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THE FUTURE OF THE PRACTICE OF LAW

By HON. CURTIS G. SHAKE*

Are there any of you who have not at some time heard some lawyer express sentiments like these: "I don't want my boy to become a lawyer. The practice is not what it once was. The law has ceased to be a learned profession and has become a competitive commercial business. Clients expect a lawyer to be a business adviser, rather than a counselor or an advocate. The profession is overcrowded. The better practice has gravitated to the larger cities. Banks and trust companies, insurance companies, credit and adjustment bureaus, and abstractors now render services that were formerly performed by lawyers"?

It is not to be denied that there is some truth in these oft-repeated observations. They challenge our thoughtful consideration. Within the memory of most of us, deep and vital changes have taken place in the social, civic, and economic life of our country and the world. It was not to be expected that of all fields of human endeavor ours alone should remain unaffected. The practice of law is intimately

* Chief Justice of the Supreme Court of Indiana. Address delivered at mid-winter meeting of Indianapolis State Bar Association, Indianapolis, Indiana, January 13, 1940.

associated with the administration of justice. The administration of justice is one of the first concerns of a responsible government. The concepts of governmental responsibility have, in recent years, been re-examined, re-interpreted, and restated. There is, therefore, much reason for surprise, as well as gratification, that our great profession has not been even more seriously disturbed.

It was Daniel Webster, I believe, who said: "When the mariner has been tossed for many days in thick weather, and on an unknown sea, he naturally avails himself of the first pause in the storm, the earliest glance of the sun, to take his latitude, and ascertain how far the elements have driven him from his true course." Applying the metaphor so eloquently used by the Sage of Marshfield to our profession, we have, indeed, been tossed about in thick weather, and there have certainly been times when it seemed that we were sailing an unknown sea. We trust that what presently appears to be the welcome sunlight of a better day is not merely a mirage, and that the appearance of smoother waters ahead is not a temporary calm between two violent storms. Perhaps, then, the time is at hand for us to take our latitude, and ascertain how far we have been driven from our true course.

I take it that we are all conscious of the fact that in recent years there has been a let-down in popular respect for the bench and bar. This is a most serious indictment, because the integrity of courts and lawyers is the foundation stone upon which the temple of law and order must stand. From the very nature of things, the successful lawyer must enjoy the complete confidence and respect of his clients and the public. You do not need to be told that most lawyers are absolutely faithful to the trusts that are reposed in them. A client will place a valuable note or negotiable bond in the hands of his lawyer for collection without asking for a receipt —no banker enjoys more complete confidence than that; a man charged with murder will tell his lawyer things which, if revealed, would send the client to the electric chair—no priest or preacher ever heard a deathbed confession on more

intimate terms than these; a dying man will leave it to his lawyer to see that his wife and children receive the benefit of their inheritance—no sick person ever relied on the knowledge and skill of his doctor with more complete abandon.

Why, then, this growing lack of confidence in the legal profession? May it not be due, in part, to the fact that lawyers on the whole are so worthy of the confidence reposed in them and so generously trusted that the public is shocked when one of them proves unfaithful, as must occasionally happen? These individual derelictions cannot be prevented any more than the public can prevent murder or larceny. Nor should the bar be expected to answer for the unprofessional conduct of every individual member. It is our duty, however, to do all that we can to maintain the good reputation of the profession and to reduce, so far as possible, the re-occurrence of those unfortunate incidents that reflect upon the integrity of the bar.

A long step in the right direction was taken when we set up machinery for regulating admissions to the bar. Inquiries into the character and fitness of candidates and standards of education and training have already given assurances that the lawyers of tomorrow will be better equipped for their responsibilities than are some of those of the present generation. We are greatly indebted to the modern law schools for the excellence of the training they offer and the contributions they are making toward a better bar.

Associations like the Indiana Bar Association, and the American Bar Association in particular, have promulgated canons of professional ethics that represent crystallized sentiments of decency and decorum. It is no longer necessary for any lawyer to remain in doubt as to what he should do or refrain from doing under almost any circumstance.

The problem of how to deal with the few in our ranks who prove themselves unworthy to appear for others in courts of justice, has long been a source of embarrassment to our profession. I am inclined to believe that much of our trouble in this regard has been due to a misconception of the nature of the right to practice law. We have thrown

about it all the protection due a vested or property right. We have shut our eyes to that which we all know, namely, that like any other profession, the right to practice law is merely a privilege to be enjoyed during good behavior.

Why should there be a right to trial by jury in disbarment proceedings? Lawyers take pride in regarding themselves as officers of the court. Is this anything more than an empty phrase, meant to impress the public with our own importance? Would it not seem that the courts of our state, with more than 4,000 so-called officers at their command, ought to be able to rid themselves of those unfit to practice law before them, without waiting for some outraged citizen to prefer charges and carry the litigation through a jury trial? No good reason can be seen why the courts should not be authorized to deal directly and summarily with this unpleasant subject, with incidental powers to call upon the organized bar to ascertain and report the facts and, of course, with the right of review for errors. Until the bar of Indiana musters the courage to divorce itself from those who are unworthy of a place in its ranks, the many competent, reputable, and high-minded lawyers of the state will have to suffer for the shortcomings of a few.

The pioneer lawyer of Indiana was regarded as an outstanding citizen and a leader of his community. People gathered in the court rooms for displays of legal learning and forensic skill. To be a member of the bar was a great honor and a high distinction. There is no denial that in recent years our profession has suffered a loss of dignity and respect. Our calling has become the subject of the gibes and jests and jokes of the public and private entertainers of the land. We share with our unfortunate mothers-in-law the odium of the side-splitting quips and quirks of vaudeville comedians. In more ribald quarters we hear the words "lawyer" and "liar" used synonymously. Court room scenes are portrayed on the screen and stage that are a libel on the administration of justice. The jury acquits the fair defendant without leaving the box; the motley audience calls for the blood of the villainous prosecuting attorney; the eccentric bailiff pounds

frantically for order in the court; while through it all the stupid judge sleeps on!

We cannot altogether outlaw these insults to the dignity of a great profession. Good taste cannot be achieved by legislation any more than poor sportsmanship can be prevented by court injunction. So far as I am presently advised, no one has even suggested the creation of a new board or commission to deal with this perplexing problem. This is indicative of the delicacy of the task, if, indeed, it is not conclusive proof that not much can be done about it.

Seriously, though, we can discourage these unwarranted aspersions. We can make the power and force of our organized opinion felt. We can tell the responsible agencies, in a language which they will understand, that when they do these things they impede the administration of justice and foster disrespect for law and order. The public can be reminded that when they insult the dignity, they thereby injure the usefulness of the great profession that is the refuge of the oppressed and the spokesman for those who are persecuted. Why do they not, we may ask, make a comedy and a mockery out of the deathbed scene, where the faithful family physician uses all his skill to fan the dim spark of life. We too save lives, and what is more, we sometimes carry the solemn duty of saying when men shall die for their crimes.

A consistent campaign of popular education would seem to be in order. It would do the public good to be reminded once in a while that the legal profession is the exclusive guardian of one of the three coordinate branches of government; that while presidents and governors may propose and promote policies, and congress and legislatures may enact statutes, it is the courts of this country that ultimately say what the law is. I would not take away one whit from the honor and respect that goes with the office of the chief executive of this great nation, but I hope the time may come when the Chief Justice of the United States is accorded the same high regard and recognition. After all, the President of the United States, the Chief Justice of the Supreme Court, and the Speaker of the National House of Representatives are

the three ranking officers of this government, rather than the President, the Vice-President, and the Secretary of State, as our school children are so frequently taught.

This campaign of education might well embrace a brief course in American history, with due emphasis upon its judicial development and the part played by our profession. It would do our critics good to know that 25 of the 56 signers of the Declaration of Independence were lawyers; that 31 of the 55 framers of the Federal Constitution were lawyers; that 25 of our 32 presidents have been lawyers; and that a majority of the members of every congress have been lawyers.

For many years this organization has sponsored and promoted the study of the Federal Constitution on the part of school children. This has been a commendable and patriotic objective, and it has, no doubt, accomplished much good that will be reflected in a more intelligent citizenship in the years ahead. That program might profitably be supplemented by a campaign of adult education, designed to inculcate a better understanding of the place of the legal profession in the lives of our people. Incidentally, such a project might well embrace a few lessons devoted to the part the private citizen should play in the administration of justice, with proper emphasis upon the patriotic duty to do jury service. I am optimistic enough to believe that if we will set our minds and our energies to the task, we may yet regain for our profession the high esteem in which it was once held.

Among all fields of human endeavor, it seems that lawyers alone have failed to comprehend the full import of the old adage that in union there is strength. No wonder we feel somewhat ill at ease in this highly organized age. The lack of organization on our part has reacted to our disadvantage time and again. How frequently have we observed some other group advance its own interests at the expense of ours? This is particularly true in the development of those movements that have resulted in the shifting of legal business into other channels. As a consequence, there have grown up a number of so-called hybrid professions that have taken

over a substantial part of the legitimate and profitable practice of the legal profession. This is especially true in the specialized fields, involving such intricate matters as taxation and regulatory proceedings before departments, boards, and commissions. The Illinois State Bar Association, in a recent approach to this problem, found that it could classify the members of the bar of that state as equipped to render 109 types of specialized service.

Lawyers are, by the very nature of their training and experience, rugged individualists. They soon learn to make their own decisions and to depend upon their own initiative. Because of these tendencies they do not lean as heavily upon group action as do the members of other professions. While possessing fine propensities for fellowship and social intercourse, they are disposed to depreciate the value of cooperative movements. For these reasons bar associations have not had the support they have deserved either in membership or in interest. Figures are always monotonous and a few simple illustrations will suffice. In 1938 there were 165,000 physicians in the United States, of whom 109,000 were members of the American Medical Association. During the same year there were 78,000 dentists, 45,000 of whom were affiliated with their national organization. Now for the shock: in 1938, we had in this country more than 160,000 practicing lawyers, and yet the total membership of the American Bar Association was barely 30,000! Less than 20% of the bar cannot speak authoritatively and effectively for the entire profession. It is within our power to remedy this situation, but to do so we shall have to abandon our laissez faire attitude and learn the simple lesson of concerted action and responsibility.

The indictment most frequently laid at the door of our judicial system is the matter of the law's delay. Efficiency, promptness, and exactitude have come to typify the American mode of life. These attributes have made us the richest and most powerful nation of all time. It is not surprising that the public has become impatient and exasperated with our slow and cumbersome methods of administering justice.

Many people studiously avoid submitting their controversies to the courts because of the attendant delays and uncertainties. They have learned through experience that postponed justice may become the rankest kind of injustice. It would no doubt startle us if we had some way of ascertaining the extent of the patronage that is lost to the members of our profession because of our tedious and cumbersome methods. It is as essential that the lawyer render a service that is acceptable to those he serves as it is for the merchant who sells goods over a counter. The difference between the successful lawyer and the unsuccesful one is more often a matter of trained industry than of native ability. Perseverance is frequently a satisfactory substitute for genius, and promptness will sometimes serve the purpose quite as well as profundity.

There is much room for improvement with respect to the machinery of the law. Because of our lack of organization and facilities for concerted action, we leave the legislative assemblies almost without guidance in the matter of organizing our judicial system. Courts are created and abolished without due consideration to the need for them, while obsolete and antiquated methods of transacting business are allowed to continue. This is especially true with respect to fitting our judicial system to meet the needs of those of small means. Can you conceive of anything more reprehensible than to submit an issue of law or fact in a criminal case to a justice of the peace whose compensation depends upon whether he convicts the defendant? Notwithstanding the Supreme Court of the United States decided many years ago that such a method of administering justice does not meet the constitutional requirements of due process, we have hundreds of courts of this character operating daily throughout the State of Indiana. It is no answer to say that their jurisdiction is limited and that the cases they decide are of relatively small consequence. To the people who are required to submit their controversies to these so-called courts, the matters involved are of the most vital importance. Justice, promptly, impartially, and economically administered, must

be brought within reach of the most humble citizen if we are to inculcate that genuine respect for law and order which is necessary to good government. Our forefathers set before us the standard to be attained when they wrote into our State Constitution these words: "Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

The law is built upon precedent. It says that this or that should be true because it has been said that this or that is true. It scrutinizes changes with a critical eye; it seeks constantly to harmonize human conduct with human experience. By the same token those who work with the law are disposed to resent innovations. They prefer to do things as they have been done.

It is a fine thing to preserve the traditions of the past, but this should not be done at the expense of service and efficiency. The doctrine of *stare decisis* is a sound rule for applying legal principles, but it must not be allowed to become the enemy of progress, causing us to be content with worn-out methods and facilities of administration. It is the glory of the common law that its basic concepts can be applied to ever-changing situations and conditions. Its adaptability and flexibility have kept it alive and efficient. If it had been unyielding, stationary, and static it would have passed into oblivion. We must approach the modernization of the machinery of our courts in the spirit of the common law, preserving always the fundamental principles, but streamlining them, so to speak, to make them function smoothly and efficiently. This is the peculiar obligation of the bench and bar. It can only be discharged through united effort. This association is the only adequate agency for deliberation and expression in this state.

When Peter the Great visited London in 1697, he was surprised at the number of lawyers about Westminster Hall and remarked that there were but two lawyers in all his dominions and that he had already made up his mind to have one of them hanged when he got home. This explains one thing that is the matter with Russia today. There can be no

such thing as a great legal profession in a country that is ruled by a despot or a dictator, and, conversely, there can be no such thing as a dictator in a country where justice is honestly and efficiently administered and where every man for injury done to him in his person, property, or reputation has his remedy by due process of law.

Across the sea democracy is being subjected to the cruel test of steel and fire. Happily, we have thus far escaped that ordeal, but nevertheless, democracy is on trial in this country. Our ability to govern ourselves is constantly challenged. Every generation is confronted anew with the problem of adjusting itself to changed conditions. The legal profession will live and be respected just so long as and so long only as it holds itself responsible for the administration of justice.