic preventative program. It could study and assimilate the work of experimenters all over the country, in different institutions, both public and private. In short it could act as a clearing house for all scientific information in the various fields which bear upon legislative problems. Upon the basis of this material, recommendations might be made to the legislature and the science of legislation become, at least in part, a reality.

I do not think that legislatures are going to quietly turn over to any committee of college professors the sacred duties which have been entrusted to them. Legislators are far too conscientious for that. But I do believe that it is not impossible for such a group of scientific men to perform such effective work and render such obviously priceless service to the public as to seduce the respect of legislators, and eventually the confidence of the public generally. As soon as this latter is accomplished, legislatures will weigh long and consider well before utterly disregarding the recommendations of such a bureau.

It is easy to demonstrate that "every beneficient change in legislation comes from a fresh study of social conditions and of social ends, and from some rejection of obsolete law to make room for a rule which fits the facts. One can hardly escape the conviction that a lawyer who has not studied economics and sociology is very apt to become a public enemy." It has been some years since these words were written by an intelligent student of social institutions, but their truth is now more obvious than ever.

As to the direct service of such a group to the courts, in brief, it is possible for it to perform the same function that under our present practice is performed by the sociological brief and expert witnesses, with an infinitely wider field in which to function. The bureau could act only in an advisory capacity. Courts could submit hypothetical questions to the director, who, in turn, submits the same to the particular scientist interested. The answer, from available data where possible, or after experiment and investigation, may be returned to the judge together with written memoranda of the reasons therefor and an abstract of the scientific principles underlying those reasons. Where possible, the facts and data can be sent to the court with explanations permitting him to make his own conclusions from those facts. Intelligent courts will be able to anticipate many such problems before time for a decision. In certain cases specialists can be sent to different venues to conduct examinations or investigations where such can be conducted only there. Especially valuable could be this procedure in criminal trials, for the trial court through competent technical advice and a little legislative latitude can do much to forward the application of the principle of individualized punishment of crime. The Supreme Court, of course, could have ample time to submit troublesome questions which are apparent upon the record, and await the bureau's answer, in the form of a report or advisory opinion as I have indicated.

Some of the advantages of such a bureau as this must be patent to all. The members of the same are specialists, devoting their entire time to the particular field of knowledge in which they are interested. Such questions as are submitted to them would be attacked in a perfectly objective way, from an unprejudiced and unbiased point of view, in so far as such is humanly possible. These men are working under conditions conducive to producing scientific results, unpolluted by political influence and, to a large extent, free from the intolerance of class partisanship. In many problems, submitted by courts hypothetically, the scientist and research man will have little notion of the purpose or application of his work. His findings and advice should be

welcomed by the courts, and would, I make bold to predict, be taken into account in an ever increasing degree.

By no means unimportant is the matter of expense entailed at the beginning of such an experiment. It would be comparatively nominal. The personnel of the bureau is already available, in the employ of the state. A slight reduction of teaching hours, particularly for the director, upon whom the heaviest duties would obviously fall, slight expenditures for secretarial and office assistance would be all that would be required to launch the enterprise. Laboratories, libraries, equipment and workers are at hand. Great quantities of valuable material are accumulating. Only the organization and coordination of this work by lawyers and the presentment of the same to our lawmakers, both legislative and judicial, is necessary. No revolutionary or even novel theories or doctrines are needed to make such provisions. But trifling expense is entailed in starting a process which has tremendous possibilities for increasing the effectiveness with which courts and legislators may perform their work and the need for some such action is imperative and obvious. There is great profit to be derived, and nothing to lose.

In North Dakota conditions are particularly propitious for such an experiment. The volume of litigation is not so great but that reasonably accurate observation could be made of the comparative value of the work of such a bureau. Over the space of a few years definite conclusions could be drawn, and necessary corrections and adjustments made. The criminal problem in our state is not so acute but that this bureau could, with a limited number of members, give adequate attention to it, although this might not be possible were the volume of criminal cases much larger. The population of the state is not so unwieldly that it would prevent effective administration of any rational preventative program which the bureau might advocate and the legislature adopt.

Further, and quite as important, the state prides itself upon the high standard of its bar and the intelligence of its judiciary. We have no occasion to apologize for or to mistrust our legislature. It undoubtedly strives to cooperate with the bar and to weigh seriously measures championed by it. The state is definitely aligned with the more progressive communities and we take a just pride in our educational institutions. It is in such a jurisdiction that some plan similar to the one I have outlined might be expected a trial. It is not, nor is it intended to be a radical or unique scheme. Similar plans, though I think perhaps not so inclusive nor yet so concrete, have been suggested by outstanding

legal scholars. I have tried to offer a sane, but it is to be hoped effective plan to definitely align science and the scientific method with law and government, and to utilize, in behalf of society and of the state, those instrumentalities and agencies already at its disposal, but awaiting the work which only the legal profession can perform, to harness them to the specific task of serving their master well. The defects of the plan, perhaps obvious to most of you, may I suggest, could be best remedied by the interest which I am bold to hope this Association may display in it.

JUDGE MCKENNA: Mr. President, I feel that the thanks of this Association are due Professor Harper for this carefully prepared and scientific paper. He has come here and very frankly told us the need for co-relation between law as a science and the other sciences. He has stressed with knowledge of the law the necessity of knowledge of other sciences, which we lawyers of today have evidently not given much thought to and with which we have not kept abreast. I notice he advocates cooperation with the sociologists, with medicine and many various professions, and suggests the study of the positive and social sciences by the law students. I think that it would only be proper that Professor Harper's paper be printed in our regular proceedings of the convention and that we go on record as giving him a vote of thanks for coming here and telling us of some of the defects which we are slow to recognize.

PRESIDENT: You move that the paper be printed and that a vote of thanks be extended to Professor Harper?

JUDGE MCKENNA: Yes.

MR. CUTHBERT: I second the motion.

PRESIDENT: It has been moved and seconded that Professor Harper's paper be printed in proceedings of this Association and that he be extended a vote of thanks; all those in favor may signify by saying "aye." (Aye.) Those opposed. (None.)

This meeting stands adjourned until 2 p. m., at which time we will continue our program at the Epworth League Hall.

AFTERNOON SESSION

PRESIDENT: I am instructed to say to you folks in the back seats that this is not a Methodist camp meeting and no collection will be taken. I don't know if you have heard the story of the stranger who wandered into Edinboro, Scotland, and found the streets deserted. He asked one of the natives what the trouble

was, and he said, "It is tag day," and two weeks later he found that the residence section was deserted and he asked the trouble and one of the natives said, "They had tag day two weeks ago and everyone stayed home so now they are going into the residence district."

We are going to be entertained for a few minutes with a musical number by one of the young men of our city of whom we are justly proud. A young man—those of you who have heard him enough is said, and those of you who have not heard him I will say that after you have heard him nothing I could say will add to his laurels; Mr. Paul Yoder.

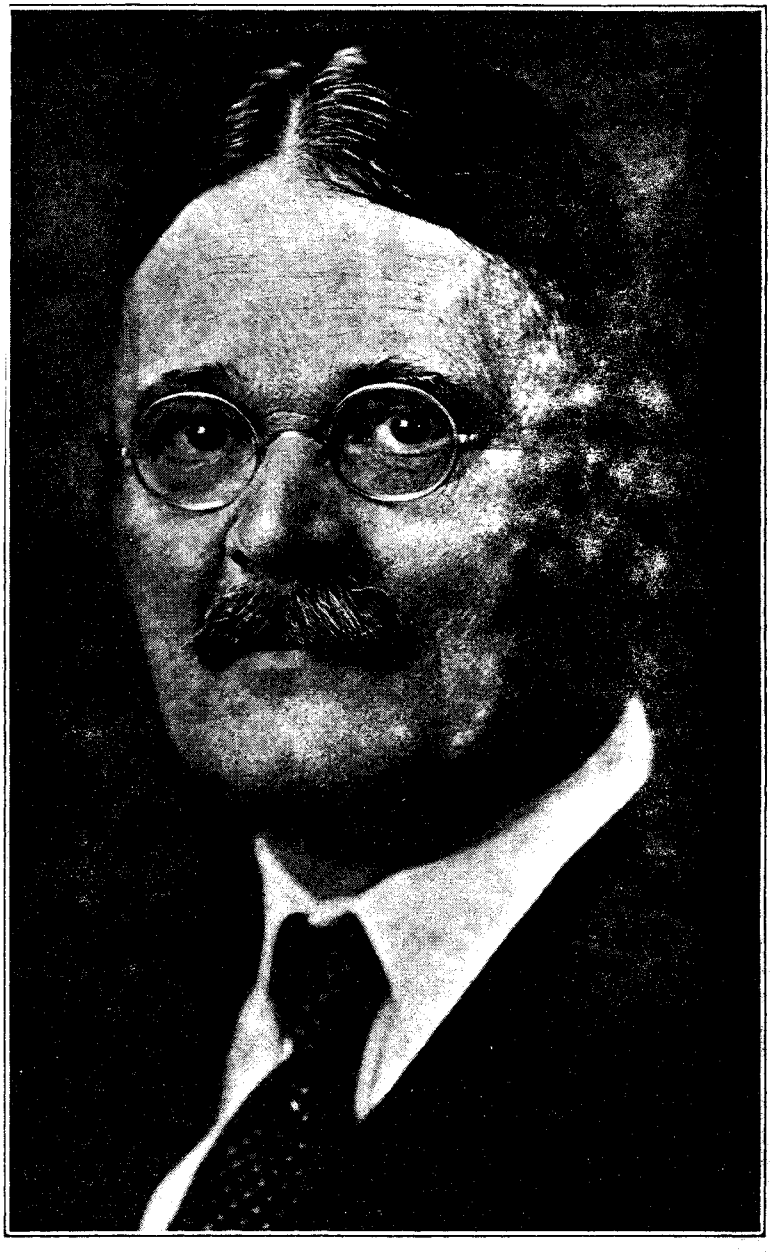
(Plays xylophone solo, is encored twice.)

PRESIDENT: I have the great pleasure now of presenting to you the Dean of our Law School, who will present the speaker of the hour; Dean Cockerill.

DEAN COCKERILL: Mr. President, members of the State Bar Association, ladies and gentlemen: President McIntyre has been an excellent official. He does all the hard work and delegates to his assistants the easy things to do; only the delightful tasks, the simple ones. Dean Pound is known everywhere in the legal world, in the educational world, and in the other world. He not only furnished inspiration for the law schools but he has stood out in front of us beckoning us to come forward; not only beckoned us but in many instances roped us and tied us and pulled us up to his high place. Not only has he been an inspiration in the law school world, but he has been an inspiration to the American Bar. If there is any State Bar Association in the United States or under the jurisdiction of the United States that he has not addressed my geography does not carry me that far. Not only has he educated the law school world but he has inspired the Bar of the United States. He has been quoted more often than any other writer on legal subjects. You know him personally and by reputation. It certainly affords me great pleasure to introduce to you Dean Pound of the Harvard Law School. (Applause.)

DEAN POUND: Mr. President, ladies and gentlemen: It used to impress me when I had to sit on the platform and be introduced by the presiding officer in his best florgothian style of introduction and oratory, but not so long ago it chanced that I had to sit for a season on the highest Court of my native State. In that capacity I decided a particular piece of litigation not entirely to the satisfaction of the populace press, and in commenting on that decision they compared me to a . . . parrot. Nothing

that anyone has been able to say about me since has given me very much concern. Now I have a manuscript here which I am not going to read but which I am going to turn over to your secretary that it may be printed as a complete, authentic and accurate account of exactly what I said. I am going to endeavor to give you the substance of it. About a year ago I delivered a commencement address at the University of Pittsburgh. I called in a public stenographer and dictated the address to her. It was a day considerably warmer than this and as I warmed up to my subject the stenographer passed her handkerchief over her face and held up her hand and said, "Gee, but you do use highbrow words." Now I imagine that nobody can speak on a technical subject to an audience, a great part of which at least is trained in these technical terms, without a certain highbrow vocabulary, but I am going to try to limit that to the manuscript and in my oral exposition I am going to keep as close as a difficult and technical subject will allow to the use of words of one syllable, being less highbrow.



ROSCOE POUND
Dean Harvard Law School