Indiana's Constitution and the Problem of Admission to the Bar

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INDIANA’S CONSTITUTION AND THE PROBLEM OF ADMISSION TO THE BAR

Did Constitutional Convention of 1850 Actually Mean to Prohibit Requiring Educational Qualifications in Applicants for Admission?—Examination of Journal and Debates
Supports Contrary Inference—“Good Moral Character” as a Phrase of Changing Content to Be Given a Present-Day Meaning*

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I t would seem that the necessity of an adequate legal education as a prerequisite for admission to the Bar should have become an accepted standard of individual and public conduct. It would seem that to defend or expound the validity of such a standard ought to be “wasted energy”: that one ought to be able to assert that “the proposition is so well settled that the court does not feel called upon to cite authority to sustain it.”

The truth is, however, that there is respectable (but in all kindness, mistaken) opinion to the contrary. Each attempt to amend the Indiana Constitution to specifically allow the use of such a standard in passing on applications for admission to the Bar has disclosed some persons actively opposed to the proposed change “upon principle.” The present time is no exception, and we find some lawyers.

The Constitution to the Bar Association, July 10 and 11.

1. Upon principle it is fundamentally wrong.
2. It was unneeded eighty years ago: therefore it is unneeded now.
3. It necessarily fails to take care of the exceptional individual who might become a valued lawyer and citizen were he permitted to pursue his ambitions unhindered by such a requirement.
4. It creates a monopoly.
5. Upon principle it is fundamentally wrong.

When this subject was assigned to me last winter it was assumed that the citizens of the state would be voting on a constitutional amendment providing for educational qualifications for admission to the Bar. Since that time is has been settled that because of defects in the legislative action proposing the amendment the question will not be submitted to the voters this fall. And in view of the slight probability which exists as to the calling of a constitutional convention it would almost seem as if one might well plead a failure of consideration as to the subject matter of this paper.

In reply, however, it is submitted that the subject is of present interest to the Bar and public, and if it is not it ought to be. For the fact is that for some time a committee of this association has been at work preparing a bill to be submitted to the legislature regulating admissions to and demissions from the Bar.

A bill of this character will be presented to this meeting and the next session of the legislature; so that we are in truth faced with the task of educating ourselves and the public upon this subject.

Such a procedure (that is, legislative action) necessarily involves a specific question of constitutional law, which must be settled first. Our constitution provides that “Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.” Does this take from the legislature and the courts the power, which otherwise they admittedly have, to regulate this subject to this extent?

It is submitted that although there has been a quite general assumption that that question must be answered in the affirmative, that a critical survey of the constitutional convention proceedings and the cases decided under this section, and of the principles involved, results in the conclusion that the question must be answered in the negative.

Two propositions falsely have been assumed to be true: first, that the Constitutional Convention of 1850 and 51 actually intended to prohibit educational qualifications: second, that “good moral character” today does not include an educational qualification.

As to the first. So far as I have been able to discover the facts from the Bar.

Supports Contrary Inference—“Good Moral Character” as a Phrase of Changing Content to Be Given a Present-Day Meaning*

*Address delivered before the Annual Meeting of the Indiana State Bar Association, July 10 and 11.
any substance to it. The rule is a starting point, or a point of departure, rather than in any sense a rule of guidance. However, there seems to be a little more substance to it when a question of constitutional interpretation is involved, and (for that matter) in courts of law. Indeed, some have contended that the actual specific intention or purpose of the framers of the constitution might be material. That is, the question is ("good moral character" being somewhat vague and ambiguous in its meaning), did the convention say the same thing as if it had said "good moral character and without any educational qualifications"? If we may inquire if that were its actual intention (but embodied in the shorter phrase "good moral character") we must seek evidence of that intent in the proceedings of the Convention.

That is, we start out with the proposition that a constitutional provision is to receive a fair interpretation on the basis of the language used. If the language does not have a settled or unambiguous meaning, the proceedings of the Constitutional Convention may be investigated for evidence to sustain one or the other of possible meanings. That is, the court re-writes the phrase to remove the ambiguity. The question is not, how would the Convention have decided this case, but how would the Convention have expressed the principle involved had the ambiguity been brought to its attention.

Suppose then that we concede (for the sake of argument) that the phrase in question is ambiguous within the meaning of the rule, what evidence is there of any other meaning? The truth is that the evidence on the point is meager and conflicting, but to my mind, if it proves anything at all it disproves the common assumption on the point. I think that the only fair inference as to the actual intention of the convention is that it did not specifically intend to prohibit an educational requirement for admission to the bar. Had the point been specifically put to the convention it would not have re-written the phrase to read "good moral character, but without educational qualifications."

There are only two sources of information which can be considered legally, (and so far as I know they are the only actual sources of information). These are the Journal of the Constitutional Convention and the Debates in the Constitutional Convention, both published under the authority of the convention. They do not agree in all respects as to what transpired, but I fail to see how any such disparity can be considered legally, (and so far as I know they are the only actual sources of information). There can be no question but that prior to 1852 ordinary good moral character was but one of the qualifications for the practice of the law, and the courts were free to, and undoubtedly did, exercise discretion as to the other qualifications of an attorney. As we shall see we have a remark in the convention by a prominent attorney which substantiates that interpretation of the act.

The convention assembled on October 7, 1850, and adjourned February 10, 1851. The provision in question did not come up until rather late in the session. On January 18, 1851 Samuel Frisbie, delegate from Perry County (he was a lawyer: Vol. 3, Monkes, Courts and Lawyers of Indiana, p. 1143) moved the adoption of a resolution "that the committee on the practice of law and law reform, be instructed to report a section, that every free white male citizen of the age of twenty-one years, and of good moral character, shall be permitted to practice law in any and all courts of this state, whether of record or not of record." (Journal, p. 710-711. Debates p. 1673.)

James W. Borden, chairman of that committee, (delegate from Allen County and a lawyer and judge of some consequence, C. & L. I. p. 319, 339, 540, 541, 548, 551, 647, etc.) suggested that the resolution should go to the committee on courts of justice. "Several voices. No. No. The subject belongs to law reform." The resolution was adopted.

The committee on law reform was composed of James W. Borden, Chairman, (Allen County, a lawyer): Joseph Ristine (Fountain County, a lawyer): Thomas W. Gibson (Clark County, no information); Daniel Kelso (Switzerland County, a lawyer and afterwards prosecuting attorney, C. & L. I. p. 559, 579, 787, 789, 893, 919, 981, 1031); Samuel Hall (Gibson County, a lawyer and judge of some prominence, C. & L. of I. p. 81): David Wallace, (Marion County, a lawyer, former governor, legislator, congressman, and afterwards judge of the court of Common Pleas. C. & L. of I. p. 79, 81, 91, 112, 338); John S. Newman (Wayne County, a lawyer, and later President of the Indiana Central
Of the thirteen members of the committee which drafted the section as it was finally adopted eight of them were lawyers, and among them were included some of the most substantial and influential members of the convention.

On January 27th Mr. Borden reported the following section: "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," which report was concurred in and the section read a first time and passed to second reading. (Journal, p. 796; Debates, p. 1833.) It is to be noted that this section left out the provision of the original resolution concerning free white males, and put in that the person was to be "entitled to admission to practice." As proposed the section was that he be "admitted to practice." In view of later action in the convention this change is very pertinent.

On January 31st the section was read a second time. Ross Smiley (Fayette County, no information) moved to strike out the words "be entitled to admission" and insert the words "have a right." Mr. Thomas Butler (Green County, no information) moved to lay the section and amendment on the table. The amendment was tabled, and the section passed to third reading. There was no discussion on the proposed amendment. (Journal, p. 860; Debates p. 1961).

Apparently one member at least thought there was some difference between "be entitled to admission" and "have a right" to practice and the fair inference is that the committee thought there was a difference: for it had changed the language from "entitled to practice" to "entitled to admission to practice." Whether the difference was thought to be one of substance or of form it is impossible accurately to tell. One is left entirely to inference, and that we shall discuss later.

The Debates report no other proceedings at this time, but the Journal reports the following additional proceedings: Mr. John Davis (Madison County, possibly a lawyer, C. & L. of I. p. 319) moved to insert after the words "suffrage" the words "and requisite qualifications." Mr. Alexander C. Stevenson (Putman County, no information) moved a call of the previous question.

Mr. George W. Moore (Owen County, no information) moved to lay the amendment on the table, which was decided in the affirmative. The inference from this we shall also discuss later.

On February 1st the section was read a third time. The Journal reports merely that it was passed by a vote of 84 to 27 (p. 879). The Debates report the following proceedings (pp. 1971-72):

The section was read a third time. (What follows is a verbatim copy of the Debates) Mr. Kelso (a member of the committee which drafted it, and a lawyer): "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 of 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 recommitted with instructions to strike out the words 'to admission.'"

Mr. Borden (Chairman of the committee and a lawyer of prominence.) "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. Robert H. Milroy. (Carroll County, a lawyer and judge, C. & L. of I. p. 582, 585, 590, 691, 755, 878, 960, 1073, 1127) 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, Mr. Borden), said: "The main question is upon the passage of the section."

A member. "I want the yeas and nays upon this question."

Mr. Schuyler Colfax (St. Joseph County, a newspaper man: later congressman and Vice-President of the United States. C. & L. of I. p. 434). "The previous question I think brings the convention to a vote first upon the motion to recommit."

Mr. Colfax. "There has been no motion to recommit."

Mr. Colfax. "There certainly was such a motion, and it was made from the gentleman from Switzerland" (Mr. Kelso).

Mr. John Pettit (Tippecanoe County, a lawyer of great prominence: former U. S. District Attorney and Congressman; later a U. S. Senator; Chief Justice of Kansas and a member of the Indiana Supreme Court. C. & L. of I. p. 92). "The motion to recommit was made by me certain knowledge."

Mr. John L. Watts (Dearborn County, there were three John Watts', who were lawyers and judges in this county, and this may have been one of them. C. & L. of I. p. 84, 628, 635, 712, 1151).
"I make a point of order. The gentlemen of the bar have no right to vote upon this question because they are personally interested."

The President (laughing). "Members of the legal profession will be excused from voting."

Mr. Thomas W. Gibson (a member of the committee). "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 ruling of the chair, being upon the adoption of the section, the yeas and nays were taken. Yeas, 84, Nays, 27. The section was referred to the committee on revision, arrangements and phraseology.

Of the members of the convention heretofore mentioned Colfax, Cookerly (of the committee), Frisbie (the original proposer of the section), Gibson (of the committee), Holman (semble), Kelso (semble), Kendall (semble), Kendall (semble), Kelso (of the committee), Smiley (who had moved to substitute "right to" for "entitled to admission") voted for the section.

It is to be noticed that Kelso, Smiley and Gibson, who had wanted to amend the section nevertheless voted for it as it stood. Wallace and Hall were the only members of the committee who voted against it; while Borden, Ristime, Newman and Read, members of the committee, did not vote.

On February 10, 1851, the committee on revision reported the final draft (Debates, p. 2056) and the only change which had been made was that "being a voter" was substituted for "be entitled to admission." (Debates, p. 2056.) The section which was adopted was changed against it; while Borden, Ristime, Newman and Read, members of the committee, did not vote.

The convention had appointed a committee to prepare an exposition of the new constitution to be circulated among the people of the state. This "Address to the Electors" was presented and approved February 8th (Journal, p. 963, Debates p. 2042). There was no word of explanation offered on the section in question. It was merely set out in the language of the constitution. (Debates, p. 2044.) What was the actual intention of the convention? In view of the fact that there was no argument, no attempt to explain the purpose of the section, the only expressed intention is in the language used. The actual intention or the specific purpose of the convention on the proposition that the section must be re-written to prohibit a requirement of legal education, is left to inference and conjecture. The most unfavorable conclusion which can be drawn from the proceedings is that the convention had no specific intention on purpose (semble), and we are therefore driven to a fair interpretation of the language used. On the other hand it would seem that the fair inference from what transpired is that the committee and the convention did not intend to make ordinary good moral character and voting the qualifications to the implied exclusion of legal education.

It will be noted that as originally proposed the section was aimed partially at least against any colored invasion of the bar, for the convention was anti-negro and submitted sections prohibiting negro suffrage and negro immigration into the state which were adopted. Too, on January 25th Mr. Watts proposed a section providing that "every legal voter of good moral standing shall be allowed to practice law." A voice: "Did the gentleman say every negro voter?" Mr. Watts: "Yes, if the gentleman can find any." After some argument, directed primarily at the good faith of Mr. Watts (it was offered as an additional section to the article on Reform and Procedure), the proposal was withdrawn. (Debates, p. 1713, et. seq.)

The section which was adopted was changed to leave out "white male." But this change may have been made upon the assumption that the constitution would prohibit negro suffrage, and that the prohibition would therefore be included in the word "voter." Certainly there is something to be said, however, for the proposition that originally the section may have been aimed solely at negro lawyers.

What are the other inferences from what little was said about it during the convention? It passed first reading without comment, although it had been changed by the committee. On the second reading Ross Smiley (no information) moved to substitute "have a right" for "be entitled to admission" and thus restore the section substantially to its wording as originally proposed. It is apparent that at least one member and the committee thought there was a difference. It may have been thought to be only a matter of form: or it may have been thought to be one of substance. But in ordinary parlance "having a right" to do a thing is the equal of its meaning in legal parlance. It means "right" and not something less. It may be that in substance it means the same as being "entitled to admission" to do a thing. I think Mr. Smiley and the committee thought it did not. The reason is that if it were merely a matter of form the change would not have been suggested (so far as Mr. Smiley is concerned): for the procedure was on final adoption of any section to refer it to a committee on revision and phraseology. It would seem fair to infer that at least this one individual thought as Mr. Kelso thought, when he later stated that "to be entitled to admission" meant to be entitled to take an examination for admission, and this by inference is the position of the committee, for it had inserted the phrase and, as shown by the later proceedings, the two members of the committee who actually expressed a view stated that it contemplated an examination. In any event if the convention were so hostile to the legal profession as it is sometimes represented, and was really intent on prohibiting legal education as a qualification for admission to the bar, it seems quite reasonable that it would have adopted Mr. Smiley's motion, and changed the language from one of ambiguity to the ordinary meaning of certainty. It would seem that the fair inference here is that the convention was not intent on prohibiting legal education as a qualification, and it was quite willing to allow an interpretation to the contrary.

At this point the Journal reports that Mr. John Davis moved to insert "and requisite qualifications." This apparently was to make the section certain as against an interpretation that it did not require a legal education. The amendment was tabled without discussion. What is the fair inference from this? It might well be that the conven-
tion wished to exclude legal education as a qualification; it could also well be that it thought the present language plain enough to the contrary.

In view, however, of the fact that the convention immediately prior to this had refused to amend the section to make clear the opposite meaning, and that it here refused to specifically add these words, we give the opposition the benefit of every doubt when we say that the fair inference is that it was willing to let the matter rest on the language as used. That is, it refused to take either side. It was, in other words, willing at least to leave the phrase "good moral character" open to future fair construction.

On third reading it is clear from what Mr. Kelso and Mr. Borden said that both of those gentlemen, who were members of the committee which drafted the section did not understand that the section prohibited legal education as a qualification for admission to the bar. Mr. Kelso moved to strike out "entitled to," because the section as written "contemplated an examination"; and he also expressed the view that the sections but stated the existing law (which as we have seen clearly made good moral character only one of the conditions for admission). And the convention was against him. He had asked for unanimous consent to make the amendment; there were but several voices of "consent." He then was also convinced that the convention was against a change, for he said it made little difference, as the section stated the existing law. So here we have his opinion that the existing law did require legal education; that the section contemplated an examination, and a record that the convention was very definitely against a change to exclude it.

Mr. Borden expressed surprise that Mr. Kelso should wish to amend the section in this manner and allow "a man who knows nothing about the law at all" to practice law, and moved to table the section.

Apparently there was quite a little excitement at this point in the proceedings and the reporter states that the President overlooked both the proposed amendment and Mr. Borden's motion and took a vote on the section as it was.

We have here the first and the only clear-cut actual expression in the convention, and it is emphatically to the effect that the section did not exclude legal education: that an examination and legal education could also, and presumably would, be added by the courts or the legislature.

And this interpretation is by fair inference fastened upon the convention as a whole. At this point, if the convention did not know it before, it learned that the chairman of the committee which drafted the section, and one of the members, both of them lawyers, interpreted the section to be not exclusive of legal education in its requirements. Mr. Kelso mustered very little support for his amendment and finally the convention did nothing to correct the chair and bring about a vote on Mr. Kelso's amendment. It seems wholly unlikely that if the convention was so anti-educated-lawyer as has been assumed and asserted, it would not have taken the occasion again to change the section to meet its mind.

On the other hand, Mr. Gibson, a member of the committee, apparently thought the language too broad, and desired to offer some amendment to correct it, but he was not permitted to do so, the previous question having been voted. Whether he thought it too broad on the voting provision, or on the other is not disclosed. If it were the latter it would seem that here again the inferences are somewhat equal, Mr. Gibson's utterances counteracting that of Kelso and Borden. But in view of the fact that the convention was in a position to act against Mr. Borden's and Mr. Kelso's suggestion, and was in no position to sustain Mr. Gibson's view, the more importance must be attributed to the former.

In the Address to the Electors nothing is said about the section. The address does laud the section for the reform of procedure: and it would seem that if the convention thought it had accomplished anything new in the section in question some advertising on that score would have been forthcoming also. Again the inference is against the assumption that the purpose or result was to prohibit legal education as a qualification.

Although the inferences as to the actual intention of the convention are to a degree conflicting, certainly it can only be said that the more in number and the more in reason support the result that the convention did not intend nor purpose to specifically prohibit legal education as a qualification: and that on the contrary it did intend to merely state the law as it was and leave the qualifications in addition to voting and ordinary good moral character to the courts and legislature. We might even say that the section sets out the minimum and not the maximum requirements, and means that if one does have those qualifications he can not be kept out for those reasons. As a practical matter the section so construed means little and is somewhat of an idle gesture.

But that, of itself, is no conclusive argument against the interpretation. The truth is that the constitution was not framed by masters of constitutional law. And other sections have been construed to be practically meaningless. The one which provides that "all courts shall be open: and justice shall be administered freely and without purchase" is a notable example.

On the whole I think that results is not entirely satisfactory, if for no other reason than that it is based on a specific intention of the convention founded wholly on inference. But if we throw it out for that reason we must in the same have throw out the specific intention of the convention to the contrary, for there is more evidence to support the first than there is to support the latter.

So I think we can even be generous and admit that after all, if the specific intent and purpose here is material it is not to be discovered; or at least that the information is so meagre that finally the inferences sink into conjectures insufficient to prove either side of the argument (although they do favor the conclusion heretofore reached). Certainly there is no evidence which would justify a court in re-writing the section to read "good moral character, but without legal education."

We then get back to the proposition that the problem is to be settled by a fair construction of the language used: and after all the convention seems to have adopted that attitude.

It is submitted that the section is susceptible to any one of three interpretations. 1. It is a grant of a constitutional right to any voter with good
moral character to practice law. 2. It is a limitation on the power of the courts and legislature to make anything less than suffrage and good moral character the qualifications for admission to practice. That is, it sets a minimum standard. 3. It is a limitation on the power of the courts and legislature to make anything more than suffrage and good moral character a qualification for admission to practice. That is, it sets a maximum standard.

It really makes no difference which view is taken, because the solution of the problem at hand turns in any event on the proper meaning today of the phrase "good moral character." But it is submitted that the third interpretation is the most reasonable one, and is after all the one which has in a majority of the decided cases been placed upon the section.

If we take the first it is clear that such a right is no different from any other right, and would be subject to reasonable regulation. It would, therefore, be competent for the legislature or the courts, to define "good moral character" to include legal education and such a definition would certainly be a reasonable regulation. The fact that one's right or privilege is a constitutional one does not add much to its value as against an exercise of reasonable regulation by a proper body. For example it is well settled that the right or privilege to engage in interstate commerce is subject to regulation: as is also the privilege of a non-resident to use the courts of a state under the privileges and immunities clause: as is also the right acquired under the patent law. (Patterson v. Ky. 97 U. S. 501, 1879). As is also the right to vote and the right to a jury trial.

If we take the second nothing stands in the way of a similar regulation, for the constitution sets only a minimum standard. That is, it is a check on the power of the court and legislature to make something less than suffrage and good moral character a test for admission. As has been suggested heretofore such an interpretation is not impossible, nor even unreasonable, although the practical result he to make the section a form of words merely; but that interpretation is, as we shall see, precluded by possibly the latest decisions of the Supreme Court.

The least that can be said as to the third interpretation is that it has been tacitly accepted by the Supreme Court in the last two cases.

The decisions under this section are very few and are as follows:

In McCracken v. State, 27 Ind. 491 (1867), the question arose as to whether an act of 1865 prohibiting a county recorder from practicing law was or was not in conflict with the section in question. It was held that it was not for the reason that the act in question was not a regulation of the qualifications of attorneys, but a regulation of the qualifications of recorders. The result is, of course, that there is added to the constitutional qualifications, the legislative qualification that the person be not also a recorder, and that the section is not exclusive. The reason given is facetious. Whether the decision could be sustained upon the ground that under a proper interpretation of the entire constitution, the grant of power to regulate qualifications for public office was an implied limitation on the section in question, is open to doubt. So sustained, however, the decision has no bearing on the present inquiry. Otherwise it is a distinct authority that the section sets only minimum qualifications, and it is impliedly overruled by later cases. But as it stands, if anything, it is an authority for us.

The next case, Ex parte Walls, 73 Ind. 95 (1880), is a case of disbarment, but in it "good moral character" is defined. The special findings in this case disclosed that the attorney had robbed and cheated his clients, but that in his business relations with other (not his clients) he was honest and upright. In answer to the argument that the latter was the test of his "good moral character" and not the first, the court said: "It requires much more than mere honesty and uprightness in business relations outside of a profession, to constitute a good moral character. Such business relations might admit even of the grossest misconduct and immorality in the practice of his profession, and does not exclude even crime." That is, good moral character here means character as it affects the attorney's capacities as an attorney only. The decision realizes the common assumption that "good moral character" as used in the constitution means solely a matter of ordinary and commonplace personal rectitude. Here is a decision which says it means "character" as it affects attorney and client and the public. The case is a valuable authority for us, and is really about all the authority we need.

In In re Petition of Leach, 134 Ind. 665 (1893) the court held that a woman, although not a voter could be admitted. The reason given was that the constitution "secured the right of the voter of good moral character" but did not deny the right to one with less qualifications. It takes the first interpretation suggested above. I think it is a strained construction; but it contains nothing against us, for admitting that the constitution gives a right to every voter of "good moral character," such a right ought in any event to be subject to reasonable regulations; and there is still left over the proper interpretation of "good moral character."

In In re Denny, 156 Ind. 104 (1900) there was involved the question of the adoption of a constitutional amendment giving the legislature authority to regulate admission to practice. The Marion Circuit Court had apparently adopted regulations for admission which included an examination of some sort. It found that the applicant was a person of good moral character and a voter, but the applicant refused to submit to the examination and as a conclusion of law the court stated that he was not entitled to admission. The court said "If the proposed amendment has not been adopted, the conclusion of law and the judgment cannot be sustained."

The case decides either that there was a constitutional right denied, or that the court's regulations were invalid, being beyond its jurisdiction. At best it is a weak authority, for it was apparently admitted, or assumed that the regulations were invalid unless supported by the constitutional amendment; and all of the argument was directed to the proposition as to the adoption of the constitutional amendment. Apparently the attorneys for the appellee were so confident of their proposition that the amendment had been properly adopted that they didn't argue the other proposition: illus-
trating again the old truth that it is dangerous business to carry all your eggs in one basket.

The case is in no sense a decision against us, for the trial court specifically found that the applicant was a person of good moral character. By no stretch of the imagination could it be said to be decisive of a case where the court would find that he was not a person of good moral character because he did not possess an adequate knowledge of the law to permit him honestly to represent himself to be an attorney.

In In re Boswell, 179 Ind. 292 (1912) the same question was again presented. The court says, "It appears from special findings of facts and conclusions of law made and stated by the trial courts that the petitioner was possessed of all the qualifications necessary for admission to practice law under the provision of the constitution so long in force... and it also appears... that the court refused to admit the petitioner solely upon the assumption that the proposed amendment had been carried—thus leaving the court free—to make rules requiring qualifications additional to those prescribed by the original constitutional provision, which it had done, and with which the petitioner could not comply."

The case is no stronger than the Denny case. Both cases seem to be on the theory that the constitution sets a maximum standard; and as a matter of constitutional interpretation that, on the whole, seems to be the fairest construction to be placed on the section. There is nothing in either case to the effect that the applicant was kept out by reason of a lack of legal education. For all that appears he may have been kept out for any number of reasons, which could have nothing to do with his good moral character as an attorney.

But if the assumption be that the application was denied on the sole ground of a lack of legal education, again there is no decision that after all such lack goes to the question of good moral character. And even if it were so decided then, the cases would not be controlling today, for "good moral character" is a phrase with a changing content. (There is nothing in any of the other cases material to the issue. They turn on the questions of procedure.)

And so we come to the crucial point in the case. It is submitted that there is no evidence that the convention intended that "being a voter and having good moral character" should be forever read as "being a voter and having a good moral character, and specifically having no legal education." In no event did it intend to prohibit legal education as a qualification if it squared with good moral character. And the question never is, as to how the convention would have decided a specific case; for if it were, "voter" then and "voter" now would necessarily mean the same, although obviously they mean different things, for today a negro may be a voter; but the convention would have had no trouble in excluding him, because he was not a voter. The difference is between reading in something to clarify an ambiguous phrase, on the ground of an actual intention and asking how would the convention or people would have decided this particular case at that time without reference to the language they used. That is, if the phrase "entitled to admission to practice" if one has "good moral character" is ambiguous, we may clarify it by evidence of what the convention would have said had
the ambiguity been called to its attention, but as we have seen there at best is no reliable evidence upon which to base a redrafting of the section. The question then is, what is the fair interpretation today of the language used; and the manner in which the convention might have decided the specific case before the court is wholly immaterial.

So the problem finally simmers down to what is meant by "good moral character." It is clearly a phrase of changing content. There are few phrases in the constitution which mean today what they meant (in content) in 1852. No principle of constitutional construction is better established. In the case of Weems v. U. S. (217 U. S. 349, 373) Mr. Justice McKenna said this: "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had heretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provisions for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in word might be lost in reality and this has been recognized. The meaning and vitality of the constitution have developed against narrow and restrictive construction."

The Justice goes on to point out the varying application of the 14th amendment, and only recently in the case of Ambler v. Village of Euclid (272 U. S. 365) (where a general zoning ordinance was upheld) the court gives point to the principle by itself admitting that twenty-five years before it most likely would have reached an opposite result. Admittedly "due process of law" twenty-five years ago probably is not "due process of law" today (outside of the field of procedure).

In our own constitution the phrase "common schools" occurs. In 1857 in the case of the City of Lafayette v. Jenners (10 Ind. 70, 78) the Supreme Court said that an academy (or high school) was not a "common school" within the meaning of the constitution. Today it is conceded that the high schools of the state are part of the "common schools" provided for by the constitution. (See, Robinson v. Schenck, 102 Ind. 307 (1885) and State v. O'Dell, 187 Ind. 84 (1918). And within the past few months our Supreme Court has very correctly decided that what was "garbage" ten years ago is not "garbage" today. (Jansen Farms v. City of Indianapolis, 171 N. E. 199) If such a locally commodity as "garbage" is subject to the changes brought about by science and business it ought to be doubly apparent that "good moral character" can have a new significance in keeping with the moral progress of the race. If we are not tied to our grandfathers' ideas on garbage, by the same sign we most certainly ought not to be tied to their ideas on "good moral character" in an attorney.

The Weems case above is an excellent example for the purpose at hand. It involved the application of a clause in the constitution of the Philippines prohibiting cruel and inhuman punishment. The court reviews all of the cases and points out that the phrase has received (on the whole) an enlightened construction. The courts do not, and ought not to, go back to enquire what would the convention, or even the people of that time, have thought of this: but the inquiry is, what is cruel and inhuman punishment as to this date, in the light of human views on the subject at this time. Thus it is conceded, that whipping, branding and capital punishment for minor offenses would today be cruel and inhuman; although they were not in 1789. Mr. Justice McKenna says this (p. 378): "The clause of the constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice." The court therein held an imprisonment of fifteen years under ball and chain and hard labor, for a minor offense, to be cruel and inhuman punishment. A court even fifty years before would have had no difficulty in reaching an opposite result.

Can there be any doubt but that the phrase "good moral character" is likewise one subject to a new meaning as public opinion becomes more enlightened? I can find but one case defining the phrase, as involved here. In In re Spenser, (22 Fed. Cas. 92, Fed. Cas. No. 13234, 5 Sawy. 195) Mr. Justice Deady, said this (the question was as to the good moral character of an applicant for citizenship): "What is a 'good moral character' within the meaning of the statute may not be easy of determination in all cases. The standard may vary from one generation to another, and probably the average man of the country is as high as it can be set. In one age of the country dwelling, drinking and gaming are considered immoral, and in another they are rewarded as very venial sins at most."

Is it not true that public opinion can change and has changed as to what constitutes good moral character in an attorney? The test is not what would a court have done in 1852 nor even in 1912, nor yet even in 1929; it is, what is the proper application of the section today?

(To be concluded in next issue)

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.
Reprints of the address

by the

Hon. Henry Upson Sims, President

AMERICAN BAR ASSOCIATION

on the subject

"The Law as a Basis of
Investment Security"

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tening regularly to these weekly pro-
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and distinguished guest speakers.
We have no difficulty in saying that an attorney by present standards, so that we can unequivocally to get a college education had it been required, and education were asked if they would have managed a college education in preparation for their legal to the bar in New York last year who did not have the three hundred persons examined for admission although ignorant on the subject, advises him as the representation that he is learned in the law, and appropriates it to his own use is unfit to be an at-who collects $100 belonging to his client, and ap-
say that he does not have a good moral character? shows further an absolute dishonesty, as measured everyone answered "yes,"-that one who wishes to ought to bar his admission? That instead of'prac-
moral fibre to the extent that his mere application one who wants to represent himself to 

We are concerned, as was pointed out in the Walls case (73 Ind. 95) with his good moral character as an attorney and not in any other capacity. Do we have to prove to anyone at this date that one who wants to represent himself to be an attorney, when he is not one in fact, is wanting in moral fibre to the extent that his mere application ought to bar his admission? That instead of prac-
ticing law such a one is practicing fraud?

And the facts prove that that is more than idle theory. I was chairman of the Committee on Grievances of the Lake County Bar Association for a year. I investigated fourteen or fifteen complaints, and not one involved an attorney who should have been admitted in the first instance; each one being very deficient in legal education.

But more important than those observations are the two or three authentic instances in which a jury has specifically decided that an applicant for admission to the bar without legal education is not a person of good moral character. What better evidence could there be than that public opinion on the question has progressed since 1852?

The conclusion must be that legislation, or court regulation, on the subject would be constitu-
tional.

This conclusion can in truth be supported upon any one of three propositions: first, that the constitution gives a "right" to one being a voter and of good moral character, since as we have seen such a right is subject to reasonable regulation in any event, and the phrase "good moral character" is open to present day application; and on these grounds there would be permitted a requirement of legal education, either as a reasonable regulation, or as part of "good moral character." Second, that the constitution sets a minimum standard, or imposes but two conditions for admission to practice which may be added to. There is ample support for this view in the proceedings of the Constitu-
tional Convention and in the first two cases decided, but on that point it probably must be conceded that those cases are impliedly overruled by the last two. If the proposition were to be re-examined, however, a very forceful argument could be made to sustain the proposition that the first cases were right and the last ones wrong. After all is said and done the substance of the proceedings of the con-

There remains to be considered briefly the facts and the policy assumed against the proposed change. Those opposed to it say that we have got along for one hundred years or more without it, why change? And the short answer to that is that it isn't so. We have not got along without it. Our facts and the policy assumed against the proposed change. Those opposed to it say that we have got along for one hundred years or more without it, why change? And the short answer to that is that it isn't so. We have not got along without it. Our

*Address of Mr. Bernard C. Gavit before Annual Meeting of Indiana Bar Association. As the October issue was devoted exclusively to the American Bar Association's Annual Meeting, it was impossible to con-
clude it in that number. The first and main installment of the address was printed in the September issue.
than we can expect the peasantry of China to set up a new order of things there. But we can expect that this group shall say that we are through with injustice which results from the old system, and that this group shall take the lead in making legal education not only the insurer of success at the bar, but make it a prerequisite for admission.

And have we not already answered the second argument—that legal education was unnecessary eighty years ago, when the constitution was adopted, therefore it is unnecessary now again, it was as necessary then as now. It is true that its form has changed. Then it was obtained in a law office, and in the practice; now for the most part it is obtained in law schools and the practice. Then law schools were few and far between, for the most part inaccessible, and on the whole offered little real advantage over office study. Then the body of the law was slight and simple as compared to its present proportions and complexities. Then lawyers and judges were dealing with law in frontier civilization. Times have changed, and what it have changed the amount and content of law and the manner in which a student is to acquire knowledge of it. But the very real necessity for such a knowledge and the acquisition of the power of legal reasoning for the purpose of applying it is increasingly apparent. Eighty years ago a student learned his law primarily in the practice, and to a certain extent, at the expense of his clients. Today, the question fairly is: is there any real necessity for a young lawyer learning all of his law at the expense of his clients? The obvious answer is, "no." Opportunities for his education at his own expense and that of the state are so plentiful that the old system has been abandoned in all but rare instances.

Indiana is alone in its present situation and the glaring ugliness of it is graphically set out in the article by Richard Tinkham in the June issue of the Indiana Law Journal. Three of our ninety-two counties make good faith efforts to regulate admissions to the Bar! Standards of education in other states have been set higher and higher each year. Standards in law schools have had a corresponding rise. Everywhere else there has been action vitalizing the self-evident truth that a knowledge of the law and the manner in which a student is to acquire knowledge of it. But the very real necessity for such a knowledge and the acquisition of the power of legal reasoning for the purpose of applying it is increasingly apparent. Eighty years ago a student learned his law primarily in the practice, and to a certain extent, at the expense of his clients. Today, the question fairly is: is there any real necessity for a young lawyer learning all of his law at the expense of his clients? The obvious answer is, "no." Opportunities for his education at his own expense and that of the state are so plentiful that the old system has been abandoned in all but rare instances.

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And then it is urged that such standards would keep out the exceptional individual, too poor to secure the necessary education. If that were true, it might well be said that such a case falls in that rather large class of cases where "it's just too bad." Any rule which is in any real sense a rule may seem unjust in its application to exceptional cases, but the latter must bow to the obvious general benefits the latter must bow to the obvious general benefits to the Bar! Standards of education in other states have been set higher and higher each year. Standards in law schools have had a corresponding rise. Everywhere else there has been action vitalizing the self-evident truth that a knowledge of the law is the lawyer's sole tool. Other states will not allow him to attempt to work without it.

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