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Charles S. Whitman

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SOME MODERN TENDENCIES OF THE LAW

It is a somewhat trite observation that a nation's history may be read through its laws. Although it has been probably true that our profession has been the most conservative of all and that changes in the written law are often made long after customs which they sanction have become more or less firmly fixed, the careful historian has been perhaps able most accurately to discern and understand conditions long past by a thorough scrutiny of the rules of conduct of the people as prescribed by governing authority. Our President has said that man does not make law—he discovers law. Theoretically, at least, statutes follow or are created as a result of conditions.

I am going to ask you briefly to consider with me rather apparent tendencies in present-day law and law making, as well as the attitude of our own profession toward the practice and the development of the great field of endeavor which concerns us as lawyers. As to whether these tendencies are in the right or wrong direction is a matter of individual opinion. How far they should be encouraged or discouraged depends largely perhaps upon the point of view of the individual. But it certainly can do us no harm to check up, as it were, on ourselves and on our calling. Merely for convenience I am going to refer to five familiar phases of the modern development of law and administration and their bearings upon those who engage in the legal profession. Undoubtedly numerous other phases will suggest themselves to you. Perhaps these phases may naturally be discussed under general titles, such as "commercialization," "specialization," "arbitration," "delegation," and "centralization."

As the result of the general and quite natural desire and disposition to bring the great body of legal principles abreast of the progress of the times considerable stress has been laid during recent years upon the improvement and necessity of adapting the activities of the lawyer to the requirements of modern business conditions and of changing or reforming the traditional relations of lawyer and client in an effort to increase the business usefulness of the lawyer to his client in the newer and constantly

\footnote{An address delivered at the University of Kentucky, October 27th, 1926.}
changing and enlarging fields of conduct between government and industry which have been established by modern legislation and the present-day concept relative to the powers and scope of government. It is broadly suggested that as various administrative codes have removed the disposition of many problems and controversies from the judicial forum and placed them under the control of administrative agencies the very necessities of livelihood compel the lawyer to seek other outlets for his talents, and that such outlets may be found in a broader knowledge of the intricacies and the problems of the business of the client, in its technical details, in its economic bearings, in its social aspects and in its political aspects. In no other country have there been so many instances where men trained and experienced in the law have turned from its active practice to devote themselves to successful business careers; and today we find men who in earlier life gave promise of success at the bar engaged in industry and commerce.

Should the law school be a training for business? How far must or should a lawyer acquire a practical knowledge of the intricacies and problems of his clients' business in order to perform his true mission? No curriculum of any law school at the present provides for education of the student in the ramifications of modern industry and commerce. Are the law schools failing in their proper functions? May it be said that the requirements of education and knowledge as preliminary to entering upon the study of the law are not sufficiently embracing because they do not exact of the entrant the preliminary pursuit of a course of study in a school of commerce? May it likewise be said that the inquiry which is now usually conducted into the fitness of the candidate for admission to the bar is deficient in that it fails to search the applicant's knowledge of the complexities of numerous trades with which he may be brought into intimate contact during the course of his practice?

I know that my questions have some exaggeration, but what I do wish to emphasize is: where is the line to be drawn between what a lawyer is expected to know about the ramifications of business as a proper qualification for a successful career at the bar and what he may dispense with?

To commercialize means to subject to the domination of trade. To subject the practice of the law to the domination of
trade would be to commercialize it. Have we come to a period of development where the traditional exactions of the profession of law with its lofty ideals, its fine ethics and its high personal standards must yield to the demands of changed conditions? Must it be a merely money-making occupation? That is a momentous question which may well challenge the attention of the whole legal profession. It is feasible for the general mass of lawyers in broadening their usefulness as commercial advisers to clients to blend the important characteristics of their profession with the standards of commercial practices and yet maintain the former in their full vigor? To me it seems that the future preservation of the law as one of the great learned professions in which ethical considerations play so important a part depends almost entirely upon the maintenance of its high ideals and standards in the personal conduct of its members. To entangle the practice of the law with the motives and the methods of the market place, to make the lawyer a commercial consultant rather than a legal adviser, is to create an alliance which in the end must lessen the usefulness of the profession to the public as a whole and destroy its noblest attributes.

It is quite true that many commercial institutions have made of their legal advisers members of an important division of their organization, a law department or bureau as it were; that the judgment of the lawyer is sought as often in regard to questions of business policy, of social advantage, of political support, as in regard to the application of legal rules or principles to business exigencies, and that the lawyer's usefulness is due more to his success in mastering the details of the various branches of an industry than to his legal erudition.

We have no desire to exalt our own vocation at the expense of another's. But it always has been true that the high ethical standards which must ever pervade the practice of the law do not control the conduct of the business man, and it has been held repeatedly that a lawyer will not be confined to those standards in mere business transactions where no relation of attorney and client has been established. How far the rewards and the emoluments of business are going to attract and divert the best of our profession from the traditional limitations of our calling is a somewhat serious concern to those who have been taught to believe and who love to believe that the great and learned pro-
fession which has given so freely of its best to the service of the
country and humanity through all the years of our national life
is not and cannot properly be a business.

That the great mass of case law in this country has become
unwieldy and oftentimes confusing and contradictory and has un-
favorably affected the repute of the administration of justice is
a lamentable condition which has led to the constructive move-
ment for a restatement of the law so that it may be simplified
and clarified. There is greater need today than ever for a
mastery of the principles of law, both common and statutory, and
ability properly to apply them to a given statement of facts.
That task ought sufficiently to absorb the ability, faculties and
legal knowledge of any lawyer, leaving to others the daily vicis-
situdes of trade.

We have been told and we know that this is an era of
specialization. In the somewhat mad race for success or
supremacy the efficacy of specialization has been again and again
attested. In the attainment of greatest progress, of greatest
benefits and best results along certain lines, specialization has
been a superior force. And this tendency has strongly pervaded
the profession of the law. The lawyer who has specialized in one
branch of the law often acquires advantages over his brother
whose knowledge and experience in that branch may be more
or less rudimentary, and these advantages are often illustrated
by the financial emoluments received by the specialist. Special-
ization in branches of the law has, however, produced some un-
wholesome effects. You and I know that. It has often estranged
the specialist from the general principles of other branches of
law which do not pertain directly to his chosen branch. Some-
times it has engendered in him a feeling of disdain for his fellow
practitioner who has not been initiated within the hallowed circle
of the specialist. The drifting away of the specialist from other
branches of the law has tended to deprive the bar as a whole of
the benefit of his support and his advancement and power and to
diminish the extent of his influence in the profession. The at-
titude of the specialist toward the lawyer who does not belong
to the specialistic class, as it were, has engendered class feeling
in the profession and weakened the fraternal bonds which should
tie the members together. On the other hand, and I believe very
unfortunately, at least in some localities, certain branches of the
law, notably the practice at the bar of the criminal courts, at which most of the great lawyers in the past have achieved their reputations, has fallen into disrepute and the specialist in criminal law is looked upon somewhat askance by his professional brothers.

Time does not permit me to enlarge upon the dangers incident to such a situation. One branch of the law is no nobler or essentially more worthy than another. The attorney and counselor at law has taken an oath to uphold and support the laws of his state and his country. Called upon so to do, the service which he renders in any court and in any branch is essentially a service to the public and those preparing students for admission to the bar can render no greater service than by so impressing their student bodies. It is the most important lesson a young lawyer can learn.

General arbitration statutes have been recently enacted in several states. I speak of New York because I am somewhat more familiar with the plan there. The new system of arbitration appears to be designed to remove the legal restrictions in determining the facts or applying the law and to dispense as far as possible with the aid of lawyers. I know this is not the generally accepted idea, but it seems to me it must be the inevitable conclusion. Under it the court's function is limited practically to ascertaining first, whether an agreement exists to arbitrate; second, whether the arbitrators took an oath; and third, whether the decision rendered by them was within the limits of their power and was free from prejudice or corruption. As to errors of fact or of law, no matter how unjust the result may be, the court has no power of correction. In a case where the defendant objected to an award on the ground that the arbitrator admitted hearsay and otherwise incompetent testimony, misconstrued the agreement out of which the controversy arose and applied the wrong measure of damages, it was held (I am quoting the language of the court):

"These matters, however, are not open for consideration at this time as the award of the arbitrator cannot be set aside for mere errors of judgment, either as to the law or the fact."

The arbitration movement has received considerable support of lawyers and judges no less than that of business men and

\footnote{Anderson Trading Co. v. Brimberg, 119 N. Y. misc. 784, and cases cited.}
others interested in judicial administration. It undoubtedly rep-resent an honest effort to overcome and remedy the law's de-lays, the fetters of the judicial system and the expense and burden of protracted litigation, to say nothing of securing more intelligent consideration of the merits of a controversy than is some-times possible through the jury system. The effort is commenda-ble. The remedy may be open to objection.

Now the fundamental and proper concept of arbitration is or should be the application of law and judicial methods to the determination of disputes. Dissociated from that concept, arbitration becomes an uncertain and dangerous mode of redress. The relations of members of society to the body politic and the relations between individuals in which the body politic may be vitally interested must be governed by definite rules and regulations, else chaos must ensue. Commitments of one to another, the assumption of obligations and the grant of rights are mat-ters which under our form of government are regulated by rules of law the application of which may at times be beset with diffi-culty but which are ever certain and definable. These rules of law constitute in a great measure the protection of the rights of the individual. Disregard of these rules must tend to diminish the measure of that protection.

The new system of arbitration as represented in most of the arbitration statutes does not require the application of law and judicial methods to the determination of disputes beyond, as I have said before, the ascertainment of the existence of an agree-ment to arbitrate, confinement of the arbitrators to their powers and their freedom from prejudice. It is no answer to say that the disputants ought to lie in the bed which they prepare for themselves; if the ultimate result is likely to lead to insecurity, to injustice and to dissatisfaction, has not society a duty to pro-tect itself from its consequences, and are not lawyers vitally inter-ested in this matter?

In the delegation of governmental powers to administrative agencies the purpose has been, of course, to substitute for uninformed, casual and haphazard legislative interference with cer-tain activities, regulation by agencies constituted of trained per-sonnel, endowed with adequate power and authority and equipped with the necessary facilities for inquiry and determi-
nation. It was not intended to establish private substitutes to exercise the powers of sovereignty.

An interesting and somewhat surprising development along this line, however, is observable, particularly in our great centers of population. Agencies have come into being created with the worthiest motives, largely by private enterprise, tending to supplant the constituted authorities charged with the maintenance of peace, the preservation of health, the protection of rights and the promotion of the general welfare. I refer particularly to organizations such as those formed for the suppression of different forms of vice, for the prevention of cruelty, for the punishment of delinquency and for various other purposes which will suggest themselves to you. These organizations have been endowed from time to time with governmental powers of great and increasing importance. The personal representatives of these organizations are by statute frequently given drastic authority over the freedom of persons and the use of property. The tendency of these organizations has been to supplant public functionaries, such as the police, the courts and similar officials who are charged with the duty of government. On the one hand, the public officials have been relieved of the responsibility and accountability to the people for matters which are of purely public and governmental concern; and on the other hand the semi-public organizations are left without that public vigilance over the acts of public officials which is a safeguard of the rights of liberty. The power possessed begets the desire for increasing and multiplying power and not infrequently these organizations become to a degree a law unto themselves.

Undoubtedly civic organizations are a potent factor for the promotion of the weal of the community. They deserve encouragement and support. But I urge upon you jealous watchfulness of the activities of organizations which undertake the performance of functions of government, the determination of the rights of members of society and the execution of our laws. Under our system of government they cannot serve as satisfactory substitutes for legislative, judicial and executive agencies of government which lawyers have an important duty to support and to defend.

No tendency is more observable and, in the light of the history of our country, more interesting than the clearly appar-
ent trend toward centralization of power. This subject supplied the issue for the bitterest political controversies in the early days of the republic; in fact, before the creation of the republic itself. However you and I may feel, we must admit that we have lived to see powers assumed and exercised by the federal government which, even in our childhood, official Washington would not have dreamed of. Time does not permit me to go into detail on this subject and I know I do not need to endeavor to enlighten as able and intelligent a bar as that of this state on the events of recent years; the Department of Agriculture, with its tremendous power; the Labor Department, with its vast appropriations; the passage of legislation known as the bill to aid old age and for the protection of maternity and infancy; the proposition to create a department of education authorizing the expenditure of $100,000,000 by the federal government through the various states, practically giving the federal government control of elementary education throughout the country by giving it control of the funds and the method and manner of their distribution. Interstate Commerce Commission; bureaus without number; efforts by constitutional amendment to give to Congress the right to determine whether or not or when or how children should labor in the various states; legislation controlling the working hours for women—and so I might continue almost indefinitely.

With little children in my own home I certainly have no desire for anything but the best for the children in our land. But I question the wisdom of taking in each of the forty-eight states the right to determine these numerous questions of such vital local importance away from the control of those most concerned. I am not prepared to criticize any of the legislation to which I have referred. I am suggesting, however, that this is a government composed of forty-eight states, sovereign in all the powers except those ceded to the national government; that under that plan we have grown to majestic proportions and maintained a national and state existence until we have come to be the mightiest nation on the earth.

The lawyer has never hesitated in any English speaking country to raise his voice against the violation of the legal limitations of government as affecting the rights of the individual. Substantial reforms in law have usually been championed by the members of our profession. Resistance to unwarranted exercise
of authority has been successful largely through the labor and
the sacrifice of those learned in the law. The Constitution of
the United States is a contribution of the lawyer. The founda-
tion of our governmental structure was laid by the hands of the
lawyer. To preserve all that is best in this great experiment of
government, the United States of America, is the noblest task to
which an American can be committed.

As we think of the splendid record of the past, as we think
of the names, the brightest on the roster of the American lawyer
and on the pages of American history, is there any group or class
of men to which this task can make a more natural or a more
profound appeal than to us who regard this title as one of honor
and distinction—‘attorneys and counselors at law?’

Charles S. Whitman,
New York City.