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President's Annual Address

Fred C. Gause
Indiana State Bar Association

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PRESIDENT'S ANNUAL ADDRESS

By FRED C. GAUSE*

It is the custom for the President to address you at the annual meeting upon the activities of the Association and its accomplishments and purposes:

I desire first to express to the members of the Association my appreciation for the distinguished honor you conferred upon me by making me your president for the past year. I have had the fullest measure of co-operation from all members and officers and my duties have been pleasant on account thereof. My predecessors had succeeded in placing the Association in a position where it can point with pride to much progress, and the present excellent condition of our organization is due much more to them than to me.

The Indiana State Bar Association is now forty years old, having been organized in June, 1896.

At the beginning it had 110 members.

On June 30, 1936, as shown by the report of the membership committee, we had a total membership of 1411, besides student members to the number of 169.

This represents a substantial increase over a year ago.

As shown by the report of the treasurer at the last annual meeting we had on hand $742.11, and which was a great improvement over prior years.

* Address of Fred C. Gause, president of the Indiana State Bar Association, delivered at the annual meeting of the Association, July 10, 1936.

We had on hand July 1st this year $2047.09, and the only unpaid bill was for $405.98 which had not been presented at that time, but has since been paid.

It is then apparent that both numerically and financially we are making substantial progress.

However, we should have many more members.

If our Association is to accomplish the things which it should, it is important that a greater number of the active lawyers of the State join with us.

Of course, this Association, as is true of all similar groups, is subjected to criticism by non-members. Some of it is just, but a much better course, and one which would have some real objective, would be for the fault finders to become active members of the Association and then aid in removing the causes of criticism, rather than being content to find fault.

We want every member to feel that he has an equal voice in the affairs of the organization and to that end have appointed a special committee to recommend changes in the by-laws as to the manner of nominating and electing officers and as to co-operation with local associations.

The first report of this committee is to be considered later in this meeting, but regardless of the action that may be taken on such report, we believe such a committee should be continued and further study given as to how the Association may be made more useful to its members as well as representative of their views.

It was, of course, the primary purpose of the lawyers who organized this Association forty years ago, to raise the standard of the profession and improve its usefulness.

It should be a source of gratification to the surviving members of that original group, as well as to all others, that we can point to many accomplishments in fulfillment of the original purposes.

Naturally the ultimate goal is never attained in such matters and there is much yet that can and should be done to improve the standard of the legal profession, but real progress can be reported.

Judicial Council

The practice and procedure followed in legal proceedings is always the subject of dispute and criticism.

The result is that at about every session of the legislature an attempt is made to change the statutes upon the subject. Because of the conditions under which the legislature works in its limited sessions, with a multitude of other subjects to be dealt with, proper consideration cannot be given to the proposed changes.

It follows that desirable changes are apt to be ignored and occasionally changes of doubtful or no value are made.

Through the effort of the Bar Association we now have a Judicial Council established by an Act of the General Assembly of 1935, to study and recommend from time to time wherein the practice and procedure may be improved.

We shall hear a report later of the activities of this Council and in view of the character and ability of the men on that Council and the thorough manner in which it is making its investigations, it is certain that this body will be of outstanding benefit to the public in raising the standard of judicial procedure to a higher level.

Rule Making Power

If the Judicial Council recommends that any change be made in any existing statute relating to judicial procedure, it is necessary that the legislature act thereon before such recommendations can be effective. Our Association has approved the proposal that changes to be made in all matters of practice and procedure should be made by rule of the Supreme Court. The proposal is that the present statutes on that subject remain in effect as rules of the Court until changed by the Court.

With a Judicial Council to investigate and recommend any such changes and the Supreme Court to finally pass upon and either adopt or reject such recommendations, it would seem that the public interest would be served, as well as that of the legal profession, if this power were committed to the Supreme

Court, rather than to have it exercised by the legislature under the circumstances surrounding legislative sessions.

The wisdom of such a course has been recognized in the Federal Government through the conferring by Congress of the power upon the Supreme Court of the United States to make all rules governing practice and procedure in the Federal Courts.

The courts get the blame for imperfections in judicial proceedings and they should have the power to remove such imperfections.

Admission and Disbarment

It is no longer possible for a person to become a member of our profession without making any effort to qualify himself for the practice of law.

As a result of the continued effort of our Association the exclusive right to admit to practice has been conferred upon the Supreme Court and that Court has prescribed rules setting up educational standards and examination requirements to the end that, in the future, only such persons of good moral character who have made adequate preparation to become competent and reliable shall be admitted to the bar.

This is a step of outstanding importance, not only to the profession, but to the public, and will be of great benefit in the future.

But while congratulating ourselves upon this important accomplishment we must not think that our duty has ended in this respect.

We have succeeded in taking one important step in making it more difficult for the incompetent or the unreliable to be admitted to the bar, but we have not succeeded yet in taking the next necessary step, namely, making it possible to deal with the occasional lawyer, who, after admission, discloses that he is not worthy of the trust imposed upon him.

The great majority of lawyers maintain a high standard of professional ethics. They are entirely trustworthy and loyal alike to the courts and to their clients.

Unfortunately a few do not meet these qualifications and usually it is the conduct of these few which is given wide publicity and the public is prone to judge the entire profession by the conduct of the few.

Our profession is censured because it does not rid itself of those who violate their professional obligations and the oaths they take as attorneys and officers of the Court.

The lawyer knows that the present recognized procedure for the disbarment of attorneys is inapplicable in many cases of professional misconduct. The public generally does not know this and the legal fraternity is censured for its supposed unwillingness to do anything.

Many times the legislature has been asked to pass laws regulating such matters in a way that would be effective, but each time it has refused to act.

It is well settled that the admission of a lawyer to practice calls for judicial action upon the part of a court, and that while the legislature may pass regulatory Acts in respect thereto, which the courts will follow, so long as such Acts are in aid of the court's power, it cannot take away from the court its inherent right to finally determine who should be admitted.

It is likewise well settled that the disbarment of an attorney is a judicial act.

The legislature may pass regulatory Acts to aid the court in exercising its functions, but cannot deprive the court of its inherent power to determine such matters.

An attorney is an officer of the court and I do not believe that when the Supreme Court admits an attorney to practice, its power over the attorney has been exhausted.

The trend of modern decisions sustains the view and in my opinion, it is the correct view, that a court which has power to admit attorneys to practice has the inherent power to discipline or disbar them for misconduct thereafter, and no Act of the legislature is necessary to enable the court to exercise this inherent judicial power; that it is a part of the power granted by the constitution which confers the judicial power upon the courts; that the legislature may pass Acts in aid of

the exercise of this power, but cannot withhold the power, either by failing to pass any Act on the subject, or by so limiting the power as to make it impossible of proper exercise.

The Association has petitioned our Supreme Court to adopt rules to govern proceedings before that Court in the exercise of this power.

We believe that if the court finds it has such power and adopts rules for its exercise, the profession will be able to take the second important step.

It is more difficult for the unreliable one to get in and it should be reasonably possible to get the unreliable one who is in, out.

No reputable lawyer need have anything to fear from the exercise of such power by the court.

Those who are true to the principles of our profession should be active in advocating the curbing of those few who do so much harm to the reputation of the many.

One dishonest or disreputable lawyer can injure the public standing of a thousand honorable ones.

We should not be content merely to know that our own conduct is proper, but we should be anxious to raise the standard of the entire profession in the opinion of the public generally.

Duty of Lawyer Today

The lawyers of this country have always taken a leading and patriotic part in the affairs of the government both in peace and in war.

Their study and activities make them familiar with public questions. They are trained in representing the interests of others and the prominent part they have taken in great questions of national concern from the time of the Revolution to the present day has been natural.

The lawyers of our nation, in my opinion, have a public duty to perform at this time, that is as important as any with which they have been confronted.

As every citizen and every school child knows, our government is based upon a written constitution, but what some do

not understand is how this written constitution is made and kept effective.

Everybody knows that in that written Constitution every citizen is guaranteed certain rights, but some do not seem to realize how those rights are to be preserved.

The Federal Constitution provides that, "All legislative power *herein granted* shall be vested in a congress of the United States."

It will be noted that it is not *all* legislative power that is given to Congress, but only such as is *granted by the Constitution.*

Not only is the power of Congress limited to that granted in the Constitution, but before the Constitution was ratified the states exacted a promise that certain express limitations should be incorporated by amendments. As a result the first ten amendments, known as the Bill of Rights, were adopted.

This Bill of Rights expressly prohibits congress from doing certain things.

For example, it cannot pass a law respecting an establishment of religion. It cannot interfere with free speech or a free press;

It cannot take a person's liberty or property without due process of law and no one's property may be taken, even for a public purpose, without compensation.

But suppose congress should attempt to do any one or all of the things that the Constitution says it cannot do?

Must the citizen submit notwithstanding the written safeguards in the Constitution?

Fortunately the same Constitution which limits the powers of congress does make secure the rights of the citizen against the abuse of such power.

That Constitution declares what the supreme law of the land shall be. It shall be, the Constitution and the laws made *in pursuance to* the Constitution, and all treaties made.

If then an Act passed by Congress conflicts with a provision of the Constitution, a judicial or legal question at once arises as to which is the law.

The determination of that question of course requires the exercise of judicial power.

Judicial power is the power to decide as to what is the law.

That same Constitution expressly provides that,

"The Judicial power of the United States shall be vested in one Supreme Court," and in such inferior courts as may be established.

The Constitution then does provide a safeguard for the rights it guarantees each citizen. That safeguard is the Supreme Court of the United States, and it acts as a safeguard merely by exercising the power expressly granted to it by the Constitution.

We are all familiar with the language which Chief Justice Marshall used in describing the duty of the court, in case of a conflict between the Constitution, which is the supreme law, and a statute.

Nowhere have I seen this duty of the court stated more clearly and succinctly than by Judge Blackford, of our State Supreme Court, where that question, as relating to a conflict between the State Constitution and a state statute, was involved. This was in the first case that the question was presented after the organization of our State.

In a case reported in 1 Blackford 204, in considering whether a state statute took away the right of trial by jury, the Court, speaking through Judge Blackford, said:

> "If, however, that was their (the legislature's) intention, we have only to say that so much of the Statute as destroys the common law right of trial by jury in civil cases, where the value in controversy exceeds 20 dollars, must yield to the constitution, as the fundamental and paramount law of the land, which has wisely placed that invaluable right beyond the control of *any department* of the government. The task is delicate and unpleasant, but the duty of the court is imperative, and its authority is unquestionable, to declare any part of a Statute null and void that expressly contravenes the provisions of the constitution, to which *the legislature itself* owes its existence."

I am, of course, not discussing the correctness of any decision of any court. I am only discussing the *power* of the court to make the decision and the necessity that the court

have such power, if we desire to continue under a written constitution.

Individual judges may differ in their opinion as to whether a particular Act does or does not conflict with the Constitution, but no judge, in more than a century, has ever denied that the court had the power to decide that question, or that such power was necessary.

In none of the cases decided by the Supreme Court, has any attorney ever contended that the court did not have the power or that it was not its duty, to decide that a legislative Act was invalid if it was in conflict with the Constitution.

I do not need to argue this question with lawyers. They see the necessity for the continuation of such power, otherwise, as they know, the written constitution would become but a scrap of paper.

What I do desire to impress upon the lawyers, is the necessity for them to take the lead in resisting all efforts to take away from the courts this power.

Although, as I have said, no court, no judge and no attorney of record is found denying such power, or its necessity, we do see many theorists, many persons who believe a mistake was made in not waiting to write the Constitution until they could have had a part, either contending that no such power is possessed by the court, or if it is possessed that it should be either taken away entirely or materially curbed.

As to those critics who assert that the Court has made erroneous decisions, it might be said that if we assume such decisions have been made, that is no more argument in favor of taking away the Court's power, than that the power of Congress should be taken away because it may have passed some unwise laws.

Of course, the power of neither should be taken away because of occasional mistakes made.

The constitutional guaranties are, obviously, safer in the hands of an independent judiciary than if left to the will of Congress operating under the pressure of political influence.

Believing, as we do, that a constitutional form of government is superior to a parliamentary form, where the legisla-

ture has no limit to its powers, it seems to me that no greater opportunity has ever presented itself to the lawyers of this country to be of patriotic service than to take the lead in impressing upon the public the soundness of our *constitutional* form of government and resisting any and all proposals, from whatever source and in whatever form, to deprive us of the judicial safeguard which the Constitution has so wisely provided, to make secure the rights of each citizen.

If the people desire Congress to possess powers to enact laws of a sort which it does not now have power to enact the remedy is, not usurpation of powers reserved to the states or to the people, but further grant of power from the states or from the people through amendment of the Constitution. But whatever further grants of power may be made to Congress, the necessity will always exist for power in the Court to uphold the Constitution as the supreme law of the land against all usurpation of power and against all infringements of our constitutional guaranties.

Let us be ever careful that our own conduct is such as not to lessen public confidence in the courts of the land and vigilant in our efforts to maintain their independence and power, for upon that power and upon its independent and fearless exercise clearly depend the continuance of our constitutional system of government and the preservation of the fundamental rights and liberties of our citizens.