THE

AMERICAN LAW REGISTER

AND

REVIEW.

OCTOBER, 1894.

THE PLACE OF ORIGINAL RESEARCH IN LEGAL EDUCATION.

By GEORGE WHARTON PEPPER.

There appeared in *The Forum* for July, 1894, an admirable paper, entitled "Research the Vital Spirit of Teaching," by President G. STANLEY HALL. "In the days of the old New England farm," says the writer, "where every boy had active duties and was, in a sense, a member of the firm; in the days of the old debating society and the earlier disputation, which from the time of Socrates down to the present century was the chief academic method,—there was far more to develop the active powers of youth than in the academic training which, with the decline of these things, languished until these days of research; and research, for the average man, is doubtless of far greater value for discipline than for discovery." He proceeds to point out that the deeper causes and effects of this movement lie in the fact that individuality is thus developed, and that the method is re-enforced by the newer anthropology, which regards man as two-thirds will, makes effort the highest and most educable part of his nature and thus gives the method

of research itself the highest value, even for lower schools, quite apart from the value of discoveries.

It seems strange that so little attention has been paid to the bearing of such considerations as these upon the subject of legal education, especially in view of the fact that a somewhat heated debate is in progress at the present time with respect to the proper method of law school instruction. The explanation is probably to be found in the fact that the study of law, in this country, is commonly looked upon as a department of education widely separated from all others—the lawyer, with characteristic narrowness, believing himself to be there in a world of his own creation, where no principles of education are recognized save those which he himself evolves. It is assumed that all problems which arise are to be solved with reference to the consideration that the subject to be taught and learned is *law*, instead of with reference to the consideration that the problem is, before all else, an educational problem. It follows from this that almost every lawyer with whom one converses on the subject of legal education is ready to speak *ex cathedra* and, merely in virtue of the circumstance that he is a member of the bar, to pronounce the most positive opinions upon the most difficult educational questions. In New York city, for example, where the contest is fiercest between the so-called "Case-System" and the so-called "Dwight Method," the school which seeks to identify itself with the latter intrenches itself behind a published list of the names of members of the New York Bar who signed the petition for the incorporation of the school—the inference being that they took this step because of a settled opinion favorable to that particular method of instruction. It is indeed true that, considering the efforts which must have been made to obtain signatures, the list is more notable for the names which it does not than for those which it does contain; and it is also true that some of the gentlemen whose names appear on the list attained their present conspicuous positions for reasons other than the profundity of their legal learning. The point insisted on, however, is this: that there is among lawyers a tendency to decide questions of this sort by a mere count of heads and to seek to

vindicate a particular method of instruction by a simple enumeration of the successful lawyers whose legal education was moulded in conformity to it.

Another result of this mode of conceiving the subject is the basis of the selection of teachers of the law. It is often assumed that an eminent judge or a successful advocate or a learned counsellor will unquestionably prove himself the right man to instruct students of law, and to inspire them with a zealous love for the science to which they have sworn allegiance. When a chair is to be filled in a law school, it is far too seldom that the inquiry is made respecting a candidate whether or not he possesses those peculiar qualities which mark the teacher, and it is quite certain that the instances are few indeed in which a selection is made upon the basis of the candidate's ability to stimulate in his students the spirit of research. "For research," says the writer already quoted, "the first need is a professor who not only points, but leads the way. . . . The distance between these men and the routine-lesson-hearing professor is too great to be estimated by any method of psychological measurement yet devised."

Now, it requires but little reflection to convince an open-minded man that if research and research methods have value in any department of education, surely they must attain their maximum value in the law. In legal education research has a positive value as regards discovery entirely apart from its disciplinary value; for it must be remembered that there are few who study law except with the intention of actually engaging, upon graduation, in what is "original work" in its truest sense. The great majority of college men who take, say, a history course, are taking it for its pure educational value, and not with a view to themselves enlisting in the ranks of the historians. Yet, the highest authorities unite in commending the research-method as the method which will, even in such cases, best enable professor and student to attain the desired end. *A fortiori*, is this true in the study of the law, for there every student is fitting himself to take an active part in the development of the law, and, by argument based upon research and investigation, to influence the decision of the cases which evi-

dence its growth. It is somewhat discouraging, therefore, to find in a paper recently put forth by the Dean of the New York Law School such a paragraph as the following, in which he shows a lack of appreciation of the general educational value of research, and ignores the peculiar conditions which give it a special value in legal education: "If a young man wishes to learn English history, is he sent to Europe to ransack the archives and study the original documents, or are the works of GREEN and GARDINER and MACAULAY put into his hands? If he wishes to study medicine and surgery, is he kept carefully aloof from the treatises of great medical writers, who have recorded, for the benefit of those living, the abiding results of all past and present study, experience and discovery, and is he furnished with a living patient and a dead subject, that he may learn, by treatment of the one and by dissection of the other, what he may thus acquire from the 'original sources?' BRYCE'S *American Commonwealth* is an elaborate treatise upon the government and institutions of this country, gathering together a mass of valuable facts, which the student might have sought out for himself in the 'original sources;' but still it has been welcomed as one of the most important books of the time, and readers by thousands derive instruction from its pages, sadly oblivious of the fact that they are getting their knowledge at 'second hand.' In fact, when one thinks of the enormous mass of 'second hand' knowledge that has been absorbed by the educated classes of Europe and America, in school, in college, or in private reading, the thought is almost appalling." These sarcastic references to the getting of knowledge at "second hand" were called forth by Mr. JAMES C. CARTER'S use of that phrase to describe the method of teaching law in which the instructor follows with his class in the roadways made by some text-book writer, explaining as they go the nature of the work which the author has wrought, and "proving" it from time to time by an examination of a few of the cases with which the author was compelled to deal. Mr. CARTER, in using the phrase in question, was pointing a contrast between this method and the so-called "case-system," in which the instructor, turning aside from the royal road

which others have made, leads his class through the wilderness by a way which he himself has explored—instructor and class together grappling with the cases and hewing for themselves a broad path, which is thus, in a real sense, a path of their own making.

Much has been written and more has been spoken about the "case-system." It is, perhaps, useless to multiply words in its behalf—for in any course in which it has been tried it speaks for itself. Under the case-system the materials which are put in the students' hands are the cases which the instructor has selected as the stepping-stone cases in the development of the subject or doctrine under discussion. These cases stand for the stages of development through which the doctrine has passed from the time that its germ first made its appearance until its present proportions were attained. With the facts of the second case, in historical sequence, before him and with the original decision as a precedent, the student is asked to address himself to the problem with which the court was confronted when that second case arose. Step by step he is made to carry the development forward as applied to the facts of the cases as they successively came up—thus entering into the inmost spirit of the opinions of the judges, after, in each case, first endeavoring to form his own. He is thus taught to look upon the law as a living and a growing organism, and to undertand that the development is destined still to go on. He is in a position to apply the necessary mental corrective when he reads text-books and treatises such as BLACKSTONE'S, which almost ignore historical perspective and treat legal doctrines in a given form as things recognized in that form *semper, ubique et ab omnibus*. The "genius of the law" ceases to be to him a mere phrase. He realizes that the law grows upon historical and not upon mathematical principles. He is made to perceive how it will grow and develop while he is at the bar. It should seem that no institution which aims at dispensing all that is best in education can long remain in doubt as to which of these two methods shall be adopted in its law school. "The law, for the student, is not merely something to know of, but also something to do; and the method that inures the

student to such mental processes as are to be his very tools of trade when he starts upon his independent career is the method that will best fit him for any responsibility he may assume for his first or his last client."[1] Harvard has pursued this method for a quarter of a century, and Columbia, within a few years, has followed her example. Both have done great things for the cause of legal education in America.

At this point, however, it is proper to recognize that while law is in its essence a science, it is nevertheless, in our day, in some of its aspects a trade. There must, therefore, be *trade schools* where the primary end in view is admission to the bar of some particular city. For such a school the consideration of educational problems is useless. It should be run wholly on business principles. It should follow public opinion and not lead it. Curriculcum, location, hours—all should be determined with reference to the convenience of the class of students from whose patronage it is to derive its profits. Except in rare instances such an institution will have little dignity, but it will make money. Here is a picture of the Columbia Law School in the days when its diploma admitted, *ipso facto,* to the New York Bar—when Professor DWIGHT and his method were, perhaps, in the zenith of their fame. "There were, on the average, not more than ten students using the library at one time. The room was usually empty; but just before or after a recitation it was a popular resort. The order was not good, loud conversations—often on politics—were carried on, tobacco was freely used, and there was no place to leave hats or coats. Many of the students never used the library. Those serving in offices hurried to the school just as recitations began, and left the instant they

[1] See "The Dwight Method" by THOMAS FENTON TAYLOR. Harv. Law Rev., vol. 7, p. 203. This admirable article did not come under my notice until this paper was half written. It is a satisfaction to have additional weight given to many of the views here suggested by the circumstance that they have been asserted independently by Mr. TAYLOR. He writes from the point of view of the lawyer who has had a practical experience of the so-called "Dwight Method," and his paper, while calling attention to inherent defects in the system itself, makes it entirely clear why it is that the "Dwight Method" cannot exist apart from a Dwight as its exponent.

were finished. . . . The questions were put quickly and with wonderful tact. . . . No student ever had his "faculties tried in the highest degree," or was ever driven to a standstill. Every student was "encouraged." . . . The final examinations for a degree were oral, and throughout specifically like the recitations." [2]

Where, however, a law school is a department of a university the considerations urged in this paper are obviously in place. A university which allows its educational policy in any field to be controlled by the business principles which determine the policy of a trade school, must at once forfeit its right to be considered among the forces which make toward highest education. If a university offers instruction in law, that instruction must be given upon the basis of the best development of educational science. If under existing conditions, when only two eastern law schools conform to this standard, it could be conceived that such a policy would in a particular institution, result in financial loss, then expenses must be cut down by diminishing the corps of instructors—or the school must be closed. "A university cannot temporize, but, despite ulterior considerations, it must strive to furnish the best possible education in the law."

In university law schools, then, research methods must prevail—and it is contended that *the research method of learning law* is substantially identical with the so-called "Case-System," which has been already referred to. Professor KEENER prefers to give to this system the name of the inductive method of teaching law. This name is suggestive; but I prefer to emphasize the fact that it is the student himself who is the *actor* under this system. Something more is required of him than that he shall put himself in a receptive state. He himself takes the field and actually plunges into the wilderness of the law. If there is a mountain to climb, and if he desires to become an expert climber, the student becomes like one who is not content with studying the admirably clear treatise on mountain climbing contained in the Badminton Library—or even with ascending the peak by a route that has become familiar. He

[2] Harv. Law Rev., Vol. 7, p. 205 *et seq.*

sallies forth with his guide, determined himself to experience the sensations of the explorer, not unmindful of the fact that his ultimate object is not to reach the top of this particular peak but to learn so to climb that he may climb hereafter. The function of a teacher under the "Case-System" in the department, say, of corporation law, or the law of the *quasi* contracts, is precisely analogous to the function of an Alpine guide in the case of an expedition of unusual difficulty. No one who has had the benefit of the services of a guide on such an expedition will object that this method of instruction is not distinguishable from solitary and unaided study.

Of course it may well be that under particular conditions, it is impracticable to adhere exclusively to the "Case-System" in its typical form in all the branches of study. Lack of ability upon the part of an instructor so to manage his class as to push the work forward with the necessary rapidity often makes it necessary to cover a portion of the field by means of text-book study or by "forensic lectures." Sometimes the magnitude of the field and the limited number of hours at the instructor's command induce him to adopt a similar expedient in order that his students may obtain a rounded view of the whole subject. Again it may often be found desirable (as Professor KEENER points out[3]) to lighten the work of beginners by the use of a text-book during the first year of study, when the student is unacquainted with technical terms and unfamiliar with legal modes of thought. In such cases, however, there is no abandoning of the research method as the normal method to be pursued in the higher legal education. It is therefore absurd to say, as Professor CHASE, the Dean of the New York Law Schools, says in this connection—"and so the DWIGHT method emerges again as the safe reliance when other methods fail." Perhaps, indeed, Professor CHASE must not be taken too seriously; for the circular from which this extract is taken is obviously the advertisement of a particular law school, although it is cast in the form of a discussion of educational methods. Even the language of the passage just quoted —"the safe reliance when other methods fail"—has long ago

[3] Yale Law Journal, March, 1892, p. 148.

been appropriated by the writers of advertisements and cannot be used without at once suggesting to the mind that a business enterprise is being forwarded.

The point insisted on, however, is that educational principles recognized in the other departments of institutions which are engaged in the work of higher education must be recognized also in their law schools and that the first duty of a university law school is to set definitely before itself the true educational ideal and then subordinate every other consideration to its attainment.