AN ORGANIZED AMERICAN BAR

Forces That Are at Work to Limit Field of General Practitioners—Extraordinary Growth of Commissions and Other Bodies for Dispensing with Judicial Methods of Settlement—Lawyers Should Recognize That Responsibility for Training Our Legal System Down to Fighting Weight, Sweating Out Its Excess Cost and Formality and Speeding It Up So It Will Have a Fair Chance to Compete Rests on an Organized Bar*

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CRITICAL re-examination of the structure of the American Bar Association is a manifestation of the bar's anxiety for its collective welfare. The same sense of insecurity as to the profession's future has initiated in every state movements to strengthen bar associations either by incorporation or by federation of existing voluntary bodies. Bar Association speeches drop the old tone of self approval and take on a tone of apprehension and uneasiness.

No one, I suppose, fears that the lawyer, as an experienced adviser and trained controversialist, will disappear. As a super executive, as a technical expert on the payroll of big business, or in a group of legal experts constituting a law firm or legal clinic that differs from a law corporation more in theory than in fact, or as a specialist in trial or tax matters, or utility cases or criminal or personal injury cases, he prospers and multiplies. But what is happening to that class of lawyers to whom Woodrow Wilson referred as a "dwindling body of general practitioners who used to be our statesmen?" The law as a profession depends upon lawyers of rather general practice, not submerged in a specialty nor dominated by a single overshadowing interest, who become champions of any just cause, reserve their intellectual independence and uphold the tradition of loyalty to client and respect for the law and the courts.

Before considering problems of organization, let us appraise the forces that are at work on this legal profession of general practitioners. These tendencies I would point out as a matter of analysis, not necessarily criticism, and to stimulate consideration, not opposition. Many are inevitable, some probably beneficial to society, if not to the bar, others may, in the end be for our good.

Perhaps most conspicuous is the tendency to encroach upon the field of the lawyers' monopoly. No matter what the character of his practice, his field is being invaded by laymen. Plaintiff's advocates were deprived of many cases by the Workmen's Compensation Law. A strong sentiment now favors compulsory automobile insurance and arbitration of personal injury and property damage claims by an administrative tribunal. Whatever merits such a plan may have, it would take a large volume of business from both plaintiffs' and defendants' lawyers and leave them to seek other sources of income. In corporate reorganization and in tax matters, the business man more and more relies upon the accountant as his counsellor. In fact the Federal Treasury Department will not permit a member of the bar, even of the United State Supreme Court, to participate in a tax conference with its subordinate clerks unless specially admitted to the Treasury Bar and this special admission is extended to accountants as freely as to lawyers. The lawyer who builds his practice upon executorships and estates, finds the Trust Company taking his place and much business formerly transacted in law offices is now transacted in the bank. The lawyer's function of passing upon titles, except in rural districts, has been taken over by Title Insurance Companies. A concern financially embarrassed is now quite as apt to be liquidated by an adjuster representing Credit Insurance Companies who are subrogated to the interest of nominal creditors as by lawyers. Laymen's collection agencies, resorting often to methods of collection which would be reprehensible in a lawyer, are handling collections. Trade associations are providing bureaus to furnish specialized legal advice to members. Whole industries and groups of merchants have bound themselves by arbitration agreements to prevent their controversies from falling into the hands of lawyers and courts. Mergers, combinations, chain stores and chain banks reduce the number of clients and remove the conflict of interest out of which retainers arise. We hear that the depression and the inflation that sired it, both have operated to the economic destruction of the middle classes, whence most of us drew our clients. I fear it is all too true.

These economic developments are paralleled by legal developments prophetic of a declining prestige of courts and a corresponding decline in the prestige of the legal profession. The litigation method of settling controversies is steadily being superseded by the administrative method. Today the controversies settled in our courts of general jurisdiction are of small magnitude compared to the values being adjudicated in the tribunals of special jurisdiction such as the Interstate Commerce Commission, Utility Commissions, Trade Commissions, "Blue Sky" Commissions, Workmen's Compensation

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Commissions, Zoning and Building Commissions and scores of others, Federal, State and municipal.

Each business feels that the legal center of gravity is in some administrative body and no longer in the courts of original jurisdiction.

Of course every business is subject to litigation in the courts. Often its magnitude is considerable. Yet to a large business, court litigation is incidental compared with the power to make or break the business which some administrative body possesses. And such tribunals multiply in number and in power.

Moreover, far more finality is given and far more confidence reposed in these special tribunals than in our Judges. Regardless of the professional training required and the safeguards to his independence, few indeed and trivial are the decisions of a judge of original jurisdiction that are not subject to full review on both law and fact. But many of the administrative bodies have by statute, fully sustained by the Supreme Court, been granted power to make final findings of fact which no court can review.

The legal profession may well be apprehensive of a decline in the prestige of our law courts if they can only announce scholarly abstractions while a lay commission grants orders that means prosperity or failure or makes awards that must be paid in cash.

Even courts of last resort may entertain only limited questions and must in many cases accept the premises prepared by the administrative body.

The administrative method of settling controversies has made progress against the strongest opposition of the bar. Lawyers instinctively prefer the slower, more contentious, more deliberative methods of the court and regard the informality, short cuts and mass production methods of Commissions as a sort of slap-stick justice.

But if the lawyer's animosity against the administrative method is well grounded, why does it make progress each year? We lawyers place an affectionate emphasis upon a traditional set of values such as the separation of powers of government, the supremacy of an independent judiciary, proof of every allegation according to time-tried rules of evidence, testing each witness by cross examination, deliberation, jury trial and the appeal. We know the price we pay is delay and technicality and expense. The history of our profession is the history of the battles for these rights and we yield them an almost oriental devotion. However, the public is placing its insistence upon a different set of values from those we prize. It seeks speedy settlement, finality and freedom from the procedural contentions it pays for, but does not understand. Hence, it ousts the court of jurisdiction and the lawyer from employment and settles its cases by procedure extemporized by a lay referee or commissioner who suspends rules of evidence he never dreamed existed, and his decision has the finality of a decree of fate.

The philosophy upon which classes of controversies are being withdrawn from litigation and turned over to administrative determination is stated in a recent decision (Crowell vs. Benson decided Feb. 23, 1932) by Chief Justice Hughes:

"The findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded."

And in the dissenting opinion in the same case by Mr. Justice Brandeis:

"With a view to obviating the delays incident to judicial proceedings the Act substitutes an administrative tribunal for the court. . . .

"The purpose of these administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a *special and expert tribunal.* The proceedings of the deputy commissioners are endowed with every substantial safeguard of a judicial hearing."

And he concludes that to permit re-examination of jurisdictional facts "would seriously impair the entire administrative process."

The reason is stated by Judge Crane of the New York Court of Appeals as follows:

"When, therefore, we pass from the courts to the Commission of all kinds and leave to them the final determination of the facts unhampered by our technical rules of evidence, we have demonstrated in a very practical way the popular discontent with the ordinary method of determining much of our litigation. . . . The way is left open for the determination of many matters by departments or commissions, or the administrative bodies."[1]

The gain or loss to society from substituting executive justice for judicial justice is sharply in debate and it is no part of my subject here. Except in the case of efforts to enforce confiscatory rates upon utilities, the courts have summarily disposed of all constitutional objections to the complete removal of controversies over facts from the reach of the judicial power. It is time that a smug and somnolent legal profession awaken to the fact that our generation has a definite preference for the administrative method, for in a time when the government has steadily extended its functions and its need for fact finding, no new power has been confided to the courts, but all have been placed with Boards or Commissions. On the other hand such litigation as employers liability has been withdrawn from the courts and passed to the executive powers.

As we face a struggle for law reform, long overdue, I shall not be surprised if it takes the direction of withdrawing certain classes of claims, such as automobile negligence, small claims and commercial debts, from court litigation and extensions of liability without regard to fault, and determining this "vicarious liability" by the administrative method. Regardless of social effects, what effect will it have on the bar?

Administrative tribunals give the lawyer no such monopoly of attention as do the courts. They usually require no admission to practice and technical experts in other lines such as accountants and engineers, often specialize in appearing before them. In New York City it is disclosed that the

1. Judge Frederick Crane, N. Y. State Bar Bulletin, March, 1932.

most successful practitioner, before some of its municipal tribunals, was a veterinary surgeon.

Equally serious upon the general bar is the pressure to specialize in practice before such bodies. Special tribunal work does not fit into general practice and the specialist is frequently not interested in the profession as a whole. The tendency is to break up the general bar into a number of bars of limited practice.

There is but one way for the lawyers to escape the economic demoralization that is already evident, and that threatens to increase as by one device or another our monopoly is invaded.

The bar must recognize that the administrative method is a recent but established competitor with our judicial method of fact-finding.

We must recognize that in the competition our favorite is severely and needlessly handicapped by a load of delays, costs, formality, technicality and uncertainty, which win it nothing but public suspicion and hostility.

We must recognize that the lay public is not well enough informed as to the intricacies of legal procedure to lead effectively in reforming it. It can only reform present abuses as it did reform the practice in employers liability cases—by setting up lay tribunals to handle them.

We must recognize that responsibility for training our legal system down to fighting weight and sweating out its excess cost and formality, and speeding it up so as to have a fair chance to compete for its life is definitely that of the organized bar. The possibility of preserving the judicial or litigation method of settling controversies over facts depends on the bar abandoning its traditional hostility to progress, its cynical opposition to reform. We fall into a pit of our own digging.

The Bar faces its problems as a house divided against itself. It is divided into counsellors and advocates, with divergent interests and viewpoints. A sharp and often bitter division is between plaintiff's lawyers and defendant's lawyers in personal injury cases. We are admiralty lawyers, patent lawyers, mineral lawyers, railroad lawyers of several specialties, utility lawyers, bankruptcy lawyers, commercial lawyers, criminal lawyers—classified according to the interests of our dominant, and too often dominating clients. There is no economic solidarity among us. We have developed no guild spirit, no professional bond.

The result is that while a bar association may count as members the most influential men of its community, its collective influence is slight. There is a cancellation of influence due to their service of opposing interests, political parties or causes. The bar associations have less real control of individual members than does a trade union, and less of the lawyer's loyalty than does a secret society or a lunch club. We are not sufficiently organized to accept collective responsibility for the profession's welfare.

Bar organization has made uneven progress. Strong voluntary associations of varied activities and strong financial support exist in a few large cities. Rather casual associations exist in smaller cities and rural sections. Some states have powerful incorporated, all-inclusive, organizations, others voluntary ones numbering as members a small part of the bar. In some sections several local associations have federated to produce a large district association of greater strength and usefulness. Perhaps the strongest unit for close organization will be the state. But under our form of government problems common to lawyers of all states were early recognized and now arise in increasing numbers. There can be no doubt that, however pressing our local organization needs may be, there is urgent need for a strong, cohesive, compact, representative and vigorous American Bar Association. It is not a reflection upon its long and honorable existence to suggest that these times call for closer organization.

One of the first to recognize the need was Elihu Root, who was responsible for the calling of the first Conference of Bar Association Delegates, and who is quoted as saying:

"The Bar of America has been fumbling for years through national, state and local associations, in private conference, and in public addresses, to find some way to render public service we know we are bound to render, and that we all feel we are not rendering satisfactorily."

No better exposition of the need was ever made than by James Grafton Rogers when Chairman of the Bar Association Delegates and you will find his excellent address in the January, 1930, number of AMERICAN BAR ASSOCIATION JOURNAL entitled "The Demand for Reorganization in the American Bar."

A Committee of the Conference of Bar Association Delegates has been studying the subject and in the March, 1932, number of the AMERICAN BAR JOURNAL, you will find the carefully considered report of the Committee on Coordination of the Bar of the American Bar Association.

The April, 1932, number of the AMERICAN BAR ASSOCIATION JOURNAL publishes a statement of this Committee on Coordination of the Bar which canvasses the whole field of reorganization and which is deserving of every lawyer's study. I quote from the report what seems a temperate and well balanced statement of the problem of the American Bar Association.

"It now numbers a fifth of the nation's lawyers, its membership being recruited by individual solicitation. Because of the inherent limitations of membership solicitation, it probably can never hope, in its present form, to enroll or speak directly for a majority of the profession. Its will finds expression through annual assemblies which, of late years, have become too large to be deliberative, and, furthermore, are not truly representative of a balanced national opinion. Though the existing machinery is apparently not the most efficient in many ways, it is not certain that either of the two most frequently suggested improvements are immediately feasible: (1) an annual assembly of delegates elected by the members resident in each state, or (2) the establishment of a more or less loose but organic affiliation with independent State and Local Associations by some provision that all members of Local and State Bar associations shall automatically become members of the American Bar Association. Though the latter plan would seem to promise great advance in terms of actual aaccomplishments, and a better opportunity for the profession to collectively discharge the duty of leadership which it bears to the public, it cannot even be characterized until some indication is forthcoming as to the willingness of the State and Local Associations to co-operate. Your Committee is well aware of the vast divergence in conditions and in degree of associational activity which exists in the several states today."

It is not my purpose to advocate any particular program of changes. The adoption of a program will require the reconcilement of many interests and the meeting of many minds. My purpose here is purely evangelistic. I want to bring to you a sense of our shortcomings and a desire for salvation

and so to arouse your interest in the problem that you will contribute to its solution the best talent which this splendid association affords.

A basic question that the American Bar Association must decide is which of the two schools of Bar Association activities it will follow. One school favors a voluntary club of selected members. Opposed to this is the all-inclusive Association which is an organization of the whole Bar as it is, good, bad and indifferent. Personally, I more enjoy the voluntary club of selected members and I believe that there will always be a demand for that kind of lawyers' groups. But I seriously doubt whether the Bar will effectively marshal its collective influence under that type of organization. The difficulty with Bar Associations has been that the so-called leading lawyers became the active members of the Bar Associations and the other lawyers went to the legislature and defeated the Bar Association's bills. Thus in my own state in three years, out of eighteen bills sponsored by the Association of the Bar of the City of New York, sixteen were defeated by a legislature dominated by lawyers. While it may not be necessary to abandon our different lawyers' clubs, we need an organized profession and while this includes some members whose fellowship and opinions we may not value, yet if they are worthy to be admitted as members of the profession, they must not be excluded from the organized bar.

Another problem is whether a national bar association will be a federation of state associations or will disregard state lines and seek its own membership. Bar Associations have been successful under each type of organization. The most complete and illuminating study of Bar Associations ever published is that by Mr. Philip J. Wickser, Chairman of the Conference of Bar Association Delegates, in the Cornell Law Quarterly of April, 1930. It is said that the original founders of the American Bar Association had in mind an organization federal in structure. However this may be as an ideal, the American Bar Association cannot now abandon a voluntary membership of individuals nor surrender its independent source of revenue. Unless and until the organization of the several states is more complete, more energetic and more uniform it would be unwise for the national association to rest upon them as a foundation. A federal structure must await in the several state organizations, uniform, tested and successful. Even then it presents the same conflict as to voting power that so vexed the Federal Constitutional convention and led to compromise between the populous and the smaller states. A federal structure is not impossible, it is just difficult.

It has been suggested that a federated form could be combined with the present voluntary form of organization. An experimental body of this kind is already in being. The Conference of Bar Association Delegates is a representative body somewhat loosely constructed and functioning as a section of the American Bar Association. It might be strengthened and made a sort of second chamber of the American Bar meetings and thus balance the democratic mass meeting with a representative assembly.

It has also been suggested that the American Bar Association offer to the stronger State Associations a joint membership in some form so that the lawyer would obtain for a single fee, membership in both his state, the national and perhaps the local bar association. The American Bar Association might grant membership to members of local associations, applying through the State organization. This would not require basic reorganization but would be accomplished by agreement between the American Bar Association and the State or Local Associations cooperating in such a plan. It would furnish an example of cooperation and tend to stimulate interest in the complete bar organization. It would enable those who are active in promoting the interests of their local bar associations to promote the interest of the national association at the same time. It would seem that some effort toward unifying the efforts at increasing bar association membership might well be undertaken and at least in a few states as an experiment.

Whatever is done, we must definitely aim at consolidation and concentration of our organization efforts rather than continue to diffuse our energies through new and separate organizations, and the profession must be brought to a realization of the need of financing its professional bodies adequately to provide executive organizations of full-time salaried employees of the highest type. Our Bar Associations rely too much on voluntary service, which is fitful and uncertain and calls for a sacrifice of time and expense which some of the best fitted members are unable to give. The average man pays more in dues to third-class secret societies than he does for membership in the body that, if it functions properly, would represent his entire professional interest. Bar association work should not be a seasonal effort culminating and terminating in an annual mass meeting, it must be the twelve-month task of an adequate staff of junior executives. We have over 50 state, national or regional Bar Associations and over 1,200 local ones. Duplication or possible conflict of effort must be eliminated and they must be so coordinated as to constitute a harmonious professional representation.

I have rested the case for better bar organization upon the ancient appeal of self-defense. A bar that is threatened by an unprecedented increase in numbers and at the same time by a loss of its business, may justly be apprehensive of economic demoralization. It takes no delirious vision to see that increasing numbers and decreasing income may produce such competition as will overrule all ethical restraints as it has in some lines and in some localities already. To prevent such a condition transcends the mere right of self-defense, it becomes a duty of public service. A collectively impotent and individually predatory bar would be a collapse of our professional tradition that would stamp our generation as unworthy of its heritage. We are summoned to trial by ordeal. We dare not fail.

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