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Thomas McIntyre Cooley

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THOMAS MCINTYRE COOLEY

The Department of Law of the University was opened in the fall of 1859. The wisdom of the step was doubted by many, and it cannot be said to have had the hearty support of the profession of the State. Systematic legal education through the instrumentality of formal instruction was in its infancy. It was practically unknown in the west, for outside of New England and New York there was at the time no law school of standing and influence. The profession generally, the country over, had little sympathy with any method of training for the bar excepting the historic one of apprenticeship in the law office. The study of the law as a science separate and apart from its study and application as an art did not appeal to the average practitioner. It did not seem to him either logical or practicable, and so his influence was against the new departure and in favor of the old regime. Moreover, at this time but little attention had been given to methods in legal instruction. As a rule the work of the schools was carried on in an irregular way by men whose predominant energies were given to active and practical duties at

the bar or upon the bench. It was of necessity largely incidental and secondary. It goes without saying that, under such conditions, it was possible to make out a very good case against the law school and in favor of the office apprenticeship, where, as it was argued, the student had the constant supervision of his preceptor.

But notwithstanding the attitude of the profession and methods that are now regarded as defective, the Department of Law of the University enjoyed an immediate and continued prosperity. This was due undoubtedly to the exceptional strength of the first Faculty. At the time of their election by the Regents, Judge Campbell was a distinguished member of the Supreme Bench of the State, Judge Walker, a practitioner of marked ability and large experience, while the subject of this sketch, the third member, then the reporter of the decisions of the Supreme Court, was generally recognized in the State as a profound lawyer of the scholarly type. Each of these men brought to the work of instruction not only great learning, but also that which in the teacher is equally important with learning, the force

of a distinct personality. Each, moreover, possessed the teaching power in a marked degree. With such men method was a matter of secondary importance.

With the exception of a single year, Judge Cooley was uninterruptedly upon the teaching staff of the University from the time of his appointment as professor in the Department of Law until his death, a period of nearly forty years. He served the Department of Law continuously for twenty-five years and during the most of that time he was its Dean and the only resident professor. He was thus brought more directly in contact with the student body than were his associates and became in a very large degree the molding force in the Department. "The largest share of the success of the school," says one of his associates upon the Faculty, "must be attributed to him."

To one of scholarly tastes and habits, a university connection offers much that is attractive. It affords opportunities for study and investigation along chosen lines, and the life of the place prompts intellectual effort. Judge Cooley was not a college-bred man, his early advantages having been meager in the extreme, but he was an intensely intellectual man, and having early acquired the habit of continuous and discriminating reading, he educated himself better perhaps than he could have been educated in the schools. The intellectual life was certainly for him the normal life. And so it was that a call to the University appealed to him. Here he found not only most congenial society but also opportunities and an environment that stimulated his natural taste for literary work. Although continuing to give his chief energies to the law, his duties as court reporter, law professor and later as a judge in the state court of last resort compelling him to do so, he at once began to extend his studies into the

allied fields of history and political science. From boyhood his interest in history, particularly in American history, had been intense, and he now devoted to the subject extended and systematic study. Though not probably a scientific student of historical sources according to the modern standard, he read widely and appreciatively and became thoroughly familiar with the development of the political institutions of England and America. Judge Cooley had the historical sense in a marked degree, and while not to be classed as a historian, for he was first and essentially a jurist, his attainments in the historical field were such that in 1885, after his retirement from the Department of Law and from the Supreme Bench, he was elected Professor of History and Dean of the School of Political Science in the Literary Department of the University. For several years previous to that time he had delivered lectures in the School of Political Science, where he held the professorship of Constitutional and Administrative Law. In 1886, he was made Professor of American History and Constitutional Law and Dean of the School of Political Science. During his period of service, then, he was prominently connected with two great departments of the University. In 1887, by reason of a call to public duties as a member of the Interstate Commerce Commission, Judge Cooley was compelled to discontinue regular university work, though he remained upon the instructing staff and from time to time, as long as his health would permit, gave brief courses upon legal and historical subjects.

For the work of organization and instruction in the new department to which he had been called, Judge Cooley was well fitted both by temperament and training. He was at this time thirty-five years of age, and, although a stranger to the technical work of higher education, possessed

scholarly tastes and habits in no ordinary degree and a mind that had been disciplined by years of exhaustive reading and close professional study and practice. He had realized, even as a youth, that acquisition simply, while it may be learning, is not education, and that it only becomes education when coupled with the power to think and act independently; that education, in the true sense of the term, necessarily implies constructive ability. And so we find that during his student days, as indeed during his entire life, he was continually doing things that required initiative and the exercise of independent thought and judgment. While yet in his teens, he began to have definite ideas upon some of the public questions of the day, as appears from occasional articles from his pen in the local press of his native town. Nature and self-training gave to Judge Cooley the power not only to acquire but also to think clearly and independently, and thinking clearly, he wrote clearly. No small part of his remarkable success in life was due to his ability early and constantly exercised, to express his ideas in compact, clear and forceful English. He was, moreover, as one of his associates upon the bench has said "the incarnation of order," and he furthermore possessed the rare ability, acquired undoubtedly largely by practice, of being able in the midst of distracting surroundings that would confuse and perplex the ordinary man, to fix his attention at once and continuously upon the work in hand. "Being once put in motion," said Judge Graves in commenting upon this trait of his associate, "the engine stayed obedient to the engineer and neither knew nor heeded any other master or any conflicting influence. He had only to touch the lever of the will to exclude the apparatus of thought from all infringement and all disturbance."

Although Judge Cooley would have

disclaimed any special fitness for university work and doubtless felt that his lack of formal preparatory training in the schools must prove a serious handicap, yet that his equipment must have been an admirable one appears upon every page of his preparatory and early professional life. At the time of his call to the University, in addition to having gained through his own unaided efforts and the school of experience a general education much above that of most men of his years who have enjoyed the advantages of college training, he had attained a state reputation in the profession. He was not known as a trial lawyer, for he never became prominent in the *nisi prius* courts. He lacked the aggressive qualities that count for so much in courts of first instance. But he was known as a practitioner thoroughly grounded in the law, scholarly, accurate and painstaking, and as having literary ability much above the average. These qualities were first brought prominently before the profession by his compilation of the laws of the State in 1857. Doubtless his selection as compiler was due to his recognized literary ability and his known capacity for rapid and accurate work. His labors were completed within the short time fixed by the Legislature, nine months, and in such a way as to meet with general commendation. The work bears the impress of the accomplished lawyer and the man of correct literary taste and judgment, and it is certainly a testimonial to its merit that it has served to a large extent as the model for subsequent compilations. Undoubtedly the excellence of this work led to his appointment in 1858 by the Supreme Court as the official reporter of its decisions, an office that he continued to hold until promoted to a seat upon the bench in 1864. It is not too much to say that in Mr. Cooley the Court and the profession at once recognized the ideal reporter. It was

here that his powers of analysis and discrimination and his great ability as a writer of terse and forceful English first became conspicuously apparent. His *syllabi* stand today, and they must always stand, as models of comprehensiveness, accuracy, compactness and lucidity.

Such, then, was the equipment with which Judge Cooley entered upon his university work. That he was a great teacher, was at once apparent. He had the teaching power to a remarkable degree. He was a thorough master of his subjects. To his students he always gave the best of which he was capable. His instruction was always by lecture, and, though not an orator in the popular sense, he at once challenged and held the attention of his large classes by the absolute simplicity and clearness of his exposition. In slow and measured utterances, his enunciation perfectly distinct, his English a model of compactness and lucidity, he would so unfold the subject that inattention was impossible. The thin voice was forgotten and personal peculiarities were unnoticed. His hearers were dominated solely by the intellectual power of the man.

A seemingly small event not infrequently proves to be of vast importance in the life of a man. So it was in the life of Judge Cooley, for his great work upon Constitutional Limitations was probably the result of an incident that at the time of its occurrence made little impression upon the minds of those concerned. I give it in the words of one of the associates of Judge Cooley upon the bench, the late Judge Champlin. In the course of his memorial remarks before the Supreme Court, in speaking of the organization of the work in the Department of Law of the University, he said: "As the topics for each lecturer were at first arranged, constitutional law was not in the series. It was not added until the second year. . . . To show what circumstances,

small and untoward in themselves, often will turn the trend of our fortunes and make or unmake us, I will relate the circumstances, as I have heard them from Judge Cooley, which originated, developed and brought out Cooley's Constitutional Limitations. He said that in consultation the Faculty determined that this subject should be added to the course; that in his own mind he had immediately felt that Judge Campbell, owing to his great knowledge of the law, his experience in the practice of it, and his great ability upon the bench, was the best qualified to lecture upon that subject, and he so suggested, and that Judge Walker was of the same opinion. But Judge Campbell absolutely declined to take the subject, stating that he had his own ideas of constitutional law and was aware that they differed from those of many eminent jurists, and that he absolutely declined to lecture upon that subject. Judge Cooley then suggested that Professor Walker take the subject, but he also absolutely declined, and nothing was left but for Judge Cooley to take it up and lecture upon it. These lectures and his study of the subject culminated in Cooley's Constitutional Limitations, which first appeared in 1868, and established the reputation of Judge Cooley as one of the greatest living authors upon one of the greatest living subjects of the day. This opportunity was not seized, but was thrust upon him, and the performance of the task attests at once his genius and his ability as a jurist in this almost untrodden field of thought."¹

It is possible, though not probable, that this, the greatest work from the pen of Judge Cooley, would have appeared, if he had not been compelled,

¹From the remarks of the late Judge John W. Champlin upon the occasion of the memorial exercises in honor of Judge Cooley in the Supreme Court, 119 Mich. lviii.

early in his university career, to give studious attention to constitutional subjects. But it was certainly fortunate for him and for jurisprudence that the course of events thrust those subjects upon his attention before he had become absorbed in other lines of investigation, for he was thus enabled to give to them the best years of his life. It is now apparent that his mind was naturally adapted for the study and development of such subjects. He was, moreover, well fitted for the task by his previous systematic reading in American history and his deep sympathy with the constitutional restraints that the abundant caution of the fathers had imposed. That he was a firm believer in the fundamental doctrines of our institutions, is unmistakably apparent upon every page of the book.

At the time of the appearance of this book, Judge Cooley had been upon the Supreme Bench of the State for three years and a member of the Law Faculty for nine years. He had written numerous opinions in which he had shown himself to be a judge of great learning and ability as well as a master in the use of concise, forceful and lucid English. He had gained extended recognition as a teacher of exceptional power. He had also contributed occasional articles to legal periodicals and had published a digest of the decisions of the State Supreme Court. But he had never before attempted a sustained work covering an entire field in the law. That his first effort should result in what one writer of authority calls "the chiefest law book of this generation," was due to several causes that it may not be inappropriate briefly to notice.

In the first place, the field was practically a new one. Considerable had been written upon American constitutional law, but it had been chiefly upon the interpretation of the national constitution. It was left for

Judge Cooley to discuss the limitations imposed by the national constitution and the constitutions of the states upon the legislative power of the states and to do it so thoroughly that no one has since appeared to question his title, accorded to him by the united opinion of the profession, as the great authority upon the subject. Furthermore, the time of publication was fortunate, for the profession and the people were then intensely interested in constitutional questions. But the chief cause for the great success of the book lay in its plan and the execution of the work. Judge Cooley had the ability to discover that a work upon constitutional limitations to meet with general recognition must deal principally with general and not local questions; that to discuss the different state constitutions separately and in detail would not only result in a work of great length but also in one that would be neither distinctively general nor distinctively local. And so he hit upon the plan of omitting details excepting by way of occasional reference and of confining the discussion to the great general principles that are common to all constitutions. This plan enabled him to develop in a large way such general and fundamental subjects as the formation and construction of state constitutions, the functions of the state as exercised through its law-making powers and the constitutional protections to the person, property and general liberty of the citizen. The plan of the work certainly shows great foresight and wisdom and its execution constructive ability of a high order and exceptional powers of generalization. Judge Cooley was not a genius, but he possessed an unusually clear and analytical mind and a capacity for continuous intellectual work that was extraordinary. To the preparation of this volume, he devoted years of systematic study and careful thought. That there was a demand for such a

book was a circumstance that undoubtedly contributed somewhat to its success, but the chief cause for its commanding and continued influence is to be found in the fact that upon every page it bears the mark of masterly ability and conscientious and thorough work.

It was always a characteristic with Judge Cooley to underrate the value of his work. He probably never fully appreciated the worth of his services to the University, the State and the Nation. He was the personification of modesty. This characteristic of the man was strikingly apparent in his very modest idea of the value of his work upon *Constitutional Limitations*. I cannot better show this than by quoting the words of the late Judge Graves, long his associate upon the Supreme Bench of the State. They were spoken in University Hall a few years ago upon the occasion of the celebration of Cooley Day.

"We all know that of the countless multitudes incapable of writing a particular book, or indeed any book, there are often many who are yet tolerably qualified to pass on the merits of an important one brought to their attention. You will perceive the drift of this allusion when I add that within a few weeks after our first meeting at Lansing, Judge Cooley honored me with an inspection of the manuscript of his earliest, and, I think, greatest work. The immortal treatise on constitutional limitations, but as yet without a title, came under my eye. The author had "builded better than he knew." His lack of appreciation was flagrantly evident. He imagined having succeeded in getting up a convenient hand-book—not quite in line with the clerk's assistant, or the attorney's companion, but more nearly resembling the school book by Mr. Young, and destined, perhaps, to serve as a labor-saving contrivance for tutors and students, and as a manual for inferior state officers; and my sincere

and well-meant encomium only brought a good-natured smile to his face, accompanied by pooh-poohs of incredulity. I read the manuscript with interest and enjoyment, and had no question concerning its transcendent merit. It seemed too apparent to admit of doubt that the most pressing want of the epoch, in the line of legal literature, was met, and met triumphantly. I said as much to him, and predicted that the ancient notion that no elementary law book could be received as authority during the author's lifetime would be now wholly ignored, and that before the lapse of ten years this book would be cited in the best state courts, and moreover in the Supreme Court of the Union. He met my enthusiasm with a good-natured hit at my obtuseness and optimism. My prediction was, however, more than fulfilled, and he lived to see it cited everywhere in the nation, and moreover in the British House of Lords and in the most respectable of the continental tribunals."

Other law books from the pen of Judge Cooley appeared from time to time, but although of great merit and value, as was everything that he did, I doubt if they will contribute materially to his permanent fame as a jurist. This will, I think, rest mainly upon his great ability as an expounder of constitutional subjects. His later works, while not inferior in any particular, certainly do not reach the high standard of distinct superiority that characterizes his *Constitutional Limitations*, nor are they of such excellence as practically to hold their respective fields alone as that work holds its field. They must always come into competition with the works of other authors of at least equal merit.

The limits of this paper prohibit any extended reference to Judge Cooley's distinguished services upon the Supreme Bench of the State, to his varied and numerous contributions to the periodical literature of his time and

to his remarkable versatility as shown in his great work in connection with the practical problems of transportation. Suffice it to say that he was the ideal judge, combining in a rare way the qualities that go to make up the judicial temperament; that by his writings and addresses upon public questions he impressed himself upon the country at large as few men have done; that as receiver of a great railroad system, he showed administrative ability of the highest order, such as ordinarily can be expected only after years of preparatory service; and that as Chairman of the Interstate Commerce Commission, his effectiveness as an organizer and his great ability in devising ways and means in a field that was practically without precedent, were at once and conspicuously apparent.

A great teacher, a great judge, a great legal author, and withal a great administrator,—such was Judge Cooley. Few men have attained distinction in so many fields. But his success was by no means a matter of circumstance or chance; it was solidly grounded in merit. He was endowed by nature with intellectual powers of a high order. His mind was active, keen, analytical; it seized at once upon the essentials of a problem and proceeded naturally, easily, logically and rapidly to a conclusion. His powers

of generalization were marked. He had, moreover, the intellectual grasp that insured the consideration of questions in a large way and saved him from the errors of a narrow and partial view. He was also the soul of sincerity. But in addition to all these qualities, he had tremendous capacity for work. He never took a vacation and rarely rested from his labors until forced to do so by failing health. He not only had an enormous capacity for work but an intense love for it. He often declared his work to be his recreation. His failure to curb what in him amounted to a passion was, of course, a great mistake. This he realized at last, but not until it was too late.

But with all his devotion to intellectual pursuits, Judge Cooley was the ideal citizen, the devoted husband and father, and the helpful friend. He always found the time for his public duties and social obligations. No worthy cause failed to receive from him hearty sympathy and support. He loved his family and his home, and was never so happy as when contributing to the happiness of others. Hundreds of students can testify to his kindly interest and many to his material aid. Such a life as was his must always serve as an inspiration.

H. B. HUTCHINS, '71.

Dean of the Department of Law.