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THE PRACTICE OF THE CRIMINAL LAW.

AN ADDRESS BY THE HONORABLE MAYER SULZBERGER.

At the invitation of the University of Pennsylvania on the twenty-fourth of April last, in Price Hall of the Law School Building, the Honorable Mayer Sulzberger, President Judge of Court of Common Pleas No. 2, of Philadelphia County, delivered the following address:

GENTLEMEN:—Engaged as you are in studying not only the history of law but its principles and their method of application to concrete cases, I have thought it not inappropriate to avoid on this occasion the learned discussion of any particular theme, feeling that a less abstruse address might the better avoid the reproach of wearying you with an added task. On an occasion like this it may not be uninteresting to take up a practical question connected with the profession which you have chosen for your life work. After all, as life has constituted itself in our country, there is little room for the merely theoretical jurist: it is for the practice of the law that you are mainly preparing yourselves; and while this practice is impossible without an adequate comprehension of the theory, it, on the other hand, precludes an

exclusive attention to those juridical hypotheses and nice analyses which form a great part of the study of the law in some other countries. In the present state of our national development, engaged as we are in a marvelous reorganization of the industrial system, in the application of this new system to a country of untold wealth and opportunities, in the consideration of novel questions and unaccustomed situations which are the result of these conditions, the practicing lawyer must above all be a man of affairs. It is not in text-books that he can read the methods of judging the manifold and intricate relations which may be presented for his consideration, and though the principles of right and justice are well ascertained and are eternal, it is the application of them which presents the greatest difficulties to the human mind. The spectacle is not rare of men who think well and who speak well upon the necessity of justice in the abstract and who yet in a given situation in which their bias or interest is involved act so as to do wrong and injustice to others. To the satirist of the evils and follies of human nature it might appear that the principles of abstract justice are laid down by men for the guidance of others.

The practicing lawyer holds a position of great delicacy and difficulty. On the one hand he is the adviser, on the other the advocate. As adviser there is always presented to him the consideration of the question whether his client's cause is just, whether the end to be attained is right. As advocate it is his duty by all honest means to present acceptably all that may be arrayed in favor of his client's cause. When, therefore, the problem is presented to him whether his client should go to law, he may well be restrained from advising such a course by the conviction that the end to be attained is unworthy; but if he accepts a retainer to act in a cause, it becomes his duty to array on the side of that cause all the facts validly proved, all the inferences reasonably derivable therefrom and all the principles of law fairly applicable thereto. When this is done his whole duty is performed and the decision rests with the court.

These affirmative duties imply negative duties. In the ascertainment of facts on the witness-stand a man may not

in any wise create the presumption that facts whose existence he has no reason to suspect, or that facts of whose non-existence he is aware, are real facts, and though the zeal of contest and the eagerness for triumph have sometimes misled men into doing such things, and even achieving victories thereby, nothing can make such conduct respectable or even profitable. The limits of an advocate's assistance to his client are reached when he has given all the lawful assistance that he may. When he goes beyond he becomes an associate in the wrongdoing of his client.

It is an old story, which every student has heard, that after admission an attorney has plenty of time to study law,—a semi-melancholy, semi-humorous statement of the fact that it takes years to build up a practice. But if a newly admitted lawyer sits in his office and communes at best with his books and with friends equally at leisure, where is the opportunity for that training in practical affairs which gives readiness and confidence when the trial comes? The moot courts, the law academy and other methods of engaging in mimic contests are but slight preparations for real tasks,—the ardor generated is merely artificial, and the whole affair lacks the breath of life. The absence of personality tends also to impede the action of the moral sense. While on the one hand the absence of actual wrath would appear to make the mind clearer and freer from the deteriorating influence of emotion and passion, on the other, it eliminates from the discussion the highly stimulating influence of the presence of living human beings. Since law is above all things an organized system whereby great masses learn how to live together with reasonable regard to the rights of each and without unreasonable intrusion of the domination of all upon each or of one upon the other, there is no school in which the art of administering law can be readily learned except in the life school; just as in painting and sculpture, he that studies the system of the schools after dead masters, however great, will always remain a mere copyist. If he have a spark of genius it will be smothered by the deadening weight of the master's authority. How then is the student to obtain the desired experience, and where is that life school which is so essen-

tial to the formation of the great lawyer? I answer that just as the medical student of modern times has the great teaching hospitals where clinics bring him into contact with all forms of disease and all modes of cure, so in the law the criminal courts present the forum where the budding lawyer may be trained to ripen and expand. For nearly a generation a tendency has been growing to speak with an air of superiority and condescension about the Quarter Sessions lawyer, and young gentlemen of the University are not scarce who have highly resolved that when they enter upon the practice of the law they will devote themselves chiefly to the consideration of those large and important interests which are at present confided to relatively few of those who stand at the head of the bar. While a large income and a snug competence are legitimate objects to aim for, the perfect equipment for attaining them must be a more immediate object. It is to defend life, liberty and property that civilized society is organized and the defence of life and liberty is immediately within the cognizance of the criminal courts. To the non-professional mind the consideration of questions relating to property seems relatively dry, dull and uninteresting, while the discussion of rights to life and liberty strikes chords of sympathy in all. Men are born men before they become owners of property, and the human interest in their status as men is perennial. He, therefore, that devotes himself to the adequate treatment of such questions is sure of gaining the attention and the sympathy of large masses. Since lawyers may not make themselves known to the community except by their professional work, by reason of the etiquette that forbids the commercial forms of advertising, it is the criminal court that forms the earliest and the legitimate method of presenting to the public a knowledge of their qualifications for the work of advocacy. It is not, therefore, surprising that formerly the young lawyer on admission was sent to the criminal court in order there to obtain a practical experience in the life school. After the mimic contests of the moot courts, the defence of a man from the charge of assault and battery, which involves a liability to a deprivation of liberty, becomes surcharged with interest. The feeling of responsibility is cultivated, and by

reason of the relative informality of the pleadings, readiness, alertness and tact are stimulated, the insight and the outlook of the lawyer are developed. Since in criminal law the intent is the very body of the offence, the mind is driven perforce into a consideration of the profound and intricate relations of men. The hunt for a motive is a process of exploration of human minds and the trial of a simple criminal case is always a clinical study in psychology. So much for the theoretical side of the question. On the practical side it is to be objected that the enormous majority of persons charged with crime are poor in goods and have not the money with which to pay considerable fees. I call your attention, however, to the analogy of the great teaching hospitals, where the patients at the clinics are equally unable to pay large fees, and the poor though generally treated free have the careful attention of the great masters of the profession, and eager students follow with painstaking attention the slightest development of disease and pursue with ardor the investigation into the various methods of cure, eliminating this, modifying that, and finally settling on the best results of experience and science. Their object is to train themselves even without pay, so that when they are called upon to take private practice their minds may be ready and fresh for the responsibilities with which they may be charged by those who either have, or assume to have, the freest right of criticism because of the liberal rewards they tender.

Arrived at this point, I think I hear you urge your lack of acquaintance with the classes usually charged with criminal offences and the hopelessness of your being retained to conduct such causes; the whole affair appearing to move in a vicious circle, to wit: the man that is known will be sought for as counsel, and he that is much sought for as counsel is one that is well known. What then becomes of the position of him that is unknown? The answer is not so hopeless as it seems. The number of bills of indictment tried yearly in the county of Philadelphia is enormous. I will not detract from the unscientific character of my address by giving numbers or detailed facts, but I may state as a general proposition that many hundreds of cases are disposed of yearly without the appearance of counsel for the defendant. In all

these cases a large and unjustified responsibility is thrown upon the court. No judge can look on and see a poor prisoner tried for his liberty without keeping a wary eye upon all the points made by the prosecution and an attentive mind to ascertain what can be said in defence. This state of affairs has greatly increased the labor and the duty of the judges, though it is astonishing how free from miscarriage of justice the system has been. The causes leading to its adoption are not simple; I am not aware that they have ever been clearly presented, or that the public, or even the professional mind, has conscientiously considered the problems involved. The advantages of the system are speed and economy. The common man who has no counsel does not know how to cross-examine the adverse witness; he does not know whether it is to his advantage to go on the witness stand or not go on the witness stand. He stands, a little mite in the face of the huge and overawing power of the whole commonwealth physically displayed before him, and if he were a more acute intellect and an abler fighter than he usually is he might well be nonplused in so grave an emergency. In his helplessness he can only flounder a little and despairingly settle down to accept the consequences, whatever they may be. This promotes speed in trials. By the same token it also promotes economy, since two criminal courts have until lately been able to transact the business that would have required at least three. Are these qualities of speed and economy in the administration of justice so great that no limit should be set to them? Is the commonwealth so poor that it must incur the danger of injustice in order to save the machinery of a court or two? These are questions vitally affecting the whole community, and must be interesting to you not only as future members of the bar, but as affecting your rights and your duties as citizens of the state. The ultimate aim of all civilized society is justice, the due ordering of relations between the various individuals constituting the commonwealth. Beside that all other interests are trivial,—wealth and power and glory are valueless in a state where justice does not prevail, because there is no security that the man who legitimately has them may not be robbed of them. It is not an answer to point to the lowly

condition of the general mass of persons indicted. Courts of justice are not organized to adjust all the relations of all men with each other, but by striking instances and concrete examples to display the model upon which such relations must subsist; so that courts of justice are less the actual administrators of human affairs than the scientific demonstrators of principles upon which the mass of human affairs must be conducted. If the true demonstration of these principles is obscured by any defect in the administration of justice the living force of the principle is weakened in the state. I may refer to a striking example of this process of deterioration going on before our eyes. I do so with the less reluctance because of the general habit of men to seek for the movements of society in the dead past. Events of historical importance often pass before our very eyes and if lacking the elements of dramatic show or pageantry are disregarded as unimportant and insignificant.

Your studies have made you aware that civilized society has two paths for the investigation of crime,—the one presented by the jurisprudence that we call Roman and its derivatives, the other by the English jurisprudence and its derivatives. The former is the method known as inquisitorial, the latter the method known as the accusatory. In the inquisitorial method the accused is formally subjected to examination and cross-examination in order that he who of all others should best know whether he has any connection with the supposed crime should give the information in his possession; the latter exempting the person charged from all such inquiry and relying upon outside evidence alone to procure conviction. The end aimed at in both is the same, the protection of society against the breach of its laws by the punishment of the lawbreaker. The means devised are radically opposed. The fundamental conceptions of man and the state which lie at the bottom of those two opposing theories are radically different. Superficial reasoning may easily come to the conclusion that the Roman is the more direct and business-like method, but as the laws of states are intended to promote just relations between the members thereof, the real inquiry must be, has experience shown that the Roman system has been more efficient in pro-

moting such relations than the English system and even if that were as respects the continent of Europe to be answered in the affirmative, the question would still recur, is the system as well adapted to the genius of the English and American people as that which from time immemorial has prevailed among them? Into the depths of this philosophical inquiry I shall not at this time enter, but I do not hesitate to affirm that the great principle of English law that no man shall be required to accuse himself lies deeply imbedded in the conscience and in the affections of our people, and that if it were proposed deliberately to abandon our method an enormous majority of voices, approaching unanimity, would resent the proposition. What do we see in Pennsylvania? By virtue of a statute wise and beneficial in itself, a person accused of crime may, if he will, become a witness on his own behalf, the constitutional right, however, being protected by the prohibition of the statute that if he do not elect to testify no allusion to such omission may be made. Now behold the danger of what seem to be slight assaults on great citadels of principle. Within one generation from the enactment of this law there has already occurred the remarkable fact that a district attorney in one of the counties has in proof of the prisoner's guilt called the attention of the jury to the fact that he did not testify. (*Commonwealth v. Dorman* (No. 2), 22 Superior Court Report, page 20.) Straws show which way the wind blows. No one can believe that the official in question with the solemn responsibility of his office upon him deliberately intended to commit an injustice, but the fact probably is that he is a young man, during the whole of whose experience the right of the accused to testify has prevailed, and from the silence of the accused he drew the reasonable inference that the theory of guilt was more probable than the theory of innocence, but at the same time he deprived the prisoner of his constitutional right to refrain from accusing himself. Is it too curious an inquiry to speculate a little as to the relation between this ignoring of a great underlying constitutional principle and the increasing speed of trials in criminal courts? If the body of young and careful students who attend our law colleges and universities were early trained in the practical application of the criminal law—

I have already said that their insight and their outlook would be larger—they would realize and they would teach the community that in general the fate of a particular wretched creature who stands on trial is not the sole and in many cases not the main question. When a prisoner is tried the law is tried, and therefore the community is tried. Judged by accurate legal standards general impressions created by irresponsible statements, inadequately sifted, which so often form the common opinion of a community, are merely prejudices, and not judgments; and when prejudices stand in the place of judgment the commonwealth is on the road to its downfall. If then mere speed and mere economy are real hindrances to the administration of justice, it becomes important so to enlarge the bar of the criminal courts as to give every prisoner an opportunity in his own defence, whether he have money to pay the lawyer or not, and such an opportunity would be presented if the young gentlemen of this University would after admission attend the criminal courts and be ready to take up the defence of undefended prisoners, for which purpose I think I may say without assumption our judges stand ready to assist. Thanks to the creation of an additional court in our district, we are enabled now to hold three criminal courts where we formerly held but two, and the additional time required for the purposes I have mentioned can be found in that arrangement. The education involved in trying criminal cases is of the highest and most dignified kind. That crime must be punished sternly and unflinchingly is the fiat of reason and of law, but there are differences between criminals and between crimes. One man may be hopelessly bad in disposition, vicious, cruel, selfish, with a total incapacity to regard the rights of others and a readiness to yield to his passions without effort or desire to control them. He is an enemy of society and must in its defence be rendered as little capable of harm as possible. There are, however, myriads of weaker natures yielding to momentary temptation and violating the law without settled hostility to the rights of others, but with mere selfish thoughtlessness which being awakened to reflection by punishment, no longer merits the name of criminal disposition, though the act

committed be a crime. In the cases of such men, while the protection of society remains the paramount interest it may be reconciled with relative tenderness to the individual concerned. So that you see the investigation of criminal cases is not the mere reading of statutes and the dry examination whether the act charged is in violation of the statute, but requires the deeper investigation into character and motive which are always involved in criminal cases. Never forget the old saying, that "sin lieth at thy door," and that the man who stands charged in a criminal court is generally a man not so very unlike him who may stay outside free and uncharged. It is from the study and consideration of character very often normal, though many times abnormal, that are presented in the criminal court that you may ascend to the larger study of mankind as a whole, without proficiency in which your desire to advise men who have enormous corporate and property interests will forever remain unsatisfied. The passions of men are comparatively few and simple, their manifestations various and complicated. The same feelings of envy and greed which impel the poor criminal to steal his neighbor's watch may in a richer man, who has as many watches as he wants, lead to trespass on his neighbor's lands or franchises. Greed and selfishness are the basis of an enormous mass of criminal acts, and they also are behind those wrong acts which being less than crimes are the subject of cognizance in the civil court. The more profound your study of mankind in his nakedness, the better will you be trained for advising men in all relations. It is not true that the contemplation of criminality by the thoughtful observer tends to produce cynicism and a lack of just confidence in human nature; the wider and truer a man's knowledge the greater and broader his toleration, the saner and juster his judgments.

We are now living in an era when great property interests hold the front of the stage. The whole industrial system of the world is being reorganized. Relatively few great captains are taking the lead in industry, and we have now the phenomenon that in the arts of life called peaceful, there are striking analogues to an Alexander, Cæsar and Napoleon. There is, however, a law of reciprocity in nature.

The solid organization of capital is producing an unprecedented solidity of organization by labor. Thus the manifold bickerings of individuals, which were characteristic of the past, tend to be reduced in number and significance by corporate antagonisms. Great masses of men, aggregations of wealth, of power and influence are arrayed against each other, and the old machinery of the law needs to be tested and readjusted from time to time in order that it may meet the changed manifestations of the same old human nature. In these movements the lawyer must necessarily play a prominent part as citizen, legislator, practitioner, or judge. Whole classes of causes now prominent will tend to dwindle, while new categories now vaguely foreshadowed will develop.

We hear much in these times of the economic view of human relations, and academic terms are hurled about by which it is sought to be demonstrated that an age of the world has come in which numbers or other powers have the right to get what they can, regardless of the peace of communities, the rights of man or the just obedience to the commonwealth and its laws.

Such manifestations are transitory and ephemeral. Their tremendous forces may for a little time appear to destroy all that is established and sacred, but after the whirlwind comes calm, and after combat, peace.

Law is peace. The practice of the law is a continuous battle for peace. That the conflicting interests of mankind shall not be adjusted primarily by force, and secondarily by that modified force called fraud, is the mission of the law, and whatever conflicts impend it behooves the professors of that science to stand true to their mission. Fearless and unafraid they must proclaim and defend the doctrine that all legal adjustments must be based upon moral right and that every apparent triumph of force, however great, or of fraud, however subtle, must in the end crumble before the august majesty of the state whose principle is justice.