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Cuthbert W. Pound

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Teaching Civil Procedure

BY CUTHBERT W. POUND¹

The early lawyer saw the law in the form of an action. Right and wrong grew out of such forms. Unless there was a remedy there was no right. "So great is the ascendancy of the law of action in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." (Maine's *Early Law and Custom*, 389). The study of law was the study of practice. That, however, was a long way back. The New York Code of Civil Procedure provides for one form of civil action, declares that the distinction between actions at law and suits in equity has been abolished, and says that the plain and concise statement of the facts constituting the cause of action, defense or counterclaim, is sufficient. Simplicity is thus suggested. The Code contains, or has contained nearly 3,500 sections, each one a dangerous pitfall for the unwary. Court rules add to the perplexity. Detail, whereby the weightier matters of the law are disregarded while tithe is taken of the mint, anise and cummin, is thus inevitable.

Under these conditions it is not strange if the modern student looks upon substantive law as a philosophic development of principles and regards simplified procedure as a system which, promising freedom from technicality, is, in truth, one of technical forms unrelated to the merits of the controversy. The end of procedure is to make plain the essential fact and to bring speedily a decision. Remedial justice makes litigation an appeal to reason rather than to force or fetish. If all went smoothly, the law of rights would be enough, but without some degree of skill in the preparation and trial of cases, a knowledge of the general rules of substantive law is a vain thing in a litigious world. With experience in the art or trade of legal presentation a mediocre practitioner may succeed in moving a tribunal to favorable action. Without such skill, the most learned jurist may be unable to make a start. It follows that the law school which neglects to develop a proper foundation for the trial of issues because it is the work of the artisan rather than the scholar graduates brief makers who must learn somewhere how to practice law; men who are full of theory and abstractions but who have no handicraft; splendid raw material, but not a finished product.

¹Associate Judge of the New York Court of Appeals. Professor in the Cornell University College of Law from 1895 to 1904.

Courses on Common Law Pleading, based on the distinction between natural logic and legal logic, and an acquired taste for the beauty of a system wherein everything depends upon the mode of statement, and on Evidence, based on the exclusionary rules which guard the tribunal from deflecting facts, may be taught with the effect of exaggerating the difficulties of procedure in the mind of the average student until he is doubtful that anything can be properly pleaded or properly proved, at least by his opponent. Such instruction has its proper value but it is inadequate. What could be more disheartening than for a freshman in law, to begin his work in procedure with Ames's Cases on Common Law Pleading, 1, and to learn, if he can grasp the meaning of the law Latin and archaic English, that there is an obscure case in Jenkins' Century Cases, 133, (A. D. 1474) in which the plaintiff seems to have put in both a replication and a demurrer to the plea, but it may be imperfectly reported, and may not have been the exception to the general rule which it appears? Such words are unrelated to his life; a historical curiosity. Later from his courses in substantive law he soon gets the impression that a law suit may be conducted without pleadings and that proof may be made of essential facts with no great formality and concludes that substantive law alone has a present educational value.

In this conclusion he is confirmed by the discovery that the details of trial practice have been deliberately ignored in some of our best law schools and slighted in many others. The atmosphere of the class room has been kept clear of the stuffiness of the court room. Dean Pound of Harvard said, at the Association of American Law Schools in 1913, "I think it is quite possible for us to emphasize unduly this matter of trial practice; and if we are patient we may find that we can get along in another decade pretty well in the paths in which we have been going." The confession is often made, as by Professor Peck of Yale at the same meeting, that law school instruction cannot be given in procedure with the degree of success and usefulness that attends other courses. Some have not hesitated to say that such instruction has been an absolute failure. Too much may be sacrificed by refusing to comprehend the import of such a failure. We may, if we feel disposed, admit that the certainty and simplicity of the common law have been superseded by what Baron Parke would term the scandal of loose pleadings and lax practice and an unscientific method of conducting a law suit. We cannot deny that law is largely a matter of sources and that its history and evolution must not be neglected. But one cannot follow the course of a law suit to a successful end merely by condemning code procedure as basely mechanical and beneath the attention of the scholarly mind. It is unnecessary to

trace the origin of legal forms in order to comprehend their practical use. The common law practitioner who in the middle of the last century found himself overwhelmed with the novelties of a new system was excusable when he protested that the Code was a meaningless jumble out of which confusion came, but the present day law student is not concerned with antiquarian research in comparative jurisprudence. He has read that the doctrines of substantive law may often be traced to some forgotten circumstance of procedure, but he knows that lawyers take little interest in the history of the action of *assumpsit*. The grace of scholarship adorns the discussions of the forum, but it has its practical limitations. An eminent jurist wrote a long and learned opinion reviewing many old authorities pointing to a certain result, and ended with the words: "This would be the conclusion I would reach had not the Court of Appeals held otherwise last year the case of *A v. B.*" Most wise jurist, not to advance, in deciding the difficulties of the actual litigants, beyond the point where the court of last resort left off. A jurist may be impractical. A lawyer cannot afford to be. In order to be practical the law schools should take our legal practice as it is and endeavor to indoctrinate the student in some knowledge of how he may, after discovering the rule of substantive law applicable to his client's case, guide the cause through the labyrinth of a law suit from the time when jurisdiction is obtained over person or property, past the development of the facts by the examination of witnesses on the trial and the jurisdictional puzzles of the appellate courts, and in the end so operate the legal machinery for the collection of his judgment that fraud and concealment may not defeat his hard earned victory.

Cornell has never failed to appreciate the practical needs of instruction in the conduct of law suits and the practical difficulties in the way. It has upheld an ideal without claiming that it has reached the final solution of the problem. It has not been discouraged by the fact that the details of practice can be mastered, if ever, only after years of varied experience. After somewhat feeble struggles in the direction of efficient instruction, it has developed a complete practice department, with courses extending through three years, supplemented by a practice court devoted to practical exercises in the preparation, commencement, maturing and trial of issues, both of law and of fact, with and without juries; the selection of the jury; the opening statement; the examination of witnesses; the taking and preserving exceptions; offers of proof; instructions; the argument of the case; proceedings subsequent to verdict, and the preparation of the record for appeal. The foundation for this work was laid by Professor

Henry S. Redfield. His successors Judge Irvine and Professors Stagg and McCaskill have extended the work.²

The task of teaching practice is lacking in attractiveness. In the first place, procedure must struggle for proper recognition in a crowded schedule. It must assert its equality with other courses. Then the courses must command the respect of the students. The teacher must possess unusual personality to make the practice department a success. In order to make the drudgery divine, the enthusiasm of the optimist, the industry of the galley slave and the accuracy of the table of logarithms should be combined with ripe learning and wide experience and the foresight which anticipates the future. The student must actually apply the rules of procedure to real or assumed facts. He must go through the motions himself. The effort to teach a young man the functions of an affidavit of regularity or a writ of prohibition or a warrant of attachment merely by definitions from a text book or illustrations from a case book is perhaps the most complete waste of valuable time under the guise of educational effort that can be suggested. Some details of practice can be mastered if the instructor will give much time and attention to the efforts of the beginner to put them on paper or in form before something that can be staged to resemble, not that strange weird thing, the common mock court, but a real court. But no stimulant of a fee serves to heighten the illusion and teacher and student alike find their interest more readily aroused by the entertaining narrative of the facts in tort, domestic relations or even contract. Ample time must be given for careful preparation and the correction of errors. Hasty, slipshod work, prepared in unlawyer-like fashion, must not be tolerated. Deliberation, accuracy and thoroughness must be insisted upon when bluff and clever advocacy are presented as a substitute. The dull and indolent must not be allowed to suck their sustenance from their more diligent classmates. The work must change from year to year, so that it may not become a lifeless formula to be handed down with accumulating errors from class to class. A fact familiar to every teacher is that few men who come to law schools to prepare to become lawyers are greedy to consume all the wholesome food which is offered to them and that many are content with the husks of other men's labors. Minds thus nourished do not mature except in the cunning use of the book of forms and the record of cases which tell how success may be won by imitation rather than comprehension.

The medical school does not aim merely to turn out men of high

²For an interesting account of the practice court work now conducted at Cornell by Professor McCaskill, see his "Methods of Teaching Practice," 2 *Cornell Law Quarterly* 299.

character and fine intellectual powers. It aims to fit its graduates to meet the need of the community for skillful physicians and surgeons. The dental school would be ridiculous which would give its degree to a man who knew the anatomy of a tooth but did not know how to care for it properly until he had served an apprenticeship. The lawyer should be fitted by the law school for proficiency in the elements of his technical work. He should be able to protect his client without undue aid from the court. I have faith in the success of instruction in procedure so long as the aim is to teach the essentials of the procedure of a given jurisdiction. One trouble is that the attempt to teach general principles results in developing a notion of procedure that prevails nowhere. Another danger is that in learning technicalities the student may become inclined to use them as a weapon of offense rather than protection. A hastily prepared lawyer may be excused for pettefogging, for he may be unaware of his own meanness, but the big men use technicalities only as the orderly administration of justice requires and not as a means of annoying an opponent. Technicalities are useful as they save time, not as they waste it.

Another reaction to be hoped for from the more careful attention to procedure by the law schools is the simplification of practice. That work could be materially promoted by law teachers and lawyers specially trained under them. Reformed procedure is somewhat of a gibberish. It is complex. It is inexact. The proper application of its rules is uncertain. It may be made a science more tersely stated than the five fat volumes of Bliss's Annotated Code now state the law of New York and its judicial interpretations. Practicing lawyers have neither the time nor the interest to go to the heart of this subject. I do not disparage the work of the Board of Statutory Consolidation in the reform of New York Procedure, but the work I have in mind has a wider field and a broader aim. Law teachers and judges are disinterested votaries of the goddess of jurisprudence. Judicial reform of procedure consists chiefly in checking the tendency to become unduly technical; in liberalizing the existing rules. The courts have no power to amend or repeal the laws and judicial reform is local. The rules governing the settlement of disputes in the courts should be uniform throughout the United States. Uniform laws on Negotiable Instruments, Sales, Partnership and other subjects have proved practicable and the parts of practice should be as easily standardized as are the parts of a watch or an automobile. Marshal Foch, the great leader of the great war was a professor of military science. The simplified and standardized law suit might well be the invention of the professors of procedure.