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Practice Work and Elective Studies in Law Schools.

By JAMES PARKER HALL,

Dean of the University of Chicago Law School.

(Paper read at the recent meeting of the Section of Legal Education of the American Bar Association.)

ONE of the difficulties confronting the persons yearly honored by invitations to read papers before this Section is that of choosing a subject with even a flavor of novelty. Those law-school problems which can be much enlightened by discussion are neither many nor complex, and we have talked about them all before. Experience is solving them for most of us more effectively than argument, and, like our theological brethren, the temper of our gatherings is passing from the rigor of doctrinal debate to the genial toleration of the experience meeting. So long as our greatest court decides its most interesting cases by a five to four vote, we must admit that reasonable men may differ about some of our questions; and one over which disagreement is certainly reasonable is how far practice should be taught in the law school. Some consideration of this will form the first part of my paper.

Discussion of the subject in recent years has often been prefaced with the statement that half of the appellate litigation in this country is over questions of practice, and has proceeded upon the assumption that law schools could give instruction which would very much diminish this proportion. The first proposition, as usually stated, is extravagantly misleading, and the second may well be

doubted. In 1894 there was published in the minutes of this section¹ a table prepared by Frank L. Smith, of New York, purporting to show that nearly one-half the points passed upon in ordinary civil cases by the appellate courts of the United States and Canada in 1893 did not involve the merits of the causes, but concerned evidence, pleading, or practice. This table is the basis for the statement referred to. Nearly one-third of the points included in it are in evidence or pleading, regarding the teaching of which there is no general controversy. The thirty-five per cent. remaining, however, seemed extraordinarily large, and to test the figures I examined the reports of the highest courts in Massachusetts, New York, Michigan, and Illinois for the year 1902-3, tabulating the practice points, and endeavoring carefully to distinguish them from points of substantive law. It appeared that less than ten per cent. of practice points were passed upon by these courts; and I strongly suspect that Mr. Smith's system of classification must have been very liberal toward the practice headings.

Really the case against our practitioners is not nearly so bad as even this, for many practice questions are included by counsel as makeweights in cases where

¹ 17 American Bar Ass'n Reports, 367 (1894).

the appeal is really taken on the merits or for delay. That such objections are overruled in an appellate court does not stamp either lawyer as incompetent. They are simply playing all of the points in the game. In about one-fourth only of the practice points raised in the cases I examined was the practice followed held bad where an alternative existed, and in part of these the questions must have been doubtful and no more to be settled without litigation than are moot points in substantive law. Badly drawn statutes and rules of court are responsible for much earnest controversy over points of practice. The proportion of practice points on appeal in which the lawyers might reasonably have been expected to do better is thus probably somewhere between one and two per cent., a showing much more encouraging than the fifty per cent. version. Just how good or bad this is we cannot tell, because we have no record of the proportion of errors in practice which do not get into the reports. Granting, however, that mistakes are too numerous to be creditable, how far might law school instruction reduce them?

In answering this we must discriminate. Many rules of practice depend in details upon no principle, but are arbitrary rules of convenience. Of this class, for instance, are many of those relating to appellate procedure. A variety of things are to be done in a manner and at times that are minutely specified. No lawyer not largely engaged in perfecting appeals ever tries to charge his memory with these *minutiae*, or fails to refresh it by a reference to his books. Most mistakes here occur through carelessness, and would not be sensibly lessened by any reasonable amount of law school instruction. Now it is precisely this class of questions which is raised most frequently. About one-third of all practice points concern the one subject of appeal

and error; and such topics as judgment, judicial sale, levy and seizure, limitation of actions, replevin, and attachment, all of them bristling with minute statutory regulation, form a considerable part of the remainder. The experienced lawyer becomes familiar with the common details of practice in these matters, but even for the tyro the information is plainly written out in the statute or contained in his annotated manual of local practice, and if he be careful and intelligent there is little the law school can give him on such points which he will not readily acquire for himself. The attitude of the law school toward such matters should be that expressed by one of the New York Board of Bar Examiners, when he said before this Section a few years ago: "We know that the Legislature is apt to repeal at any time all we know on the subject of pleading and practice, and as we practice with a Code on our desks for ready reference at all times we will not exact from the student knowledge we do not possess in an eminent degree ourselves."²

On the other hand, while the details of practice in our various states differ, its general principles and theories are similar. The chief benefit which a student will gain from a course in practice will be less an abiding knowledge of the exact steps to be taken in a given proceeding than an idea of what kind of steps he must expect to look up the details about in his local practice books. Just as it is a better use of his time to learn the arrangement of a digest than to try to memorize the cases, so it is better for him to learn what is typical of practice in general than to spend much time in familiarizing himself with local details. No doubt the best method of teaching what is typical in practice, even in schools whose students come from many states,

² 22 American Bar Ass'n Reports, 533 (1899).

is to base the instruction upon the practice of one state, as Professor Redfield suggested a few years ago, emphasizing what is essential rather than details. The important elements of common practice, including the steps in the principal forms of action through judgment to execution, with their ordinary incidents, the procedure in the chief provisional remedies, and the typical procedure of an appeal, may be fairly well covered in the equivalent of two hours of class-work weekly for a year. If, in addition, a serious attempt is made to teach trial practice and the art of conducting cases before a jury, probably at least as much more time must be spent.

No doubt both of these courses, well conducted, would be useful to a student. The practical question, as has often been said, is one of relative values. What is the best use of a student's time? I do not think this question can be answered in the same way for all law schools. A school may be unable to provide a wide curriculum, and its students, drawn almost wholly from a single state, may for the most part go into practice for themselves immediately after leaving the school. A large majority of American law schools are of this type. The relative value of the practice courses in such schools will be high. Not only are they likely to be better taught than a number of the courses in substantive law, but there are no valuable elective courses to be substituted for them. Inasmuch as nearly all of the students are from the state whose practice is taught, even details are not valueless, and the student who does not have the benefit of an apprenticeship in an office before he starts for himself, needs instruction in practice more than if he has had some office experience first.

At the other extreme are those schools which offer more important courses on

substantive law than can be taken in three years, whose student body represents many states, and whose graduates are commonly able to spend some time in an office before starting for themselves. Every argument for the relative value of practice courses in such schools is much weakened. Where more work is offered than can be taken in three years many students will wisely choose that which they are least likely to be able to master by themselves. Probably ordinary practice can be learned with less difficulty than most branches of substantive law. It is chiefly statutory; the statutes are abundantly annotated; there are usually excellent local books upon it; its precedents are rarely sought outside the local jurisdiction; its historical roots are of little consequence; it is not a reasoned system based upon complex conceptions of social warfare; it is not related to other branches of law in evolution or by analogy; and its problems conspicuously lack that wealth of circumstance and variety of incident which create so much of the fascination and difficulty of the substantive law. The student who enters an office for a short time after leaving the law school will not at once have to decide emergency questions of practice on his own responsibility, and a reasonable amount of systematic study in connection with his office work will make him a fair practitioner in those matters in which proficiency can be gained without considerable experience.

On the other hand, there are several respects in which law-school instruction in practice is superior to what even a diligent student will gain in an ordinary office. Unless a long time is spent in an office the work done is apt to be fragmentary. Some things he will do frequently. Some not uncommon proceedings may never chance to be turned over to him. These he must learn from read-

ing, and there are a good many practical hints which he will not find in the books. The unwritten customs of lawyers approve ways of doing things puzzling to one acquainted only with the annotated practice act. Moreover there is often a choice between several methods of procedure where the most intelligent reflection, unaided by experience, would scarcely suggest the one best for a client. A good teacher of practice can give the student much of his experience in such matters, and in his early days this may be very useful to the young lawyer. Even in those schools whose graduates generally enter offices there are a respectable number who wish to begin practice for themselves at once, or to whom it is important to have a fair knowledge of practice immediately upon entering an office. Certainly there are circumstances where such knowledge is of substantial advantage at the start, and its ultimate value, as compared with another course in substantive law, the student can probably determine as well as any one. The theory of elective studies in law schools rests largely upon the belief that there may be a reasonable difference of opinion regarding the best courses for the individual needs of students, and that the latter may ordinarily be trusted to decide this for themselves. There must be many instances where students might reasonably think a course in practice more beneficial to them than certain courses in substantive law, and my conclusion would be that law schools of all types might wisely offer at least elective instruction in practice, exclusive of those features which are supposed to be taught only by mock jury trials.

Regarding the value of the latter, in view of the time they take, I am skeptical. It is true an elaborate system of such trials has been in existence at the University of Michigan for several years,

and has been introduced in some other schools; and it is true that members of the Michigan law faculty for whose judgment I have the highest respect believe in their value. In spite of this, I think one may have serious doubts. The ability to try jury cases even fairly well is far more an art than a science, and is to be acquired only by an amount of experience and observation far greater than any law school can afford. The school at best can give students but a slight start in this direction—how slight appears when we consider the artificial conditions under which mock trials must be held.

The witnesses are all intelligent young men, somewhat versed in law. There is among them neither the variety of intelligence, training, age, sex, occupation, social condition, or even of character, which marks the ordinary witness, and is the distraction of the trial lawyer. The same is true of the jurors. The mere fact that they are accustomed to legal ways of thinking makes them totally different material from the juries of our courts. Then there is the evidence. If it is merely learned by the witnesses, there will be almost no element of reality in their examination. If, as at Michigan, the witnesses actually see the facts to which they testify acted out before them, this is better; but even here there can be no real element of passion, bias, or interest to color their testimony, to induce falsehood and concealment, and to be exposed by cross-examination; and there is an additional artificiality in that the witnesses know beforehand that they are to observe what goes on in order to tell of it in court. Such observation must be much less casual and less likely to be mistaken than is that of most real witnesses. Finally, the sense of responsibility on the part of the attorney, which is so great an educational factor in real

trials (as in all real life), must be largely lacking in the imitation.

It is hard to believe that many students can obtain such benefit from taking part in a few mock jury trials that the third or fourth case they try in actual practice will be affected by it. The cases that are adapted to mock trials lie in a narrow compass. The classes of facts most difficult to deal with in actual litigation are in general those least suited to the moot court, such as questions of negligence, value, damages, mental states, expert opinion, and the like. I do not suppose it would be claimed that students can get from this exercise much practice in the art of handling questions of fact before a jury. Its value must consist rather in giving them some knowledge of the processes of this branch of litigation: how to empanel a jury and open a case, how to present various kinds of evidence, in what form questions should be put, how objections should be made and exceptions taken, and so forth. Now these matters are very easily learned. Some of them may be treated in the course on evidence, and any bright boy who has had a year or two in a law school can get a fair knowledge of the others in a few days by attending some actual trials and reading a small treatise on trial practice. He can do this in vacation, and devote his time in the law school to more difficult matters and those which better repay theoretical study. The trouble with the young lawyer is not that he does not know these things in cold blood, but that he does not remember some of them at the right time in the excitement of trying a case. He will lack self-possession more than knowledge, and until he has tried enough cases so that certain processes have become almost habitual he will continue to make simple errors. A ready command of trial procedure is to be gained

only like a ready command of the rules of evidence—by constant practice at the real thing. There could be no simpler rule than that requiring an exception to be taken in order to preserve an overruled objection for appeal, yet failure to do this was one of the most frequent errors in practice to be found in the reports of the four states which I examined. The lawyers who made this mistake knew better, but they forgot, and it is hardly conceivable that they would have done better had they participated in a few mock jury trials before beginning practice.

These are the reasons why I do not think that a law school of high grade which offers more courses in substantive law than can be taken in three years should encourage its students to spend any of their school hours in trying mock jury cases. The really difficult things about trial litigation cannot be learned in this way, and the easy ones can be acquired elsewhere with an expenditure of less valuable time. I do not lay any particular stress upon the fact that the great majority of lawyers do practically no trial work. This would be a good reason for making such work elective, but not for omitting it entirely, if we believed that the law school could do work in this direction comparable in value to what it does in substantive law.

At risk of encountering the objection of multiplicity, I want to say something upon another topic. Last year the President of the Association of American Law Schools chose "The Elective System in Law Schools" as the subject of his address. In it he criticised any arrangement by which more than about one-fifth of a student's work for the three years should be elective. So fair a statement of the objections to a wider election deserves

an answer from those who believe differently, and this joint meeting of the Association and of the Section of Legal Education seems a favorable occasion for it.

The growth of the body of the common law itself in the last fifty years, the very recent application of scientific methods of analysis and research to its doctrines and history, and the present necessity of confining the law school course to three years, have all contributed to produce the elective system as it exists in five or six American law schools. There is more matter of substantial general importance in our law to-day than can be thoroughly taught in three years. It is unnecessary to argue that it is better for a student to cover three-fourths of the field of the law thoroughly than to cover it all superficially. The most valuable possession a student can carry away from a law school is that ability to analyze complicated facts, to perceive sound analogies, to reduce instances to principles, and to temper logic with social experience, which we call the power of legal reasoning. Superficial study is fatal to the acquisition of this power which alone makes truly effective any amount of legal information. A large number of law schools have not at present the resources to attempt teaching all branches of law, nor even all of substantial importance. They do far more wisely to choose enough work to employ a student for three years and to require it all than they would do to use the same amount of money in giving more courses less thoroughly. There are also a number of schools which offer, in addition to the required work, a few extra elective courses which are frankly given in a more cursory way than the regular work. No advocate of elective studies would

wish to see these schools permit their students to substitute such electives for the regular work thoroughly given. So far we should all agree.

A real difference of opinion regarding the elective system only arises in the case of those schools, relatively few in number, which offer considerably more work of substantial general importance, thoroughly well taught, than can be taken by the average student in three years. Here the method of choice becomes important. A free elective system in the last two years of the law school does not assume, as Professor Huffcut suggests, that the end of general legal discipline (using these words in the narrow sense he intends) is the only thing to be considered. It does assume, however, that there are such differences in teachers, in students, in methods of treating subjects, in the ease with which subjects may be mastered outside of a law school, and in the special needs of students, that the greatest net good from discipline and information combined may be obtained for any particular student by a wise election of courses.

It may be pertinently asked what assures a wise election? I should answer: the maturity of the student, and his natural desire, if he be earnest, to get the best possible preparation for his profession. But, it will be said, many students are not mature and many are not earnest. So far as concerns students under twenty years old, beginning professional study directly from the high school, this is obviously true, and law schools which do not require at least two or three years of college work for admission may be wise to restrict election more narrowly. Certainly college experience shows that the older men elect work far more

intelligently than do the under-class men. What I have to say, therefore, is meant to be particularly applicable to those schools with admission requirements high enough to secure a considerable degree of maturity and judgment in their students. Indeed, such schools are almost the only ones which permit notable freedom of election. Of the six American law schools whose second and third years are elective, Northwestern alone admits students who have had no college training or are not over 21 years old. Its secretary writes that the elective system there is qualified by the fact that most of its students take the Illinois bar examinations, for which the study of certain subjects is specified. These are naturally almost certain to be elected. Northwestern also has a higher percentage of college graduates among its students than most other nongraduate law schools. Its experience, therefore, may not be a reliable guide for schools differently situated in these respects.

Of the other five schools with a wide elective system, it is significant that four, Harvard, Columbia, Stanford, and the University of Chicago, constitute at present the entire group of American law schools which require a college education for admission, and that the fifth, the University of Wisconsin, has just raised its admission requirements to two years of college work. This insures a degree of maturity and training which should enable their students to profit from an elective system, if that system, wisely used, has any decided advantages. Occasionally a student may not choose well, from lack of judgment or purpose. Serious errors due to the first will rarely occur where good advice is so readily, to be had and omissions caused by the second need not influ-

ence us, for a youth of full age, who is preparing for his chosen profession without earnestness, will not long incur her ranks, election or no election.

What, then, are the advantages of an elective system, assuming that those students who are worth saving will honestly try to obtain them?

In the first place, after the mastery of four or five fundamental courses which are required in all schools, it is not easy to say *ex cathedra* which courses in a particular school are the best for any particular student, or even for that abstract individual, the average student. In most instances the value of a course to a student in giving him that combination of stimulus to independent thinking, training in legal reasoning, and information about the subject, which is the aim of good teaching, depends far more upon the teacher's method of treatment than upon the subject-matter. A subject of very modest intrinsic importance may be so illumined by a teacher who lays all other branches of law under contribution to furnish analogies or to illustrate principles that its worth to the student is far greater than its title would indicate. This is notably true of several of the subjects Professor Huffcut considers of subordinate or little importance. Among these may be mentioned trusts, conflict of laws, suretyship, constitutional law, quasi contracts, and partnership. There are hundreds of recent graduates of some of our law schools who will testify that from few or none of the courses generally thought more important did they obtain more real benefit than from these courses under certain teachers. Less generally perhaps, but in many individual cases, the same is true of other courses. As an illustration, I

may repeat what a student—a good one—who had taken a course in common law pleading in a Western law school once told me. He said: "I learned more law about other subjects in that course than I did when I took some of those subjects. We could almost have passed the bar examinations on what we had in that course. It was a liberal education." One may guess that that teacher could not have taught a subject so unimportant that it would not have been well worth taking.

It should also be remembered that there are individual differences in personality and method between teachers of equal excellence which have a marked effect upon students. One teacher will especially stimulate and interest one type of mind, and another another type. I thoroughly believe in the wisdom of mature students choosing even law courses quite as much for the teacher as for the subject. With such students nothing tends more to make the class-room work an inspiration and a pleasure to both teacher and taught than an elective system, and this is worth a great deal more to a school than is the certainty that every student shall study all the subjects thought by its particular faculty to be most important. The student may take full advantage of the work of those teachers from whom he gets the most benefit, and the teacher is encouraged to his best efforts in the preparation of every course by the knowledge that, if he makes it really valuable, students are as free to take it as any other course. The possibilities in several of the courses I have mentioned might never have been developed had all law faculties been *a priori* of Professor Huffcut's opinion regarding their importance, and the field of legal scholarship would have been the poorer.

Not a few students know, before leaving the law school, into what kind of practice they are going, and a man who knows that he must deal immediately with the legal affairs of a city, a railroad, an insurance company, an indemnity company, or a wholesale house may wisely elect municipal corporations, public officers, carriers, insurance, suretyship, or bankruptcy, even at the expense of wills, advanced property, or bills and notes. Such cases constantly occur in some numbers, and I think a mature student is better able to decide what is best for him than is any law-school officer. Of course, the elective system does not preclude men from advising with the faculty about their work, and from my own experience I think they seldom fail to take all of the more important subjects without consultation with some member of the teaching body.

Finally, it is really not a very serious matter that some students should leave the law school without having had systematic instruction in one or two of the more important second or third year subjects. Failure to take such courses in class never means that the student remains totally ignorant of them. The principal doctrines of agency may be picked up from many of the other courses as readily as may persons and damages. Suretyship, partnership, and trusts will incidentally give some knowledge of bills and notes, a subject which to-day arises far less frequently in practice than does insurance, constitutional law, or bankruptcy, for example. Less readily, perhaps, much of sales may be learned from other commercial courses. As trusts is taught in a number of schools, it includes considerable matter touching equity procedure and the principal branches of equitable relief which are

specifically covered in the general equity courses. This to a large extent accounts for the seeming neglect of equity some years ago at Harvard, where for a long time every one has taken trusts. The recent preparation of much improved case-books upon the former subject has restored it to normal popularity there.

Besides the incidental knowledge of various subjects which may be thus gained, many students, knowing that they cannot take everything in the law school, will read some subjects by themselves. A student who has studied 15 or 18 courses by methods which have trained him to use his own powers of reasoning and investigation will have no great difficulty in mastering a few other courses by himself, and he may very reasonably prefer to do this with one or two topics which, though important, are not very difficult, or are particularly well dealt with in treatises, or are largely regulated by statute where he intends to practice.

Under normal conditions it will be found that the principal law courses are generally elected by all but a small percentage of students. Marked variations are temporary, and due to local conditions which, when understood, justify the result, or they reflect differences of opinion which exist among law teachers themselves. The records of the elective schools for five years past show that the elective courses Professor Huffcut thinks most important, equity, evidence, sales, wills, property, corporations, agency, and bills and notes, are taken at Stanford and Chicago by 98% of the students who complete three full years of work; and, excepting agency and bills and notes, at Harvard and Columbia by over 95% of the students. During the single year that the elective system has

been in operation at Wisconsin, every candidate for graduation has completed all of these courses. Practically everyone in these schools also takes trusts, which many persons would wish to include in the list of most important courses. At Northwestern everyone elects property (including wills), and about 90% elect the other courses mentioned, except trusts, which is taken by 60%. At Columbia 87% and at Harvard perhaps not over 75%,¹ have taken agency and bills and notes. Regarding these two subjects, it is to be noticed that agency is not intrinsically difficult, that it may be more readily acquired from other courses than any other important subject, and that there are excellent treatises for students upon it. The other subject has been made statutory by the Negotiable Instruments Act in many jurisdictions, including those from which Harvard and Columbia most largely draw their students. Opinions differ as to whether or not this has made it substantially easier to master the subject out of school. Only experience can decide this, and the students are getting the experience. At Columbia the percentage of those not taking the subject has steadily increased during the last four years, which is perhaps an indication that recent graduates have not regretted their choice.

These considerations induce the belief that, with students mature enough to choose wisely, an elective system in law schools is advantageous to both students and teachers. From the fact that it has been uniformly adopted by those schools which require a college education for admission, it is likely that the example will be followed by any other schools which raise their requirements to approximately this standard. During the next decade a

¹ This figure is based partly on local estimates, a record being kept at Harvard of those only who take the examinations.

number of schools will probably decide to require at least two years of college work as a preparation for law, and it will be asked whether this secures sufficient maturity in students to insure the wise use of an elective system. I think it does, and that the experience

of our universities, which all agree in the wisdom of elective work during the last two years of college, is a sufficient warrant for this in any law school which offers more courses thoroughly well taught than can be taken in three years.

Chairman's Address, Section of Legal Education of the American Bar Association, 1905.

By LAWRENCE MAXWELL, JR., of the Cincinnati Bar.

THE success which has attended the efforts of the American Bar Association to improve and extend the facilities for studying law in the United States, and to raise the standard of admission to the bar, must be accepted as proof of the correctness of the principles which the Association has advocated, and as evidence of the efficiency of the means which it has employed to win support for those principles. As one of those who have looked on while others have worked, I feel at liberty to say that the movement is regarded by the bar as the most important and successful organized effort in the history of the profession in this country to improve the administration of justice. The Association had a definite aim, and began at the right point. It dealt with no glittering generalities. It started with the simple proposition that the administration of law depends primarily upon the character and learning of those who practice law, and it set to work to see what could be done to provide better facilities for the education of applicants for admission to the bar, and

to induce them to make use of those facilities. In providing more and better means of education, through the establishment of new law schools and the improvement of the quality of the instruction and the term of study in the schools, new and old, and in securing general approval of the proposal to supplant desultory study in offices by systematic study in schools, the efforts of the Association have been remarkably successful. What might have been the present state of legal education in the United States but for the organized work of this Association I will not undertake to say. Some schools would doubtless have improved their methods and lengthened their courses, and their example would have been followed by others from time to time, but it cannot be denied that the progress of the most favored schools has been accelerated, and that the development of others has depended in still larger degree, upon the stimulus which this Association has supplied.

The success of the efforts of the Association outside of the schools in enforcing standards of admission to the