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The Art of Legal Practice

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THE ART OF LEGAL PRACTICE

I.

IN one respect the law is the most perplexing subject with which a man can deal. It shifts and changes so rapidly that only a nimble and diligent student can keep abreast of it. One is likely to wake up any morning and find that the legislature has repealed a good part of what he knows, and he is in constant danger of having his most carefully formed opinions completely upset by a new decision of the Supreme Court. These violent changes are not due to any new discoveries, such as constantly enliven the scientific world, but merely to the shifting sentiment of legislative bodies and to the powerful influence of a certain variable element which enters into every legal equation. The legislative innovations are in a sense extrinsic factors. But the judicial "variable," if we may use the term, is an innate condition, and every judicial opinion may be considered a function of that variable.

A casual glance through the current reports will give one a striking impression of the importance of this judicial "variable" with which the practicing lawyer has constantly to deal. In Volume 210 of the United States Supreme Court Reports 30 per cent of the cases in which opinions were written were reversed in whole or in part, and in 20 per cent of them one or more judges dissented; in Volume 152 of the Michigan Supreme Court Reports 41 per cent of the cases were reversed; in Volume 125 of the Reports of the Appellate Division of the Supreme Court of New York 60 per cent of the cases were reversed, and in Volume 191 of the Reports of the New York Court of Appeals 25 per cent were reversed; in Volume 1 of the English King's Bench for 1905 just 50 per cent of the cases were reversed. Other reports show similar percentages.

If a legal controversy is considered a problem in which one solution is right and the others wrong, and if the decision of the last court of appeal is deemed conclusive as to the right solution, the trial judges who administer the law throughout this country and England must be considered a very incompetent class. Students who could not reach a higher percentage of correct solutions would not be graduated from even a third rate school.

But the above figures are not confined to trial judges. The appeals to the Supreme Court of the United States are most of them taken from the United States Circuit Courts of Appeal and from the highest courts of the states. The judges of these courts, then, who reverse lower judges so often, are in turn reversed with almost

equal frequency. The Appellate Division in New York, as shown above, allowed the trial judges an average of but 40 per cent of correct solutions, while these appellate judges themselves were admitted to be correct in but 75 per cent of the cases which were carried up to the Court of Appeals.

The truth is that there is no such thing as a "single correct solution" for every legal problem. Two judges may take opposite positions on a given case and both be right. Each is right from his own point of view.

The majority of cases which cause difficulty in the courts are not those which deal with mooted legal principles. The principles of the law are largely settled. The leading cases, the elementary text-books and the state and federal statutes are open to everyone, and in these the principles of the law are stated in language which usually admits of no serious question. But the great problem which haunts the lawyer and haunts the court is: Which of these legal principles controls the case in hand? The facts may be simple, the rules of law may be few and clear, but the case may be one upon which able judges may be hopelessly at variance.

A very interesting example of this may be found in a recent decision of the Supreme Court of the United States. A statute of the state of Iowa provided that the shares of stock of state and savings banks should be assessed to such banks and not to the individual stockholders. Plaintiff bank held, as a part of its capital, certain bonds of the United States, and, in making the assessment under the statute, the assessor did not deduct the amount of these bonds. Plaintiff contended that in this way a tax was really levied by the state upon United States bonds. The Supreme Court of Iowa sustained the defendant, the City of Des Moines. The Supreme Court of the United States sustained the plaintiff, the Home Savings Bank. There were no facts in dispute. Both courts admitted that to levy a tax upon United States securities was beyond the power of the state. Both admitted that there was a distinction between capital stock and shares of stock, the former being the property of the corporation, the latter being the property of the corporators. But one court said that the tax under the statute was a tax on United States bonds; the other court said it was not. One court said that the tax could not be deemed a tax on the shares, because the corporation was required to pay it and one party could not be required to pay taxes on another party's property; the other court admitted the rule stated, but said that it did not apply for the reason that the capital stock is really, though not formally, owned by the

stockholders, and the stockholders do, under the statute, in effect pay the tax. Both courts cited *Allen v. Assessors*, 3 Wall. 573; but one held that it was an authority in support of the plaintiff, the other that it supported the defendant. Six judges sat on the Supreme Court of Iowa, and all concurred in the opinion. Nine judges sat on the Supreme Court of the United States, and six of them agreed that the six Iowa judges were wrong, while the other three dissented. The question was a remarkably simple one, and the case disclosed no difference of opinion among the fifteen judges as to the fundamental legal principles involved. But one court applied the law to the facts and reached one conclusion; the other court applied the same law to the same facts and reached a directly opposite conclusion. Which judges were right?*

It is not to be denied that there are many cases which bring out a sharp conflict in judicial opinion as to fundamental legal principles. But these cases are comparatively few. By far the greater number of legal controversies involve the application of well known principles. It is this class of cases which confuses lawyers and puzzles courts.

Law is, in truth, both a science and an art, but chiefly the latter. It might be called an applied science. To know the law for the sake of knowing it is the harmless desire of a studious mind, but to know the law for the sake of using it is the high ambition which makes great lawyers. A man merely learned in the law is not a lawyer, and reading will hardly make him one. Unless he views the law, not as a body of collected wisdom, but as the practical means by which society is regulated in its every-day affairs, he lacks the chief requisite for a successful career at the bar.

If knowledge of the law is valuable, not for itself but for its usefulness, law should be taught, not as an end in itself, but as a means to an end. The student should be taught the art of applying legal principles to facts. Of course the application cannot be made until the data have been obtained, and perhaps the major part of the time of the law school student should be spent in acquiring a working knowledge of legal principles. There is no occasion for him to attempt to master the substantive law. No lawyer can carry the law in his head, but he carries enough there to enable him to see the legal bearing of the facts of cases which are presented to him. He knows enough to find the rest. But the bare knowledge of what the law is constitutes the least part of the lawyer's equipment.

Let it be assumed that one has become reasonably familiar with

**Home Savings Bank v. City of Des Moines*, 205 U. S. 503. Same, 101 N. W. (Iowa) 867.

the elements of the various branches of the law. Diligence in reading text-books or hearing lectures has given him the necessary information. Up to that point he has studied law as a science. But law as a science is abstract, and tends to become more and more so as it approaches its theoretical ideal. The scientist seeks constantly for unity, and in doing so he is obliged to sacrifice content to form. Law as a pure science is no more vital a subject than such a science as astronomy. Both attempt to classify and unify a group of related facts, but in each case the goal is reached when the classification is worked out. If the student stops here he has little to show for his labor.

As a fact, law as a science is so closely related to, and dominated by, law as an art, that it is not taught as a rigid system except, in some schools, in the brief form of a course in the Science of Jurisprudence. The various substantive branches of the law are all treated in the familiar text-books in a loose catalogue form, due to the sources being found in adjudicated cases rather than in a code. The general principle is stated, together with a list of special instances in which it has been applied by the courts. These special instances give a legal text-book a distinct concrete aspect, but while they impair, they do not destroy its character as fundamentally a scientific treatise.

Law as an art is embodied in the cases, and no other art has so vast and so rich a literature. If the student would step beyond the dry domain of the legal text-book and see how the skillful artisans of the law have clothed the naked legal rules with living facts, let him read the cases. Here are spread before him the records of the achievements of generations of lawyers. All had the same fundamental problems to solve, but the solutions were as numerous as the cases which called them forth. Each reported case shows how the attorneys and the court worked together over a set of facts, tried this legal principle and that to see which seemed most nearly to meet the needs of the situation, looked at the case from all its sides, weighed the various elements which went to make it up in order to determine their controlling force, analyzed and applied precedents, and at last, out of the chaos of law and fact, brought a clear solution of the problem.

The value of the use of cases in teaching law has become thoroughly recognized in American law schools. Law as an art can hardly be taught without them, for there is nothing more essential for developing facility in the practice of any art than the use of good models. One would hardly be expected to become a good

musical composer without a thorough study of the musical masterpieces. The best and almost the only way to acquire literary style is through the study of good prose. In equal measure is the study of cases essential to develop that skill in analyzing and handling legal controversies which marks the good lawyer.

But why stop with the study of cases? The student of composition tries his hand at actual writing. Nobody thinks that a study of models is enough. Why not give the student of law a chance to try his hand at practice?

Only two reasons suggest themselves for excluding practice from the law school course. One is that it is practically impossible to teach it. This may be dismissed with the remark that it has been done and is now being done with unquestioned success. The other is that practice has no proper place in a law school.

If practice ought not to appear as one of the features of legal instruction it is either because it is of no importance in itself or because it would diminish the time available for other more important subjects. Both of these reasons have been given; they are equally invalid.

It is most commonly said, by those who oppose the teaching of practice in the law schools, that the student will get hold of practice readily enough when he gets into the active work of his profession. So will the writer get plenty of experience in writing when he takes up the career of a literary man. So will the engineer have abundant opportunity to do practical work when he begins his career as an engineer.

There is no essential difference in the relation which practice bears to the study of law and that which composition bears to the study of literary style. The efficiency of the student must be measured by his ability to write in the one case and to practice in the other. He may know how writing ought to be done, but if he cannot actually write well he is a failure as a literary man. He may know how a case ought to be handled, but if he cannot actually handle it successfully he is no lawyer. A knowledge of rhetoric will never make a writer; a knowledge of the principles of law will never make a lawyer.

The case system is, indeed, a half-way point in the development of legal teaching. It carries the student out of the abstractions of the text-book into the realm of concrete litigation. But it merely instructs him as to how others applied the law, without allowing him any opportunity to apply it for himself. In the cases, the student sees the finished product of the lawyer's labor. He gets the same character of information from them that the engineering

student gets from reading descriptions of new structures or machinery. The case system admits that law is more than a science of jurisprudence, that it lives not in abstract propositions but in the shifting interrelation of facts and principles. It admits that the law must be studied as an applied science, but it stops short of the position which has become axiomatic in regard to every other phase of practical life, viz., that the only way to really learn how to do a thing is to actually do it.

If the aim of the law school is to make legal scholars perhaps the study of cases is enough. It is quite conceivable that one could become well versed in the principles of the law by a diligent study of the achievements of others. One might become a well-informed rhetorician, or even a clever critic of style, and yet be unable to write well himself. But one can never become proficient in doing anything by merely watching others do it. A course in pedagogy never made a good teacher.

The aim of the law schools ought to be to develop good lawyers so far as their means will allow. The lawyer is essentially a practitioner, and the schools must therefore aim to do what they can to prepare men for practice. Of course the student will learn far more in the future years of his active career than the school can teach him. But if he goes to the law school to learn how to practice law, the law school should go as far as possible in teaching him the thing he wants to know. It should teach him the elementary principles of the law; it should go further, and show him, by the study of cases, how the great lawyers wrestled with and solved the problems of the law; and it should, finally, give him problems to solve for himself, and should watch, direct and criticise through all the stages of the case, helping him to appreciate and understand the difficulties, and teaching him, by actual experience, how to avoid pitfalls and reach the desired results.

The mere scholar is disheartened over the uncertainties of the law. For him they mark imperfection and incompleteness, and he looks forward to the time when legal standards will be so far perfected that the answers to legal problems may be worked out with accuracy and precision. He would apply the close logic of the mathematician to the facts and law of the case, and would have the correct result follow invariably from correct premises. The lawyer knows better. He understands that there is no absolute standard possible; that reversed cases and dissenting opinions only emphasize the human element in legal controversies; that two judges may differ diametrically and neither be wrong; that right and wrong, as applied to the solution of legal problems, are purely relative terms.

II.

With a view to realizing the many advantages incident to the study of practice in the law school, the University of Michigan, in 1893, introduced a department known as the Practice Court. It was at first largely an experiment, and the labor involved in developing it into a systematic and practicable mechanism for teaching practice was enormous. There were no models to study, for no enterprise similar to that sought to be installed had been in operation elsewhere.

One feature of the Law Department at Michigan added greatly to the difficulties incident to the development of the court, and that was the cosmopolitan character of the student body. Three-quarters of the states of the Union are constantly represented, and to undertake the supervision of practical work carried on under the various rules of so many jurisdictions was a formidable task. And yet it was perfectly clear that no course in practice could succeed unless it were based, in the case of each particular student, upon the concrete and specific rules in force in some one particular jurisdiction, preferably that where the student intended to practice. Accordingly, from the beginning, the Practice Court has offered to every student taking the work the opportunity to study, under strict supervision, the practice of any state which he may choose.

The Practice Court is conducted as a senior class course. Pleading, at common law, in equity and under the code, is thoroughly covered in separate courses with the first and second year men, and when they enter the senior class it is assumed that they are reasonably familiar with the theory of pleading.

The first thing undertaken is some practical work in drawing pleadings. As soon as the class is enrolled identical copies of a statement of facts are given out to all the members of the class. This statement is an informal recital of facts very similar to that which a client would give a lawyer when consulting him about his case. It contains evidence, immaterial matter and conclusions mingled with the ultimate facts of the case in such a way that close discrimination must be exercised in analyzing and segregating the essential elements of the cause of action. And with the facts constituting the plaintiff's case are those which are to be relied upon by the defendant. The whole story is told, out of which an action and its incidents spring.

Each student is required to take this statement of facts and draw a complete set of pleadings based on the situation therein disclosed, raising the meritorious issue or issues in the case. He may follow the rules of any jurisdiction he chooses, and his pleadings will be

judged by the standards of that jurisdiction. The pleadings so drawn are filed on a given day, and are then carefully examined with a view to discovering and classifying the blunders that have been made. These errors are noted and, after the examination of the entire lot of pleadings filed, three sets of pleadings drawn under the common law system and three sets drawn under the code system, chosen for the purpose of exhibiting the greatest variety of mistakes, are selected as illustrative pleadings for study. Mimeograph copies of each set are made, and each man in the class receives copies of the three common law or the three code sets of pleadings, according as he has chosen a venue where the practice is based on common law or code rules.

Each man is required to study these illustrative sets of pleadings, compare them with the pleadings he himself drew on the same facts, look up all questions involved, criticize them unsparingly and rigidly, and be prepared for a thorough and exhaustive quiz on the whole subject of the proper manner of pleading in the given case and the specific mistakes shown in the illustrative pleadings. The men are divided into convenient and appropriate sections to facilitate the quiz work. Not only are all the noteworthy errors appearing in the illustrative pleadings pointed out and discussed, but the whole list of mistakes made by the class is, so far as possible, presented for comment and criticism. The aim is to make the quiz comprehensive enough to cover all the principal errors which the inexperienced pleader finds it possible to make.

After this thoroughgoing discussion each man in the class is required to draw an amended set of pleadings on the same facts, embodying all the points made in the quiz. The original sets of pleadings are then compared with the amended sets, and the men are graded individually upon the showing made.

This process is repeated as often as time will permit. Cases at law, both in tort and contract, and cases calling for equitable relief, are given out in this way. In each instance there is the issuance of identical copies of the statement of facts to all members of the class, the preparation by each man of a complete set of pleadings, the examination of these pleadings and the issuance of copies of illustrative pleadings chosen from among them, the study of these pleadings and a comprehensive quiz upon the case with particular reference to the errors appearing in these illustrative pleadings, the preparation of amended pleadings after the quiz, and a careful grading of each man upon the work he has done.

Many important rules of pleading are given concrete illustration

in this work. The manner of analyzing a set of facts to determine the precise cause of action contained therein, the differentiation of the ultimate facts from evidence and legal conclusions, the exclusion of immaterial and redundant matters, pleading according to legal effect as distinguished from pleading legal conclusions, hypothetical and alternative pleading, uncertainty, pleading by way of recital, anticipating defenses, the theory and form of different counts, pleas in bar and in abatement, the scope and purpose of demurrers, inconsistent defenses, the scope of the general issues and the general denial, duplicity, departure,—all these and a great number of similar questions are concretely illustrated by the work of the men themselves, and the discussions in regard to them have nothing of the vague and abstract obscurity which the theoretical study of pleading cannot entirely escape.

After this preliminary work in pleading the Practice Court work proper is taken up. The men in the class arrange themselves into groups of four, two to represent the plaintiff in the case and two to represent the defendant. They choose whatever jurisdiction they wish for the venue of their case. To each group is then given out a statement of facts similar in its scope and purpose to those upon which the preliminary work in pleading was based, though no two groups receive the same facts. These cases cover a large variety of questions and are so prepared as to involve disputed questions of law, or difficult applications of legal principles. The merits of the issue in each case are to be determined by the general weight of authority, but all questions of pleading and practice are to be determined by the rules, statutes and decisions of the state of venue.

Process in each case is first to be prepared, issued, served and returned under the direction of the attorneys for the plaintiff, after which the pleadings follow in due course. The Practice Court rules provide that if a mistake exists in any process or pleading, and no exception is taken to it by the opposing attorneys, the latter as well as those who committed the error are to be held responsible for it, and the court sits several afternoons each week to hear and determine all motions and demurrers that may be brought before it. The process and pleadings are usually examined and searched for errors with care and discrimination, and the multitude of motions and demurrers brought on for hearing in the Practice Court covers a wide range of questions and frequently develops difficult and intricate points of pleading and practice.

In these arguments there is nothing of fiction. The question is always an actual one arising upon actual pleadings or process. The

objections are based upon the statutes, rules of court and decisions of the state wherein the venue of the action is laid. The objections therefore involve a close and critical analysis of these statutes, rules and decisions. Such an analysis, when definitized by the concrete features of the case in hand, gives a grasp and working knowledge of procedure which no purely general study of the subject can give. And, most important of all, the analysis so made and the conclusions so reached are presented in open court under conditions practically identical with those of actual practice. It is much to be able to see a mistake in an opponent's pleading, it is a still greater achievement to run down the authorities and fortify one's judgment by well considered opinions of courts, but the final test of knowledge and skill comes when the point is argued, when the pleading is analyzed before the court and the alleged error is made to appear in what is deemed to be its true light, when cases in support of the position taken are presented and marshalled in the most telling manner, and when the argument of opposing counsel is answered and his authorities distinguished in a clear, logical and convincing way.

The Practice Court room is large enough to hold a considerable number of spectators, and the senior students are encouraged to visit the court even when they have no matters of their own pending there. This privilege is very generally taken advantage of, and the arguments are usually listened to by large and keenly appreciative audiences of students.

After the men assigned to a given case deem the same at proper issue on the pleadings, they file notes of issue to indicate that fact, and the pleadings filed are then carefully examined by the instructor in charge. He then meets the group and the pleadings are discussed and criticized and suggestions are made as to better methods of dealing with the case and ways of avoiding errors. Amended pleadings are usually required to be prepared and filed, and upon the pleadings as they stand in their final form a law argument is based.

The law argument is made before some member of the faculty; it consumes from one to two hours, and covers the issues raised by the pleadings. Each man must take part in the argument and must show familiarity with the facts and principles involved in the leading cases cited. The men representing each side of the controversy are also required to present, at the close of the argument, a comprehensive brief upon the law of the case, prepared with care in the manner usual in the case of briefs filed in our appellate courts, in accordance with somewhat detailed suggestions which are distributed to the men in printed form when the facts are given out.

The men are graded upon their arguments and upon their briefs, and if they do not attain a sufficient standard in either one a reargument or a new brief may be called for.

The foregoing represents the work of the first semester. The second semester is devoted largely to court work in jury cases. This work involves the trial of issues of fact, and the fundamental practical problem underlying it consists in the creation of the issues to be tried. In the work of the first semester statements of assumed facts are prepared, and these exactly meet the requirements, for the purpose is to raise issues of law, not of fact, and the trial is to the court and not to the jury. But when it is desired to produce an issue of fact no assumptions can be made, for that which is assumed cannot be an issue. Equally ineffectual is the method of coaching witnesses before the trial as to what they will say on the witness stand, for while the direct examination of the various witnesses might develop contradictions and inconsistencies, there would be absolutely no field for cross-examination. A jury trial can be of value to the student participating in it only when it presents the elements of actual litigation, viz., the existence of actual controversies respecting which concrete issues can be drawn on the pleadings and to support which the testimony of persons may be had who actually saw, heard or participated in the transactions out of which the issues arose.

To meet these requirements each case is founded upon a preliminary "arrangement," which consists of a working out of a series of transactions in which the witnesses and participants are members of the class. The facts so worked out may involve the question of the existence or the terms of a contract, the authority of an agent, or the intent with which an act was done; it may be a question of fraud or false pretenses, or any one of an almost endless variety of legal controversies. The parties while actually engaged in the transactions are directed what to do, but having once acted the fact assumes fixed and tangible form and the questions raised at the trial relate to what was really said and done. Here all the elements of the ordinary litigated question are present, and the witnesses called may be cross-examined as to the accuracy of their memory in regard to the matters testified to, as to their opportunities for observation, etc. In short, the controversies are actual but are artificially produced. and the issues tried are absolutely real issues. The mechanism of the arrangement has no material effect upon the trial itself, which proceeds to all appearances like any ordinary trial in one of our circuit courts.

The students act as witnesses, jurors and attorneys in the various cases, so that they have an opportunity to view the proceedings from the witness stand, the jury box and the attorneys' table and to observe how their classmates conduct themselves in those same positions. Each jury is impanelled in accordance with the practice of the state of venue, and under that same practice witnesses are sworn and evidence is introduced, motions for non-suits or directed verdicts are made, instructions are drawn and submitted to the jury, arguments are made and the verdict is rendered. Every element of the actual trial is present except the pecuniary interest of the parties to the suit.

Such are the main features of the work of teaching practice as it has been developed at the University of Michigan. It has not reached the finished stage in all its details, for the problem is a very large one. Every year sees alterations and improvements. The sole aim is to get results, rather than to justify any particular method. The Practice Court supplants no courses in the substantive law, it does not take the place of a thorough study of the theory of pleading, it does not even exhaust the attention given to practice itself, for text-book courses in "General Practice" and "Michigan Practice" are simultaneously given. But it does attempt to give a concrete flavor to the work of the law student, to present legal problems to be solved as a lawyer is expected to solve them, to enable the student to judge of the value of cases by actually using them, and to appreciate the function and meaning of the principles of substantive law by putting them into practice.

The lawyer, like the engineer, is a professional man with whom knowledge is but a means to a practical end. If he cannot use his knowledge it is of no value to him. He can never appreciate what he knows until he learns how to use it; he can never know how to acquire knowledge until he understands how his knowledge is to be employed. It is to round out the law school curriculum into a practical as well as a theoretical course, to supplement the case system in making the law concrete, and to develop the study of law as a science which is primarily to be applied to the needs of a complex society, that the teaching of practice has taken a prominent place in the Law Department of the University of Michigan.

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