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FRANCIS HERMANN BOHLEN

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Francis Hermann Bohlen died on December 9 last at the age of seventy-four. Since the late spring of 1937 he had been an invalid; at first, a very suffering one. For many years prior to his illness he was recognized as the outstanding authority on the Law of Torts in the United States.

Mr. Laurence Eldredge is writing in this number of the LAW REVIEW of Bohlen's work and influence in this field, as well as his work on the drafting of the Pennsylvania Workmen's Compensation Act and as counsel of the commission set up to enforce it. I, out of the contacts of a life-long friendship, will try to set down here something of the boy and man.

He was born in Philadelphia on July 31, 1868, the son of John and Priscilla Murray Bohlen. At the time of his birth, his father, John Bohlen, who died when his son was five years old, was one of Philadelphia's foremost citizens and also one of its richest. He was a descendant of the old and important von Bohlen family of Prussia. This aristocratic junker connection in no wise lessened Frank's intense hatred of the Nazi, although his descent made its mark on his appearance and carriage which was more nearly that of the high-born European than any American I have known.

Frank and I first met, now more than sixty-five years ago, at Miss Haven's School, a Dame School for little girls and boys on South 11th Street below Spruce in Philadelphia, where we stood up in a row to recite before the teacher, played at recess in the small back yard and, we boys, at each others houses in the afternoon. We learned a little

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reading, writing, arithmetic, and geography, and, more important, made, as in the case of Frank and myself, lasting friendships.

Frank and I saw each other occasionally as young boys, but Miss Haven's was the only school he and I attended at the same time until, in the fall of 1889, we both went to the Law School of the University of Pennsylvania, then on the sixth floor of the Girard Building at the northeast corner of Broad and Chestnut Streets. I had gone to school and college near Philadelphia; he had attended St. Paul's School, Concord, New Hampshire, where he received the only systematic instruction he ever had. His remembrances of the School were not particularly happy ones. He never referred to his life there with enthusiasm. Indeed, the particular type of religious atmosphere established by the headmaster was unsuited to his temperament. His keen mind needed the contact of a great religious thinker. Religious formalism merely aroused revolt.

Graduating from St. Paul's in '84, he was afterwards much in England where if he did not acquire book learning he became one of the best known American cricketers in the world. He had that rare coordination of eye and action essential to the making of a first-class athlete. Throughout his boyhood and young manhood, Philadelphia was the center of cricket in the United States. Boys of the wealthier families played it to the exclusion of baseball. Teams were sent to England and the "Gentlemen of England" and the "Gentlemen of Australia" played international matches with the "Gentlemen of Philadelphia".

Frank began playing cricket as a boy about 1882 as a member of the junior team of the Chestnut Hill Cricket Club. Among the other members of this team were Francis W. Ralston and George S. Patterson, both of whom, together with Frank, subsequently played for the "Gentlemen of Philadelphia" in International Matches. As young boys, all three joined the Germantown Cricket Club, playing first on the Junior and then as members of its first Eleven.

At an early stage in his cricketing career, Frank was elected a member of the Marleboyne Club in England, commonly known as the M. C. C., the club which is the ruling authority in cricket. Besides playing for the M. C. C. he was a member of the "Free Foresters", one of the best of the English touring Cricket Clubs and played with them a good deal of club and country house cricket.

In 1891, the year Frank was in the second year class in the Law School, he began his international cricket career, playing for Philadelphia against the "Gentlemen of England" captained by the famous Lord Hawks. From that time forward he was a member of all the

Philadelphia international cricket teams. He played for Philadelphia against the Irish Gentlemen, the Halifax Club, the British Army and Navy Club, and the two Australian teams that visited the United States in '93 and in '96. In '97, four years after his admission to the bar, he toured England with the "Gentlemen of Philadelphia". The team played the English county teams and the M. C. C. He was a member of each of the Philadelphia teams that toured the English counties in 1903 and 1908.

Those who played cricket with him tell stories of his wit and good humor. Mr. Percy Clark writes: "Frank was always good company on the cricket field, and his fund of wit and humor will always be remembered by all who played with him. He took a great interest in the younger players and I can well remember as a younger player, whenever I had made runs or taken wickets in a junior or second eleven, he would take the trouble to congratulate me on my performance. He always helped and encouraged younger men."

His reputation as a cricketer rests on his batting. He made several "centuries", that is 100 runs, in important matches. Perhaps his two most notable innings were in 1893 and in 1902. The strong Australian team of '93 included one of Australia's greatest bowlers. In the first match, Frank's 118 was the highest score in a total of 525 runs for the Philadelphia team, and in the second match on a difficult wicket after heavy rain he was again "top score" with 56. In 1902, when J. B. King, one of the greatest, possibly the greatest, fast bowler in the world was at the height of his career and was playing for the Belmont Cricket Club, Frank made a score of 208 for the Germantown Cricket Club out of a total of 524 runs for the inning.

I have intentionally emphasized Frank's career as a great cricketer. First, because it is worthy to be mentioned for itself. It is something worthy of mention that he was known as a famous player in a difficult game; to be spoken of as a "great and most graceful batsman", and what is more to deserve the encomium. In the second place, I have emphasized his cricket career because of its effect on him. For many young men, success and acknowledged leadership in athletics is not followed by great achievements in the intellectual field. With Frank, his great success as a cricketer gave him a sense of his ability to achieve a mastery which helped him to overcome as a lawyer the almost insuperable handicaps to which presently I shall refer.

On graduating at the Law School in 1892, Frank was awarded the Algernon Sydney Biddle fellowship. He held this position for three years, his duties including teaching classes in Torts and Evidence. During the scholastic year 1903-1904, he was granted a leave of absence

and spent much of the time in England. In the fall of '96, I became Dean of the Law School and in the spring of '98 suggested his appointment as "Lecturer". The appointment followed and he gave up his somewhat sporadic attempts at practice, the step being dictated by common sense. If one is going to make his life work that of a scholar and a law teacher, he will find the requirements as jealous a mistress as the requirements of an active law practice. One cannot attain eminence at one time both as a teacher and law practitioner, though as a practitioner he may do, in a limited field, high grade teaching if not original work. In Frank's case to have persisted in trying to practice law would have been fatal to his success as a law teacher. Probably under the most favorable conditions he would never have succeeded at the Bar. His nerves, high strung as they were, would have gone to pieces trying to do something for which he would have known he was not fitted.

In 1901 he was elected assistant professor and in 1905 professor, a position which he held until 1925 when he resigned to become a member of the Harvard Law School Faculty. By that time he had long attained distinction in the field of Torts. The call to Harvard was a flattering one. It was not within the tradition of that School to call a man not a graduate of Harvard. But Frank was not happy in his new life. He was a Philadelphian. His friends were here. At the time he accepted the call to Harvard the atmosphere of the city and the University of Pennsylvania Law School was essential to his well-being. This he was not long in recognizing. He resigned his professorship at Harvard in July, 1928, and again became a member of the Pennsylvania Faculty to the great satisfaction of his associates and the alumni of the School. Thereafter there was no tendency to wander.

As Mr. Eldredge points out, throughout his teaching life the Law of Torts claimed his interest to the exclusion of the other subjects. His excursion into politics as a candidate for the United States Senate on an Anti-Prohibition platform, though it brought him to the notice of the public throughout the state, was only a minor incident. Though from 1898 to 1925 and again from 1931 until 1937 he also taught Evidence, his teaching of this subject was so much wasted energy; a sacrifice to the requirements of the curriculum and the fact that the faculty were never numerous enough to confine each member to the subject in which he excelled.

I remained Dean of the Law School until 1914. I do not think Frank ever became a good teacher of the first year or entering class. In this judgment I see that Mr. Eldredge, who sat under him as a student in the 20's, concurs. Frank was not built to do the best pos-

sible for the mediocre and the backward scholar. He had no patience with stupidity. On the other hand once he recognized that the student had brains he did all he could to help him. He was not affected by outward appearances. Himself the product of the most exclusive class in American life, he was quick to detect an aptitude for the law in a student irrespective of his origin. Such a student needed no "class card" to be admitted on terms of equal friendship. Thus, he was primarily the teacher of those who already knew some law and had brains. Many now holding high positions at the Bar or on the Bench or in the law teaching world look back with gratitude for his friendship and stimulating intellectual help. Such also have the enjoyed remembrance of his keen and reckless wit.

That "reckless wit" was sometimes embarrassing to the Dean. On the first floor of the law school building of the University of Pennsylvania there is a large Entrance Hall where students and professors congregate between classes. Frank's conversational voice carried far beyond the person whom he was addressing. Whenever he began to talk to any student, other students, anticipating fun or instruction or both, would gather round. His wit, though often personal and sharp, was not intentionally unkind. It did not spring from malice. Like many others who are themselves sensitive to criticism, he never thought whether what he said hurt or not. His wit was a manifestation of his candor, combined with a keen sense of the ridiculous. Unthinkingly, he could say such things because false flattery was abhorrent to him.

With my resignation from the Deanship, except for a single course, which I continued to carry for some years, my own life as a law teacher ended. Again, as after Frank and I left Miss Haven's School, he and I, though meeting frequently, saw less of each other. Then in 1922 I became the Director of the American Law Institute charged with the duty of guiding its work on the Restatement of the Law. We started with three subjects, Contracts, Conflict of Laws, and Torts. The first stages of the work on each subject were done by a group of experts in that subject of whom the chief member was the Reporter. Samuel Williston became Reporter for Contracts, Joseph H. Beale, Reporter for Conflict of Laws, and Frank for Torts. All three were obvious selections. Each was the outstanding and nationally known expert in his field.

From the time Frank was appointed Reporter, the work on the Restatement of Torts absorbed a large part of his time. With him, as with other Reporters, I believe the work improved his teaching, even though the Restatement became his chief concern. Torts is one of the great divisions of our law. The Restatement took many years to com-

plete. His health prevented him from being active in the development of the final chapters. Nevertheless, although each statement of law in the Restatement is a composite of group discussion, over far the greater part of the now completed Restatement of Torts what is said is the reflection of his life's consideration of the subject.

It was his duty as Reporter to prepare the successive preliminary drafts for the consideration of his group of advisers. Mr. Eldredge has well described the meetings of the group. My own position as Chairman had its elements of difficulty. Frank had a distinct antipathy to intellectual opposition and was extremely sensitive to criticisms of his literary style. Usually at the conclusion of each four or five day conference with his Advisers, and there were always several conferences each year, he would tell me he had to resign. Nevertheless, my task which was to keep things going and to see that the ultimate product was the result of group discussion was not nearly so difficult as some members of the Group considered it. I knew Frank and was very fond of him. I realized he had the temperament usually ascribed to a prima donna. But I also knew he was a great legal prima donna. The nerves which could become frayed were also the nerves that made it possible for him to have flashes of legal insight and express the result of this insight in brilliant legal writing composed at white heat. Furthermore, I never took seriously the announcement of his intention to resign. His devotion to getting the work on the Restatement well done would soon overcome any temporary irritation at the long discussions over the modification of some of his opinions or the clarification of the occasional involved sentence in the preliminary drafts of the Comments to the Sections. As for his literary style, he was proud of it and rightly so. But it had the defects of its qualities. When once in the swing of composition he wrote easily, rapidly, and often in terse sentences. But the very on-rush of his thoughts often caused him to string together several not closely connected ideas in one sentence, making what he wrote, as Mr. Eldredge says, hard reading. The necessary simplification took up a good deal of the Group's time. Nevertheless, we all enjoyed the conferences which were as stimulating as any I have ever experienced.

If the American Law Institute owes much to Frank, he owed to it opportunities which he had not previously enjoyed. When a Reporter and his Advisers have completed a final preliminary draft this draft is submitted to the Council and subsequently, as amended by the Council, is submitted by them to the Annual Meeting of members. The Reporter is charged with the duty of presenting the draft to each of these bodies; explaining the Sections, discussing suggestions and answering

criticisms. The Council of the Institute is perhaps the most distinguished legal body of its size, thirty-four members, in the United States. The meetings of the members of the Institute are attended by some five hundred leading judges and lawyers from all parts of the country. Therefore, from 1925, the year when the Tort Group completed a final preliminary draft of the first part of the Restatement of Torts, to 1937, Frank, each year, had the opportunity of discussing difficult questions of law before two notable legal bodies. The discussions in each body went on all day and sometimes occupied two days. No lawyer not of first rate ability with a thorough knowledge of his subject could have stood the test. Frank fulfilled all requirements. Many who had heretofore known of him only by reputation had the chance to find out the reality of the foundation on which that reputation rested. More than one member of the Institute has said to me that Frank had no superior among the Institute's Reporters in the power of clear statement and that his ease of manner and quickness of repartee were a delight: This of a man who as a young lawyer and indeed through all the early part of his life marred his public utterances and his occasional legal arguments in court by nervousness and the false appearance of lack of adequate preparation.

The most brilliant of all his appearances before the Institute was in May '37. I see now his distinguished appearance and feel his intellectual mastery. At the conclusion of the consideration of his subject he was given a deserved ovation. That moment was the worthy climax of his career. Within a few weeks he passed under the shadow of the illness that made him for five and one half years a helpless invalid.

Let me here try to answer the question: What was the secret of this man's notable accomplishments? If his ambition was to become as he did become one of the foremost creative jurists of his generation, no man of my acquaintance started life with greater handicaps. His family had an assured social position and wealth. These things of themselves are not necessarily handicaps to a professional career. Indeed, rightly used they may be helpful. With Frank they were handicaps. The death of his father when he was a little boy removed what would probably have been a restraining and guiding influence. Surrounded by indulgence and much mistaken kindness, as Topsy in Uncle Tom's Cabin he "just grew" without lessons of discipline and without the education on which great scholars lay the foundation of their lives' work. His nerves were highstrung. He was impatient. He was never taught and never acquired the instinct of orderly work. He disliked and never performed the drudgery through which normally the scholar who achieves has first passed. He had many expen-

sive and time-consuming tastes. He was not naturally a good teacher. Yet with all these handicaps, most of which he carried through the years of his creative work, few men have made so many of their legal ideas part of our living law. This result apparently was so impossible to those who were merely acquainted with him that they did not, and I suppose do not now all realize the value of his legal work. To them he was, and perhaps still is, merely a brilliant, witty person. However, to those who knew him well the explanation of his success is not difficult. In the first place he not only had fine brains but an extraordinary appreciation of the direction in which the law of the subject in which he was most interested should and often with his guidance did develop.

His notable mental capacity, however, though essential to the work he did, would not in itself have been enough. As in others, mental capacity had to be coupled with some equally essential trait of character. With Frank, I believe I am right in saying: This trait was the instinctive determination to see and to express ideas and views as they appeared to him without evasion or camouflage. This as indicated was the secret of his often broad and sometimes unkind wit. When he became interested in the law he instinctively revolted from shallow reasoning and those weasel words which tried to hide the law's defects and the processes of its development by judicial decision. The clear vision which he turned on the ideas of others he also turned on his own legal work. He never published a legal article until he was without doubt of the soundness of the conclusions reached and the effectiveness of the way he had expressed them. Unmethodical as he was in his work, fond as he was of time-consuming diversions, he forced himself to give the best that was in him to the law. Caring for pleasures, naturally indolent, the basic traits of his character overcame these obstacles which would in a less strong man have been fatal to accomplishment.

As I have said, he spent the last five and one-half years of his life as an invalid; much of the time confined to his bed and never able to do more than move into the next room. Had anyone who knew him well been asked whether he would have been an easy patient he would have answered with an emphatic negative. We knew how difficult the life of the helpless invalid would be to one not noted for patience. But his last illness showed all those close to him a Frank not known before. He lost health and fortune at practically the same time; his life was shattered, but the man most impatient with the little "irks" of life, faced with restricted means, with pain, and with long, weary, monotonous hours, met these larger ills with courage and considera-

tion for those about him. When he was able to see me, my visits did me good. The man, who in small matters throughout his life was not always an example, became to me as to those nearer to him, a man not only compelling but worthy of admiration and affection.