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# DIPLOMA PRIVILEGE IN WISCONSIN

By

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*University of Wisconsin, 1909*

With Preface By

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*Harvard University, 1914*

*Both Professors at Marquette  
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## PREFACE

THIS article of Carl Zollman on the diploma privilege recites some memorable fights in the history of legal education in its constant struggle for higher standards of Bar requirements. To the present writer the situation in Wisconsin seems anomalous. Pharmacists, cosmeticians, plumbers, barbers, dentists, every profession, avocation or calling has its State Examining Board. Graduates of the Medical School of the University of Wisconsin have to take the State Medical Examinations; graduates of the Law School of the State University do not have to take the State Bar Examinations. It would almost seem as though the State was less afraid of the ability of the product of its comparatively new Medical School to pass the state examinations than of its law graduates, though their department is of more ancient vintage.

The discussion is not an issue between Marquette and Madison, but broader. It is simply a question of special privilege. The present writer is a graduate of neither institution but of Harvard. Why a citizen of Wisconsin should indirectly be penalized for going to Harvard, Yale, Columbia, or Oxford seems difficult to understand. What is the benefit of the diploma privilege? Surely the better students at the Law School at Madison do not need it. It is of benefit only to those who fear a Bar examination. They are the ones who favor it. It was passed in about 1870 to attract students to Madison who were flocking to Michigan. Surely by now the University of Wisconsin Law School can stand on its own feet. Who are against this privilege? Dean Richards, Chief Justice Taft, and other prominent jurists including Justice Harlan Stone, Roscoe Pound, and Elihu Root. Why then further discrimination between Wisconsin citizens?

## THE DIPLOMA PRIVILEGE IN WISCONSIN

Ever since the Civil War a conflict has existed in a great many states as to the best method of determining the proficiency of candidates for the bar. On the one hand the determination has been left to the authorities of the individual school, on the other it has been entrusted to a body of judges or practitioners for the purpose of producing a general and uniform test without reference to the type of training favored by the schoolmen.

In New York the question early led to a tremendous controversy.<sup>1</sup> In Illinois the Supreme Court in 1899 took the matter into its own hands declaring a statute which granted the diploma privilege to the State University unconstitutional because it was class legislation and disregarded the constitutional division of the powers of government into legislative, executive, and judicial.<sup>2</sup> In states such as Michigan and Minnesota the privilege thus granted to the schools has been abolished at the request of the schools themselves. In others such as Wisconsin and a group of southern states it persists to the present day, but is limited in Wisconsin to graduates of the Wisconsin University Law School. Section 256.28 (1.) of the Wisconsin Statutes provides: "Any resident graduate of the law department of the University of Wisconsin shall be admitted to practice in all the courts of this state by the supreme court upon the production of his diploma."

In view of this situation the stand taken by the American Bar Association in this matter is of the greatest interest. This can be traced back for nearly fifty years. In 1881, indeed, the matter was not yet ripe for decisive action for the association then dodged the issue by resolving "that the diploma granted to those pursuing successfully the studies of such a course (one normally covering three years) and passing such full and fair written and oral examination as may be satisfactory both to the faculty of the school and to the proper authorities of the state, ought to entitle the recipient to admission to the Bar as an attorney at law."<sup>3</sup> In 1892 it strongly recommended "that the power of admitting members to the Bar, and the supervision of their professional conduct, be in each state lodged in the highest courts of the State; and that the examinations of candidates be referred to a permanent commission, appointed by the court, in order that a full and systematic knowledge of elementary law may always be exacted as a condition of admittance."<sup>4</sup> In 1907 the Committee on Legal

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<sup>1</sup> See Carnegie Foundation Bulletin No. 15. Training for the Public Profession of the Law 259-263.

<sup>2</sup> *In re Day* 181 Ill. 73, 54 N. E. 646.

<sup>3</sup> See Carnegie Foundation Bulletin No. 15, page 266.

<sup>4</sup> 15 Report of Am. Bar Ass'n. 9.

Education and Admissions to the Bar recommended the passage of the following resolution: "That the American Bar Association recommends the Bar Association in those states and territories in which state or territorial Boards of Law Examiners have not yet been established, to take action at an early date to secure in their respective states and territories the appointment of such boards which shall have supervision of *all examinations* for admission to the bar, and whose duty it shall be to report the result to the court of last resort in which should be vested *the sole right* to grant a license to practice law."<sup>6</sup> This resolution was adopted by the Association in 1908.<sup>6</sup>

At the meeting of 1920 in St. Louis of the American Bar Association, the special committee to the section of legal education and admissions to the bar of such association appointed Elihu Root and six others as a special committee to make recommendations in respect to any action to be taken by the section or the bar association itself to create conditions tending to strengthen the character and increase the efficiency of those admitted to the practice of the law.

The committee was duly organized and chose a secretary and directed him to send to persons who had given thought to matters of legal education a questionnaire on the subject. Such a paper, thereupon, was sent to the dean of every law school in the United States, to every committee on legal education of a state or local bar association, to every state board of bar examiners and to members of the bar suggested by the state vice-presidents of the American Bar Association. After many very helpful answers had been received the committee met at New York on May 19 and 20, 1921, and discussed the matter not only among its own members but heard the opinions personally delivered by such men as Harlan F. Stone, then dean of Columbia University Law School, and now of the United States Supreme Court; Roscoe Pound, dean of the Harvard University Law School; John B. Sanborn, of Madison, Wisconsin, secretary of the Section of Legal Education and Admissions to the Bar of the American Bar Association; Alfred J. Reed of the Carnegie Foundation, the chairman or secretary of the New York, Massachusetts, and Pennsylvania Law Examiners; and the deans of the following law schools not heretofore mentioned: New Jersey Law School, Yale University School of Law, and Indiana University School of Law.<sup>7</sup>

The result of these deliberations was a report to the American Bar Association assembled at Cincinnati in 1921 which stated: "In view of action already taken by the American Bar Association it seems unneces-

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<sup>6</sup> 31 Report of Am. Bar Ass'n. 588. The *italics* are by the present writer.

<sup>6</sup> 32 Report of Am. Bar Ass'n. 19.

<sup>7</sup> 46 Report of Am. Bar Ass'n. 679, 680.

sary to discuss the propriety of admitting candidates to the bar upon a law school diploma. We, too, believe that *such a system is undesirable and recommend that it shall not be permitted.*"<sup>8</sup> Accordingly the committee submitted among others the following recommendation: "The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness."<sup>9</sup>

The resolutions were not passed *pro forma* but led to an animated discussion in which sixteen speakers, including such men as William H. Taft, participated. In the course of this discussion Max Schoetz, dean of the Marquette Law School, inquired of the chairman whether the faculty of a state university law school would be deemed "public authority" within the meaning of the resolution. The chairman stated that he did not so understand unless the law of a particular state so provide.<sup>10</sup>

The committee as a means of bringing the American Bar Association in close touch with the state and local associations in this matter recommended the calling of a conference on Legal Education to which each of these state associations should be invited to the end that common action might result from common counsel.<sup>11</sup> The result was a special session on legal education of the conference of Bar Association delegates held on February 23 and 24, 1922, at Washington, D.C., under the auspices of the American Bar Association. The resolution now appeared in the following form: "We agree with the American Bar Association that graduation from a law school should not confer the right of admission to the Bar, and that every candidate should be subjected to examination by public authority *other than the authority of the law school of which he is a graduate.*"<sup>12</sup> After a most vigorous debate and the voting down of proposed amendments, the entire set of resolutions propounded by the committee was adopted.<sup>13</sup>

The Committee on Legal Education of the Wisconsin Bar Association in 1923 was divided in opinion on the question of the adoption of these resolutions. The consequence was that no action was taken but the two reports were published in the proceedings,<sup>14</sup> so as to give the members of the association an opportunity to familiarize themselves

<sup>8</sup> 46 Report of Am. Bar Ass'n. 686. The *italics* are by the present writer.

<sup>9</sup> 46 Report of Am. Bar Ass'n. 688.

<sup>10</sup> 46 Report of Am. Bar Ass'n. 677, 678.

<sup>11</sup> 46 Report of Am. Bar Ass'n. 687.

<sup>12</sup> Page 143 of the pamphlet report of the conference. The *italics* are by the present writer.

<sup>13</sup> Page 174 of the pamphlet.

<sup>14</sup> See page 56 of the report of such meeting.

with the situation. In 1924 the matter was ripe for action. Mr. Richards, dean of the University of Wisconsin Law School, as chairman of the State Committee on Legal Education at the meeting of the State Bar Association at Appleton on June 27, 1924, presented these resolutions in precisely the same form as recommended by the conference at Washington,<sup>15</sup> and stated that his opinion was "in accordance with the views which the American Bar Association have expressed."<sup>16</sup> He accordingly moved that the Wisconsin State Bar Association approve and adopt the resolutions. Dean Schoetz of Marquette Law School seconded the motion, stating that Marquette University was heartily in sympathy with the resolutions and that he believed that Dean Richards had pointed the way which should be followed.<sup>17</sup> After a vigorous debate, a substitute motion was lost by a vote of 63 to 40 and the original motion made by Dean Richards and seconded by Dean Schoetz was adopted by a *viva voce* vote.<sup>18</sup>

There are two main arguments against the diploma privilege: The first is that the state ought not to lose control over so important a part of its function as admission to the bar. There should be no "short cut to the bar through golden gates." The retort sometimes made that state law schools at least may be considered organs of the state has been branded by the Carnegie Foundation as a "quibble."<sup>19</sup> Instructors in the state university under the holding of the Wisconsin Supreme Court are not even officers of the state but mere employees.<sup>20</sup>

The second argument against the privilege is that its possession is against the best interest of the recipient school itself. It tends to lure both faculty and student body into listlessness and in consequence to keep away from the school the better and more ambitious students. Says the Carnegie Foundation:

The decisive argument, however, was and is that the absence of responsibility to some external authority is bad for the schools themselves. This fact, which Minor has clearly recognized, is patent to any one who has visited a large number of law schools. It is apparent even in schools which, because they have virtually a local monopoly of legal education, are under no pressure to reduce their standards. It takes here the form of a certain listlessness. The teachers are tempted to sink into that condition of uninspired placidity which is only too characteristic of many American college professors. That law teachers, as a class, move on a higher plane of efficiency than their colleagues

<sup>15</sup> See page 142 of the report of such meeting.

<sup>16</sup> Page 140.

<sup>17</sup> Page 143.

<sup>18</sup> Page 150.

<sup>19</sup> Bulletin No. 15. Training for the Public Profession of Law. p. 267.

<sup>20</sup> *Butler v. Regents of University*, 32 Wis. 124.

in the colleges of liberal arts, is undoubtedly attributable in part to their greater measure of accountability. When to this fact is added the further one that it is difficult to prevent the diploma privilege, once granted to a good school, from being extended to any school that may subsequently be started in the state, complete demoralization of the bar is threatened. There can be little question but that Delafield was correct in describing these privileges in New York in his own day as affording "a short cut to the bar through golden gates." There can be no question but that in our own day they have been scandalously abused in several states. Except as a tentative arrangement, pending the time when a satisfactory system can be devised, the diploma privilege cannot be defended.<sup>21</sup>

The third argument, already referred to, against the diploma privilege, that once granted to a good school it has the inevitable tendency to extend to any school that may subsequently be started in the state, thus threatening "complete demoralization of the bar,"<sup>22</sup> fortunately has no application to Wisconsin, for Marquette University, the only law school competing with the State University in this field, recognizes fully the consequences on the morale of both its faculty and its student body of the extension of this privilege to it and far from desiring it will oppose by all legitimate means within its power the receipt of such a "gift of the Greeks."

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<sup>21</sup> Bulletin No. 15 of the Carnegie Foundation: Training for the Public Profession of Law. p. 267.

<sup>22</sup> Bulletin No. 15 of the Carnegie Foundation: Training for the Public Profession of Law. p. 267.