

4-1926

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### Recommended Citation

Robinson, James J. (1926) "Admission to the Bar as Provided for in the Indiana Constitutional Convention of 1850-1851," *Indiana Law Journal*: Vol. 1 : Iss. 4 , Article 4.

Available at: <https://www.repository.law.indiana.edu/ilj/vol1/iss4/4>

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## ADMISSION TO THE BAR AS PROVIDED FOR IN THE INDIANA CONSTITUTIONAL CONVENTION OF 1850-1851

The Committee on Legal Education of the Indiana State Bar Association recently has recommended and published uniform rules for admission to practice law in the Circuit and Superior Courts of Indiana. The committee states that several Indiana City Bar Associations have "made it plain to applicants for admission that no applicant was of good moral character who asked to be admitted to practice law when he was not qualified." Whether the courts will permit such an interpretation of the Indiana constitutional provision for admission to the bar,<sup>1</sup> or whether the Indiana Bar Associations must continue their repeated efforts to amend the constitution in this respect, presents a critical question of constitutional construction.

For aid in answering this question may we look into the proceedings of the constitutional convention of 1850-1851? Judge Cooley says that "the object of construction as applied to a written constitution, is to give effect to the intent of the people in adopting it. . . . But this intent is to be found in the instrument itself."<sup>2</sup> . . . . It is possible, however, that after we shall have made use of all the lights which the instrument itself affords, there may still be doubts to clear up and ambiguities to explain. Then, and only then, are we warranted in seeking elsewhere for aid.<sup>3</sup> . . . . When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument."<sup>4</sup> And Dean Burdick, speaking of interpretation of the federal constitution, concludes a similar line of reasoning by saying " . . . where a term or phrase is open to different interpretations, the meaning intended to be attached to it by its framers, or the purposes intended to be effected by it, will be taken into consideration."<sup>5</sup>

Apparently the terms of this Indiana constitutional provision demand interpretation and construction. Does the clause exclude any test whatever of intellectual capacity or training? May any ignorant, of good moral character and a voter, as of right compel his own admission to the Indiana Bar? Did the framers use the words "entitled to admission to practice law in all courts of justice" with

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<sup>1</sup>*Constitution of Indiana*, Article VII, Section 21; Sec. 188 Burns' Ind. Statutes, 1926: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."

<sup>2</sup>*Cooley, Constitutional Limitations*, 7th ed., p. 89.

<sup>3</sup>*Ibid.*, p. 100.

<sup>4</sup>*Ibid.*, p. 101. As to prejudiced or unwise provisions leading to absurd consequences, see pp. 108, 109.

<sup>5</sup>*Burdick, The Law of the American Constitution*, pp. 147, 148.

the purpose of taking from such courts all control of the admission of the attorneys at law, who constitute the chief officers of the courts? Literally such might be thought to be the force and effect of the clause. But could such an absurd result have been intended by the framers of the constitution? Especially could the framers have intended such a result in Section 21 of Article VII, while in Section 1 of the same article they were vesting "the judicial power of the state" in the courts of the state? And may not the term "judicial power" be properly interpreted to include the power of a court to govern the admission and control of members of its own bar? To get more light on these questions, we look to the official report of the proceedings of the delegates on the floor of the convention.

The Indiana Constitutional Convention of 1850 was made up of 150 delegates, of whom 62 were farmers, 39 were lawyers, 16 were physicians, and 11 were merchants and traders.<sup>6</sup> Several leading lawyers of the state were delegates, but many leading lawyers belonged to the minority political party and were noticeably absent.<sup>7</sup> One of the issues on which the voters had demanded action was the simplification and reform of the law. As the debates show, law and lawyers were in disfavor with the people.<sup>7</sup> Delegate George Tague, of Hancock, on November 23, 1850, on the floor of the convention, spoke in support of his startling resolution "to abolish the common law of England." He stated a popular attitude when he said, "I do not wish to find fault with the attorneys, but when we go to them for advice, there is always too much of it. A common man cannot understand the law."<sup>8</sup> Delegate Erastus Bascom, of Wells and Adams, three weeks later, spoke in favor of a section requiring all practicable avoidance of the use of Latin terms in bills and other legal documents. He said, "I want language employed that men not versed in law can understand. I know that it will be resisted by members of the legal profession, for it will steal a little of the trade of those lawyers who hang around the county seats. (A voice. That is it exactly). But we have been long enough governed by lawyers. I am not in favor of compelling an honest and plain citizen who understands nothing about legal phrases to travel up to the county seat and pay a lawyer five dollars to explain a provision of the law. The whole system requires changing."<sup>9</sup>

Further indication of the prevailing hostility to lawyers is seen in the sarcastic slogan of non-lawyer members, by which they repeatedly

<sup>6</sup>*William W. Thornton: The Constitutional Convention of 1850. Report of the Sixth Annual Meeting of the State Bar Association of Indiana, 1902; page 176.*

<sup>7</sup>*Esarey: History of Indiana, Chapter XX.*

<sup>8</sup>*Official Report, p. 723.*

<sup>9</sup>*Official Report, p. 1130.*

referred to themselves with mock deprecation as mere "lay" members of the convention.

This prejudice against lawyers did not produce a clause in the constitution to abolish the legal profession. But it throws light on the adoption of the present clause.

On January 20, 1851, the forerunner of the present clause appeared. While the body was considering an article on law reform, Delegate Johnson Watts, of Dearborn, proposed an amendment by adding "and hereafter, every legal voter of good moral standing shall be allowed to practice law." A voice asked, "Did the gentleman from Dearborn say 'every negro voter?'" (Laughter). To which Mr. Watts replied, "Yes, if the gentlemen can find any."<sup>10</sup>

Delegate David Kilgore, of Delaware, moved the indefinite postponement of the article and amendment, but an unnamed member spoke up: "No sir-ee; you can't do it." This too, was followed by laughter. Shortly afterward Mr. Watts "temporarily" withdrew his proposed amendment. But later in the debate on the article on law reform, Delegate Daniel Kelso, of Ohio and Switzerland, said, "Now with regard to admitting every man to practice at the bar, I have no objection to that whatever. I say admit every man, and every woman, too, if you please. The more pettifoggers we can get into our courts the more money your good lawyers will make. I am quite willing that every man should practice law; and if there are not men enough to break down the bar by their practice, let the women have a chance at it, too. But sir, in all seriousness, it occurs to me that this is a matter which ought to be left to the legislature, for them to exercise their wisdom and judgment upon."<sup>11</sup>

Two days later John B. Niles, of LaPorte, a lawyer himself, who subsequently voted for the clause in its present form, said, "For one I can say that I am willing that all bar rules should be abolished, and that any man of good moral character should be authorized to practice law. I am tired of the clamor against lawyers, and of being told that we have exclusive privileges, without being able to reply—you are a lawyer, too, sir. The lawyer and advocate under the Roman commonwealth needed no special license to practice his profession. Open the door wide to free competition; and integrity, learning and ability, will be a sufficient certificate, and without such certificate, a man will have but a poor practice. The law must be a vast and learned science, so long as it affords protection to the varied interests of civilized society. The idea of making every man his own lawyer by simplifying the rules of practice amounts to about as much as the

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<sup>10</sup>*Official Report*, p. 1713.

<sup>11</sup>*Official Report*, p. 1717.

scheme of some one who wrote a book, entitled 'Every man his own washer-woman'.'<sup>12</sup>

The next appearance of a lawyer-admission clause was on January 25, 1851, when Delegate William C. Foster, Sr., of Monroe, offered the following as an additional section: "All white male citizens of the age of twenty-one years and upwards and of good moral character, shall be permitted to practice law in all the courts in this state." The official report here states: "Mr. Foster remarked, that when he came into this state many years ago, no one was permitted to practice medicine, unless a graduate of the universty, or who had obtained a license from the medical institutes of the State. That law had been repealed, so that now every one could practice in the medical profession, no matter of what grade, regulars, Homoepathists, Thompsonians, or Allopathists. In divinity, it was formerly the custom for students not only to receive an education in divinity, but to reside for some years at a theological Seminary or university. It is different now days. Why should there be an exception made in favor of the law? These were the three liberal professions. In other States, the practice of the law had been thrown open to all persons of good moral character. The members of the bar would not fear competition with those who did not understand their business. Throw the profession open to all, like medicine and divinity; these were his sentiments."<sup>13</sup>

Alexander C. Stephenson, of Putnam, moved that the amendment (section ?) be laid upon the table. The motion was not agreed to.

Thomas D. Walpole, of Hancock and Madison, moved to amend by adding the words "medicine and surgery."

Daniel Kelso then said, "I hope the question will not be encumbered by amendments; but that we may have a direct vote on the section, so that all the quacks that cannot make a living by practicing medicine may resort to the law, and thereby save themselves from becoming paupers and chargeable upon the county." (Loud laughter). The section and amendment were laid upon the table.

The next appearance of a lawyer-admission clause was on January 27, 1851, when James W. Borden of Allen, Adams, and Wells, from the committee on law reform, reported a section providing that "any person of good moral character, having the right of suffrage, shall be entitled to practice law within this state." The section was read and passed to a second reading without discussion.<sup>14</sup>

Four days later, the section came up on second reading, and was

<sup>12</sup>*Official Report*, p. 1754.

<sup>13</sup>*Official Report*, p. 1847.

<sup>14</sup>*Official Report*, pp. 1853, 1854.

<sup>15</sup>*Official Aeport*, p. 1960. At p. 1961 a proposed Article on the same subject is set out.

ordered to be engrossed to third reading.<sup>15</sup> The words "to admission" had been added to the section in some unexplained manner before third reading, and the section then read: "Any person of good moral character, and possessing the right of suffrage, shall be entitled to admission to practice in all the courts of this State."

On Saturday, February 1, 1851, the Convention proceeded to the consideration of "the section reported by the committee on the practice of law and law reform, upon its third reading." The Official Report reads as follows (pages 1971 and 1972):

The section is as follows:

"Any person of good moral character, and possessing the right of suffrage shall be entitled to admission to practice in all the courts of this State."

MR. KELSO. The section ought to be amended by the striking out of two words, and I hope the Convention will agree to the amendment by unanimous consent. The words are "to admission." The section contemplates that there shall be an examination. I would prefer that it should be in this form, that any man of good moral character and possessing the right of suffrage shall be entitled to practice in all the courts of this State.

SEVERAL MEMBERS. "Consent! Consent!!"

MR. KELSO. I do not care one farthing about it. Take the section as it stands, it just amounts to what the law now is.

THE PRESIDENT. The gentleman will send up his amendment in writing.

MR. KELSO. Yes, sir, I will send it up in writing. I move that the section be recomitted with instructions to strike out the words "to admission."

MR. BORDEN. I ask whether it is the intention of this provision that a man who knows nothing about the law at all, will be permitted to come into court and practice law?

A VOICE. "Lay members," for instance.

MR. BORDEN. I move that the section be laid upon the table. (Much confusion here prevailed throughout the chamber).

MR. MILROY demanded the previous question.

The demand for the previous question was seconded.

The main question was ordered to be now put.

THE PRESIDENT. (Without noticing the motion of the gentleman from Allen) said: The main question is upon the passage of the section.

A MEMBER. I want the yeas and nays upon this question.

MR. COLFAX. The previous question I think brings the convention to a vote first upon the motion to recommit.

A VOICE. There certainly was such a motion, and it was made by the gentleman from Switzerland (Mr. Kelso).

MR. PETTIT. The motion to recommit was made to my certain knowledge.

MR. WATTS. I make a point of order. The gentlemen of the bar have no right to vote upon this question, because they are personally concerned.

THE PRESIDENT. (Laughing). Members of the legal profession will be excused from voting.

MR. GIBSON. I would inquire whether an amendment could now be made, by universal consent?

THE PRESIDENT. Not under the operation of the previous question.

MR. GIBSON. As the proposition at present stands, it gives the right to practice law to any person.

A VOICE. Possessing the right of suffrage. It strikes me that this is too broad.

The question then, according to the ruling of the chair, being upon the adoption of the section, the yeas and nays were taken, under the rule, with the following result—yeas 84, nays 27.

Here the Official Report proceeds to list the names of the delegates voting Yea and those voting Nay. Among the yeas are Schuyler Colfax, of St. Joseph; Daniel Crumbacker, of Lake and Porter; William S. Holman, of Dearborn; Foster; Gibson; Kelso; Niles; Watts; and Mr. President himself (George W. Carr of Lawrence). Among the nays are David Wallace, John Pettit, Samuel Hall, Smith Miller, C. C. Nave, and Thomas Walpole. Among the thirty-nine delegates who were not recorded as voting were some of the most distinguished members, including Robert Dale Owen, Alvin P. Hovey, Thomas A. Hendricks, and Horace L. Biddle. As the voting majority of the convention membership was seventy-six, the yeas numbered eight more than the convention majority, but were three to one in the vote cast, and had a plurality of fifty-seven votes.

So the section was adopted and was referred to the committee on revision, arrangement, and phraseology.

Further changes in the section appear in the completed constitution, apparently changes made by the committee on revision. The section as originally adopted began with the words, "Any person;" the present words are "Every person." The original words "and possessing the right of suffrage" are replaced by the words "being a voter." The original clause "to practice in all the courts of this State" is replaced by the present clause "to practice law in all courts of justice."

Robert Dale Owen, on February 8, 1851, reported an "Address to the Electors" explanatory of the provisions of the draft of the new constitution. The only mention of the lawyer-admission clause is in

the section headed "As to Law Reform."<sup>16</sup> This section explains that the new constitutional draft provides for the appointment by the General Assembly of three commissioners to revise and simplify the practice and forms of the courts; to abolish the separate forms of action then in use; and to provide for a uniform mode of pleading without distinction between law and equity. The section then contains the following sentences: "Every person of good moral character who is a voter, is entitled to admission to practice law in any of the Courts of this State.

"These reforms are of an important character; calculated to diminish the cost and to correct the delay of law proceedings. As the law now is, a man may prosecute a perfectly just claim, but if he commence suit on what an arbitrary rule calls the wrong side of the court, he cannot recover." The section proceeds to list other grievances against similar "antiquated" and "vexatious" usages in the courts. But no other reference is made to the lawyer-admission clause. The section closes with reference to the courts of conciliation authorized in the draft and designed to secure the speedy decision of cases voluntarily submitted, "without the tedious and expensive process of law."

Now that we have looked into the officially reported proceedings of the Indiana constitutional convention of 1850-1851, we return to our question as to whether or not they throw any light on the problem of constitutional construction with which this comment opens. When we proceeded to examine this lawyer-admission clause of the constitution, we were forced to exclaim, like that "Voice" speaking on the convention floor seventy-five years ago, "It strikes me that this is too broad." We, thereupon, have examined what the other voices of that convention were saying, in order to ascertain, in the words of Judge Cooley, already quoted, "the mischief designed to be remedied, or the purpose sought to be accomplished" by the provision. Without attempting a discussion which would exceed the necessary limits of this comment, we present the evidence herein set out. From it, each is entitled to draw his own conclusions. We submit, however, that the following considerations and conclusions are proper under the evidence.

First, it is not clear either that the framers intended that admission to the bar should be open without examination, or with examination. The intent of many of the delegates in convention assembled seems to have been to make the section as broad as the language itself may indicate. But no doubt some of the able lawyers and others whose names are found among those voting for the Section, believed, as Kelso said, that "the section contemplates that there shall be an examination," and that the existing law was not changed by the section. And the apparent willingness to adopt Kelso's amendment in-

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<sup>16</sup>*Official Report*, p. 2044.



icated some agreement by delegates with this view. It is also clear that, by their proposed plans of Law Reform, many of the delegates apparently intended and expected to make law practice so simple that every man could be his own lawyer. Section 21 was merely their supplement to their plan of law reform, a plan which was not and could not be fully realized. Moreover, there is some indication in the terms and history of Section 21 that it was a declaration of rights generally rather than a definite provision for admitting lawyers to the Indiana Bar.

Second, the debates show various motives at work. They show strong popular prejudice against lawyers. Without attempting to say to what extent the lawyers themselves were to blame for this popular impatience, we may clearly see that the motives behind the section were not solely the reasoned dictates of constitutional statesmanship. Also, no passage has been found in the debates in which support for the Section was based on a motive of helping deserving young men, or older men, by admitting them to the Bar without the expense of preliminary training. In fact law offices then were the chief means of legal education, and law schools were few and not readily accessible. The Abraham Lincoln argument was not made, partly because Lincoln was not then as famous as his memory now is, but chiefly because such considerations do not appear to have occurred to the delegates generally as worth mentioning. On the contrary, probably the principal and determining motive of the delegates was a patriotic intention to reform the law and its administration. The lawyer-admission Section, as we have seen, was merely incidental to this main plan. Owen's address to the voters indicates this. The debates also show it.

Third, the Section did not receive adequate discussion on its own merits. It was tacked on to the law reform plan. It was the victim of arguments from false premises, including the argument by Delegate Foster that as anybody at that date could be a doctor, so the constitution should fix an inalienable right in anybody to be a lawyer. Another false premise rested on the argument that "other states" had made such constitutional provisions as to lawyers. The debates show that, from the first formal mention of such a provision, laughter, or disorder, frequently accompanied its discussion. Some of the non-lawyer delegates seemed to enjoy "baiting" the lawyer delegates. Lack of adequate discussion is further evidenced by the way in which the section suffered from irregularities or "flukes" in parliamentary procedure, including the change of terminology between the second and third readings, and the apparent failure of the chair to allow consideration of Kelso's final motion to recommit. By these irregularities, the important words "to admission" were put in the section, and were left there without reconsideration. This fact of inadequate discussion also militates against interpreting the section as a

literally accurate expression of any intention of the delegates to prescribe the exact conditions for admission to the Bar.

In brief, the proceedings of the convention show us that the delegates had strong convictions that the administration of justice must be improved, but that they were not sure as to the exact way to do it. Section 21 was largely just a part of their law reform plan. Therefore, their debates do not show us that, apart from their big, general law reform plan, they had a definite and reasoned intention to admit lawyers to the Bar only by examination or without examination. If, therefore, we again have the opportunity to amend or omit Section 21, the controlling arguments will necessarily be, not the law reform arguments of 1850 and 1851, but arguments based upon the modern conditions affecting the practice of law just as they affect the practice of medicine and other similar professions and occupations.

In the meantime, the interpretation placed upon the "good moral character" clause of Section 21 by Indiana State and City Bar Associations is meeting with favor. It would be difficult to show that such interpretation does violence either to Section 21 or to the intentions of its honored framers of three-quarters of a century ago.

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