1919

Pre-Legal Education

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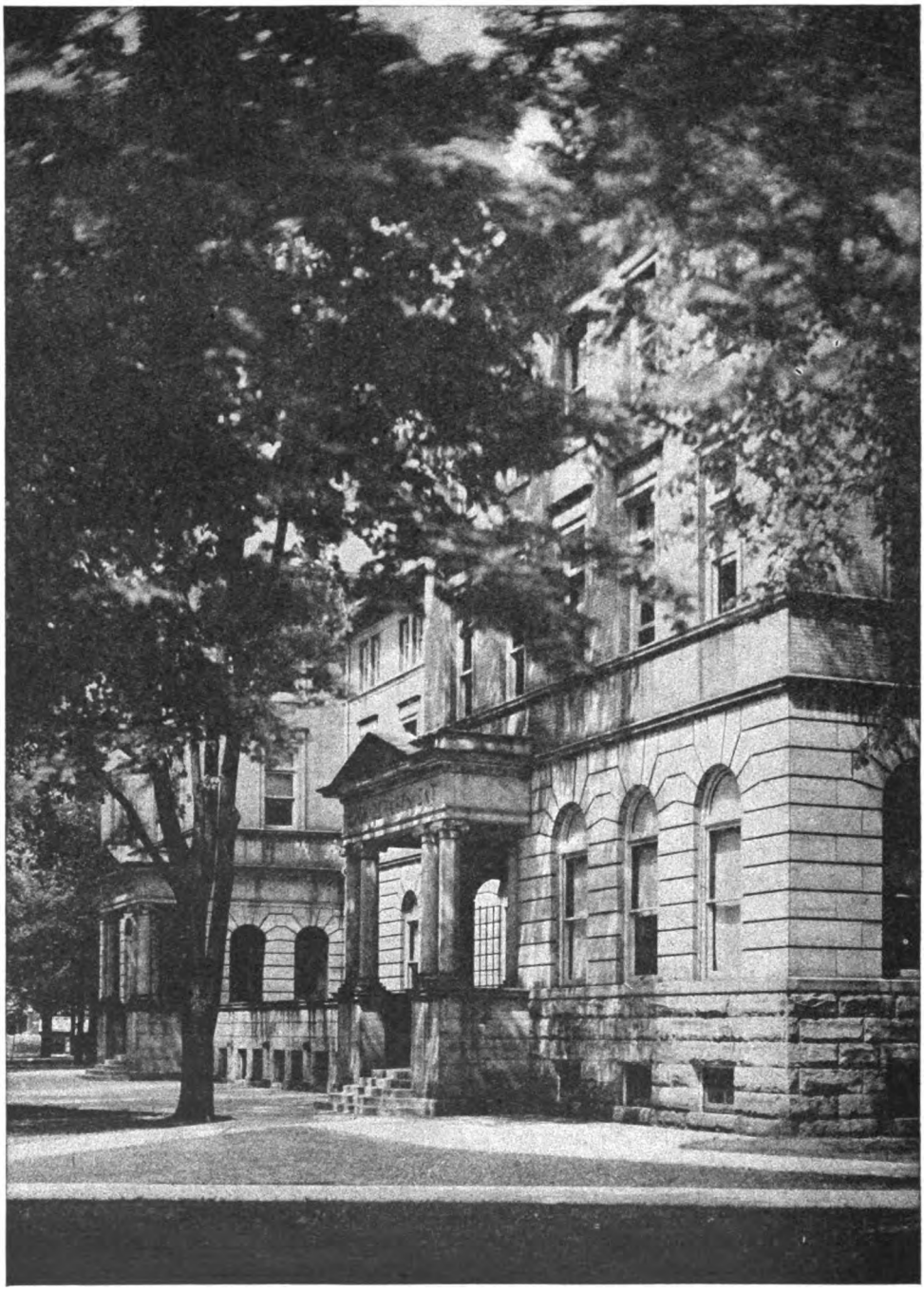
It was once thought that a lawyer's vocation was chiefly to serve his clients, so that he might bring fame and fortune to himself. The profession of law was considered only a means of livelihood, merely more difficult than clerking and more remunerative, sometimes, than carpentry. To require study for the law was thought an unfair preclusion of embryo bread-winners from an adventure with that particular occupation. Fortunately, the public mind has changed; the practice of law is no longer only a means of livelihood, but has become an important agency in promoting civilization. Some one has likened law to the shining track along which the machinery of civilization moves forward. The smoothness and direction of that movement depend in large part upon the ability of the legal profession. Society thereby acquires a very pertinent interest in legal education.

This view of lawyers as servants of the public, follows naturally a change in the conventional ideas of law itself. Law can not be defined. It is too many-phased to be seen in all its aspects from one position, and it can be described only in attributes, not as a single unique idea. As a term, however, it usually signifies the congeries of rules and principles in accord with which courts are wont to decide controversies. During the adolescence of our Anglo-Saxon judicial system it was an accepted philosophy that these rules and principles had been preordained by the Creator of all things. That is to say, what was "right" and proper in human conduct was considered as independent of human convention; and "law" was essentially a part of this preordained right. To quote Montesquieu, "Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made there were relations of possible justice. To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle, all the radii were not equal."

The hall-mark by which the details of this law of God, or of Nature, were to be known, the only mark of distinction in fact, was human custom; immemorial, general, and desirable custom. But immemorial and general custom could furnish only general principles. Particular applications, as well as decision of cases never known to custom, had to be made by logical development and extension, in harmony with the original fundamentals shown by custom. The decisions thus reached and the rules therein developed were preserved in published reports of the cases.

This law, as established by God, had another important characteristic. Not only was its substance independent of human convention, but it was eternally immutable. When once it had been correctly ascertained it was thenceforth and forever binding as the rule to be followed by courts, not only, as Blackstone expressed it, because it was desirable to keep the scales of justice from wavering with each new judge's opinion, but more particularly because what before was indefinite had become certain and beyond the power of any judge to change. This idea of permanence extended not only to the basic principles shown by general custom, but to the particular applications and extensions of these principles as well. Thus the reports of



LAW SCHOOL

prior decisions came to be looked upon as a thesaurus of all the law, and the only law, available to courts. Being the judicial interpretation of custom, it is often called the "unwritten law," or, from another source, the "common law," to distinguish it from the rules laid down by positive legislation.

Comparatively speaking, there was but little positive legislation when this philosophy was dominant, and, in theory at least, even this was of no validity whatever except as it formulated the pre-existing law of God. Even now the amount of "law" made through direct legislation is but a small part of the whole. The common law utterly predominates; so that the interest of society is still in the education of the judge and lawyer rather than that of the legislator.

With this philosophy of law as a premise, it is evident that the most ignorant of practitioners can not harm either the law or the general public. He may give his clients costly misinformation and lose their suits, but the law itself is wholly beyond his influence and above his uttermost action. Even on the judicial bench, ignorance personified can do no harm beyond the misdecision of a particular case. While, as Lord Bacon put it, "Judges ought to be more Learned than Wittie; More Reverend than Plausible; And more Advised, than Confident" and "One Foule Sentence, doth more Hurt, than many Foule Examples," yet, after all, the law itself is beyond even the judge in its preordained and eternal rightness. The power of the judge is only *"Jus dicere,* and not *Jus dare;* To Interpret Law, and not to Make Law, or Give Law." Legal education, therefore, under this theory of law, is essentially only for the benefit of the practitioner himself. All he needs is forensic power, and a thorough knowledge of that precedent which is the sum and substance of law, back to the dim period of black-letter, Latin manuscripts.

But this is to-day a discredited assumption. Philosophically, the idea of a completely detailed "right" quite independent of human convention is discarded, and a pragmatic observation of the utilities is, at least, developing. Law has ceased to be either a substance or a force beyond the influence of its subjects.

Courts do, to be sure, still follow precedent; in some cases, as Christian, a commentator of Blackstone, said they must, "even when they are flatly absurd and unjust, if they are agreeable to ancient principles." It is naturally difficult to point out cases in which courts have admittedly followed absurd precedents, but one occasionally finds a court saying of the decisions of *another* jurisdiction that they are utterly unsound; and in Bucher v. Cheshire Ry. (125 U. S. 555) the Supreme Court of the United States affirmed a state court decision, which it openly characterised as unjust, because precedents of the state compelled it to. In McCusker v. McEvery (19 R. I. 528) the court felt constrained by precedents to a decision which, it admitted, turned a recent statute into "a snare rather than (as intended) a protection to purchasers." Many another court has reached its decision on a basis of precedent, or analogic extention of precedent, alone, without the slightest consideration of practical results, or even of the fundamental reasons behind particular precedents. To such extent does this still exist

that just recently it moved a Chief Justice of North Carolina to say of the common law—albeit most unfairly—that it alone of all the professions, still retains doctrines of the time when Sangrado bled his patients to death and witches were burned, and that many of its rules are but the pedantry and quibble of long departed fools. But, on the whole, the modern tendency is to use precedents, as a Chief Justice of Ohio once said, "as the great storehouse of experience; not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which although at times they be liable to conduct us to the paths of error, yet may be important aids in lighting our footsteps in the road to truth." And the modern reason they are followed is, to reverse the Blackstonian conjunction, less because the law is immutably fixed, than to keep the scales of justice even and steady and not liable to waiver with each new judge's opinion.

This leaves a knowledge of precedent, an ability to analyse it and to extend it by logical development, still absolutely essential in a lawyer's equipment. Without it, indeed, he is no lawyer. To give this training and this knowledge is the function of the law-school, and it has been performed with such success, and with such quick development as conditions change, that it has long been free from any sound criticism. But the proper education of a modern lawyer demands much more than this, for the sake of the public as well as in his own interest.

The judge of to-day has ceased to be—even in the cry—a mere "interpreter" and expounder of a divinely detailed and preordained right. To the extent that he refuses to follow precedent, and to the greater extent that he decides cases which have no precise precedent, he is recognised as in fact a maker of law—a formulator of the rule by which he chooses to decide the case. There can, now, be admittedly something else than mere precedent or analogical reasoning from precedent in the decision which the court makes. In point of fact, courts have always more or less looked to utility and practical results, whatever the theory may have been. As long ago as 1601, an English court reached its particular decision partly "because fraud and deceit abound in these days more than in former times, (and therefore) . . . . all statutes made against fraud should be liberally and benefically expounded to suppress the fraud." And the House of Lords, long ago, gave as one cause for a reversal of the judgment of a lower court, the very practical reason that "In all merchantile transactions one great point to be kept uniformly in view (by the court) is to make the circulation and negotiation of property as quick and as certain as possible. If this judgment (of the court below) stand, no man will be safe either in buying, or in lending money on goods at sea." The tendency of modern courts to look not only back to precedent, but also forward to the practical results of their decisions, is daily exemplified. A state tax, for instance, on federally incorporated railways is upheld as not interfering with federal control of commerce, not on precedent, nor on mere formal development of precedents, but solely because "a contrary doctrine would greatly embarrass the states in the collection of their necessary revenue without any corresponding advantage to the United States." Consequently, a federal tax is upheld because a decision adverse to it might, through development of circumstances, strike down the whole

source of federal internal revenue. In upholding a Wisconsin statute placing the burden of industrial accidents upon employers regardless of actual negligence, the court stated as the reason, that the enactment tended to solve "a great economic and social problem which modern industrialism has forced upon us," and to lessen "the terrible economic waste" of the old remedies.

That courts will not consider "public opinion" in making their decisions is definitely settled by a large and varied assortment of cases. So early as Chisholm v. Georgia (2 Dall. 419) the court interpreted the Constitution as subjecting states to liability of suit by citizens of other states, despite the contrary opinion of the statesmen of the constitutional struggle, and the Eleventh Amendment was necessary to effectuate the general feeling that states should be exempt from such suits. When the Supreme Court declared invalid the New York statute limiting the hours which bakers might be employed, Mr. Justice Holmes, dissenting, pointed out that they had done it "upon an economic theory which a large part of the country does not entertain." The unpopularity of the majority's decision was thereafter very pointedly demonstrated. There can be no doubt of the average man's opinion as to the desirablity and fairness of a statute requiring sleeping-car companies to keep the upper berth of a section closed when only the lower berth is engaged. Yet the Supreme Court held such a statute to be an invalid restriction of the rights of the companies. Even more striking, perhaps, is the case of Adams v. Tanner (244 U. S. 590) in which a statute was declared invalid, as not being "due process of law," despite the fact that a majority of the electorate of the state had already voted in favor of it.

What does influence the court is its opinion of the economic or social desirability of a particular decision. In most cases involving the validity of statutes, the attack is made under the provision of the Constitution that no person shall be deprived of life, liberty or property without "due process of law." Now due process of law is a very indefinite thing, and no court has ever succeeded in defining it or in setting up a standard by which its presence can be automatically determined. But the final result has come to this: that a proposed deprivation of liberty or property is due process of law when the court is satisfied that it will be of such economic or social advantage to the commonwealth as to justify a diminution of the established rights connoted by "liberty" and "property." And this question itself turns not upon how, adversely or beneficially, the statute affects the individuals toward whom it is directed, but upon how that individual effect will react upon the common weal. That is to say, a statute prohibiting the use of intoxicating liquor is justified, not because it saves the potential drunkard from himself, but because by saving him from himself the whole public is benefited. Even when the validity of legislation is not involved, still the decision will have in many cases a positive economic effect, and will therefore be decided with regard to the effect desired. Thus, it may determine whether the buyer from a thief of a bill of lading shall be protected or shall be made to bear the risk of correctly ascertaining his sellar's title; or it may determine whether monetary damage can be recovered for wrongful injury to one's mental peace. In these cases, as in decisions upon the validity of statutes, the court is quite apt to look to the practical economic effect of its decision.

It needs no argument to support the proposition that the interest of society as a whole will be better served if the men who thus so directly and so greatly influence its economic and social life are trained in the science of economics and sociology. There is ridicule, at times, of the educational pretenses of these subjects. Possibly it is justified; possibly they have more value than is recognized. But, surely, no one would preferably leave the economic and social guidance of the nation to the empiricism of men untutored in what science of these subjects there may be.

The lawyer as well as the judge should have this training, for society's sake as well as for his own. His personal profit lies in ability to forecast what the decision in a particular case will be. So long as courts do attune their decisions to practical results, the lawyer who would predict conclusions must himself be familiar with economic and social conditions and be trained to judge the practical effect upon them of one decision or another. He must be conversant, as it were, with the problems of government finance and understand the social burden of industrial accidents. To be sure there will not be absolute certainty in such a prediction, any more than in forecasts based on logical extension of precedent. In Dr. Miles Medical Co. v. Parks, (220 U. S. 373) Justice Hughes and Justice Holmes both gave express heed to the practical effect of their decision—and reached precisely opposed conclusions. But where there is, from an observation of utility, one conculsion obviously, or even probably, more fitting than another, a lawyer is but half prepared in his own interest if he is not trained to forsee it. Moreover, since the judges of to-morrow are lawyers of to-day, even the training in social sciences by which the public is served in judicial ability, comes itself back to an element in the education of all lawyers.

But the public has an even more immediate concern with the training and ability of lawyers as such, for as lawyers they can and do affect the law itself—the law which is now recognized as man-made, and not preordained and fixed by independent Nature. Just as courts need the assistance of lawyers in hunting precedent and properly developing it, so they must need help, unless they be more omniscient than common men, in matters pertaining to the nation's social welfare. The case of Muller v. Oregon (208 U. S. 412), in which was upheld a statutory limitation of the time which women might work in certain industries, is a shining example of the fact that courts do thus rely upon counsel. The real issue was not whether this limitation was in accord with some definite standards of right but whether it was justified by its beneficial effect upon the commonwealth. Counsel in support of the law filed a brief demonstrating its practical effect, and the court was so far moved by it as to say that this evidence was "significant of a wide-spread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she shall be permitted to toil." The whole tone of the opinion indicates how far the court learned the practical desirability of the statute, from the evidence of social and economic conditions furnished by counsel, rather than as a deduction from its own existing knowledge. Of what avail, in such a case, or of what help to the court, would be the blind persuasion of counsel skilled only in the subtleties of precedent? On the

other hand stands the thirty-year old decision invalidating a New York statute which prohibits the manufacture of cigars, and preparation of tobacco, in tenement houses. (In re Jacobs, 98 N. Y. 98). There seems to have been even then a clear realization, which has since spread widely, on the part of those who knew the facts, that the preparation of tobacco in tenement house rooms was a distinct evil, deleterious to public welfare. But the evidence of this was not, so far as one can tell from the reports, presented to the court; the case was fought out solely on asserted precedent. The court thereupon, on obviously empirical knowledge, declared the enactment unnecessary and invalid, because, it said, "It can not be conceived how the cigar maker is to be improved in health or morals by forcing him from his home and its hallowed association and beneficent influences to ply his trade elsewhere." Had counsel acted as did those in Muller v. Oregon, and presented facts and economic theories, though possibly they might not have convinced the court of the social evil that existed, at least they would have shown the irony of the "beneficent influences" of the "hallowed" tenement home.

Thus it appears that while the "black-letter lawyer" is still *a* man of the hour, and always must be, so long as we have consistency and science in decision, yet he is rapidly sharing place with him whom Mr. Justice Holmes called "the man of statistics and the master of economics." The lawyer who is properly equipped as a public servant, as well as for his own self-interest, must have a knowledge of both "law," in its narrower sense, and of the newer social sciences. A part of this complementary education the law-schools are furnishing with satisfactory results. They long ago ceased simply to instruct in precedent, and have been so educating their students in the development of precedent as to make law a living and growing reality. But they are limited by their structure to precedent and the factors in its proper development. They can, and do, point out the *influence* of factors extraneous to precedent, but they can not teach the substance of these external influences. Although the social sciences are a part of "law" in its newer sense, they are essentially preliminary to technical law-school training. Now that the influence of lawyers upon law is admitted, and that society's own interest in lawyers' ability is recognised, it is to be hoped that more training will be required for admission to the bar than the law-schools alone can give.

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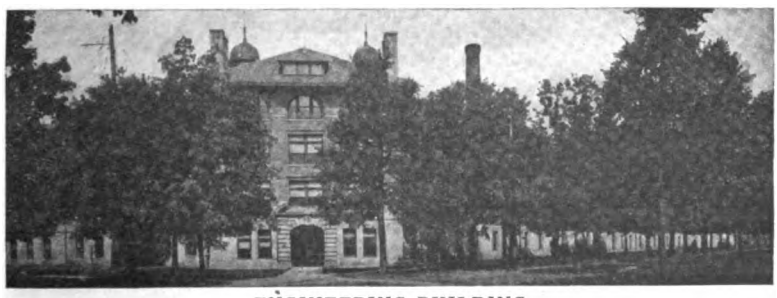

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