Cornell Law Review

Volume 2
Issue 4 *May 1917*

Article 3

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"When we want to know whether a certain horse is skittish or is capable of a certain speed * * * whether certain materials are of a certain strength, whether a certain field or a certain kind of soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether anything can be done or is likely to be done, one way is to speculate about it, and another way is to try it."[2]

Ever since Judge Emlin McClain and Professor Blewett Lee read their papers before the American Bar Association in 1896 advocating the teaching of practice in law schools there has been much argumentation and speculation as to the advisability of such a course. Some schools have seriously attempted this instruction. A few leaders in the field of legal education still maintain, however, that courses in practice have no place in a law school curriculum. A consideration of their arguments will lead to an examination of several methods of teaching practice and to a few suggestions which may, perhaps, remove some of the objections.

It is said by one that the lawyer during all his professional life is in more or less intimate touch with the problems of practice and constantly expands his professional experience and broadens his professional horizon along this line, but on the side of systematic study of legal theory professional practice can never afford the opportunity which is offered to every student by the law school at the very outset of his career. The latter offers the golden opportunity to lay deep and solid the foundation knowledge of English law on which must rest the lawyer's ability to understand and apply it, and, therefore, while the law school curriculum is limited to three years, time spent in teaching practice is misspent, because it might be better spent. The force of this argument lies in the limited time at the disposal of a law school and in the utmost importance of acquiring sound doctrine before starting to apply it. Law schools operated for purposes of revenue only, with limited endowments and consequent inadequate facilities, have frequently pretended to give elaborate courses in practice. Even if it could be assumed that the work was well planned and skillfully conducted, an examination of the method of instruction in courses dealing with fundamental legal principles, and the time devoted to them, has usually demonstrated that these

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[2]Justice Doe in Darling v. Westmoreland, 52 N. H. 401, 405 (1872).

courses were most superficial. A natural result has been that the students in such law schools have acquired very little knowledge to apply. The rules of application have become more important than the principles. They are a bulwark behind which in practice the lawyer can hide his lack of real knowledge. Such instruction in practice is, of course, a positive harm to society. It tends strongly to cause a strict adherence to the forms of procedure without reference to their usefulness in the administration of justice. As between a law school which lays all its emphasis on legal doctrine and one which teaches practice in the above fashion there can be but one choice. If the introduction of courses in practice into a three year curriculum necessarily results in a superficial treatment of the fundamental doctrines of the law, the above argument is unanswerable, but does such a result follow?

An examination of the curricula of the leading law schools shows that the fundamental principles of torts, contracts, crimes, property, equity, corporations, pleading and evidence are taught almost exclusively in the first two years of the curriculum. The courses in agency, sales and trusts are also usually given in this period. Practically all students take this work. The other courses commonly offered, and distributed between the second and third years, are constitutional law, domestic relations and persons, bankruptcy, insurance, carriers and public service corporations, negotiable paper, quasi-contracts, wills, mortgages, partnership, suretyship and guaranty, conflict of laws, municipal corporations, administrative law and public officers, international law, equity pleading, future interests in property, damages, admiralty, mining and water rights, Roman law, and patents and copyrights. The required amount of work for a degree varies from seventy to ninety semester hours. It is admittedly impossible for a student to take all of the above work in three years, as it will total considerably over one hundred hours. In most of the schools the student is allowed to elect from the last list of subjects sufficient to constitute the total number of hours required. It is more or less uncertain just which of these subjects will be elected and which will be omitted. They are all presumably important courses, but the fact that an election is permitted so generally indicates an impression that some are more important than others, and that if all cannot be taken the less important ones will have to be left to the ability of the student to acquire after he has begun his practice. The training in the courses taken presumably has so disciplined the student in analysis and methods of attack that he can be trusted to get some knowledge for himself, and to get it fairly well. The varying amount and kind of

work required for a degree by different schools indicates considerable difference of opinion as to the point at which the student may be trusted to take up this supplementary law study on his own initiative. Undoubtedly considerable stress is being laid upon mental discipline, and, in the last year of study more stress is laid here than on an insistence for knowledge in any particular subject. It is discipline in connection with specialization.

The introduction of practice courses into the curriculum would necessitate a still further displacement of some of the subjects above mentioned from the work of the student electing or required to take such work. To make the case as strong as possible for the objector, let us suppose four courses from the following list are eliminated in addition to the courses omitted from lack of time: conflict of laws, insurance, bankruptcy, quasi-contracts, domestic relations and persons, agency, negotiable paper, partnership, municipal corporations, administrative law and public officers, future interests, damages, carriers and public service companies. All of the above courses are important, and law school instruction in every one of them is highly desirable. But we are supposing that four of the most important of the list are balanced against the courses in practice. All other courses taken have been taught with thoroughness. Is it a correct assumption that the courses dealing with the application of the principles which have been thoroughly taught can be acquired more readily and more thoroughly in a lawyer's professional practice than the four courses in doctrinal law that have been displaced? Relatively speaking are they of less importance? Law instructors have been in the habit of answering both questions in the affirmative. Perhaps they have been right in so doing. A correct answer to the questions leads to a consideration of another objection that has been urged against teaching practice in law schools, to the question of the all sufficiency of the Langdell, or case, method of teaching law, and to an examination of the best courses in practice that are being offered.

A prominent member of an eastern law school faculty has said that law schools should not teach practice because it is not as well worth while as the teaching of the subjects which it displaces; that the study of the doctrinal courses gives the student the trained mind of a lawyer, whereas the study of practice is a mere memorizing of artificial rules. It has been largely influenced by legislators who have no idea of scientific law, and, when the student is done studying it, he is left no more a real, thorough, genuine lawyer than he was before, because of this lack of scientific value in it. This educator has undoubtedly pictured the ideal law graduate as a man of keen powers of mental

analysis who knows the fundamental doctrines of the law and can readily dissect any legal proposition, separating truth from error. No one will doubt that such qualifications are highly desirable, and that it should be the ambition of every law school to approximate this standard of efficiency for its graduates. But is that enough? The case system of instruction has developed the analytical powers of a student more efficiently than any other system, and if keen analysis were all that were needed, we could certainly dispense with the practice courses, and should go on further perfecting the power of analysis by the study of doctrinal courses through selected cases. I am a thorough believer in this system of instruction and in the necessity of developing the powers of analysis to a high degree, but to stop there seems to me to be lop-sided instruction.

A successful lawyer, whether he practice in the courts, or whether his activities are confined to office practice, must have constructive ability. He cannot succeed, however extensive his knowledge, and however keen his powers of analysis may be, unless he is able to apply the law he knows. His clients are not interested in knowing what the law is. They do not care what are the necessary elements of a contract, of a will, of a trust deed, or of articles of incorporation. They want a will, a trust deed, and articles of incorporation drawn in such a manner as to best accomplish their desired objects. The ability to dissect such instruments drawn by others, and the ability to draft them are wholly different powers, as most practitioners have learned through experience. But there is the solution, it will be claimed. The practitioners will learn this constructive power through experience, if they have the powers of analysis. They will, but how? Are the numbers of law school graduates who have developed these powers in practice to a high degree of efficiency so large as to warrant us in believing that the school of experience has proved an economical and scientific one? We must not look at the exceptional men but at the average. What kind of contracts, wills, trust deeds and articles of incorporation are they furnishing their clients? What kind of pleadings are they drawing, and how successfully are they conducting litigation for their clients? Are they doing all that their knowledge of the principles and doctrines of the law would warrant us in believing they should do? Or are they filling in blanks taken from the form books, copying the forms of some other practitioner, adding to the mistakes of procedure in the courts, and travelling in the rut of mediocrity because they have not acquired the principles of construction in the formative period of their legal education? Perhaps they are still efficient clerks or em-

ployees in large city offices, when they might have been members of the firm or engaged in independent practice. I venture to make the suggestion that a student who has been trained for two years and a half by the case method of instruction will be much more likely to continue the use of his analytical powers in acquiring further knowledge of the doctrines of the law that he did not have time to learn in the law school, and in acquiring it well, than he will be to acquire the ability to draft skillfully instruments and pleadings, and to conduct litigation in like manner. The boy may learn to swim by being thrown into the water. Anyone can pick up golf sticks and play golf, and his game will improve the more he plays. A clerk may learn salesmanship by being placed behind the counter. Most of us learned to swim, to play golf, and to sell goods (assuming we have had such experience), in just that fashion. We are in the habit of thinking that what was good enough for us is good enough for anyone else. But is it not astonishing how many dub swimmers, golfers, salesmen and lawyers there are? Would not a little professional coaching have aided some of them? Perhaps the lawyers could get a longer drive, had they learned in the law schools to carry through their stroke.

Analogies are not always accurate, and their value as proof is often overestimated. Is there any analogy between law school instruction in practice and professional instruction in golf and swimming? Are these courses after all a mere pretense, a memorizing of artificial rules, which require only time for any man of common sense to acquire without instruction? Is the scientific value in them so slight that they may be safely sidetracked? Let us look at some of them.

Any discussion of practice courses should distinguish between work in the drafting of legal instruments and pleadings, and moot or practice court work, and treat them separately. Objections to one branch of the work may have no application whatever to the other. If there is a weakness in one only, it should not work a condemnation of both. Most of the adverse criticism has been directed at the practice court, although the drafting courses have come in for their share.

In some schools the drafting of pleadings and other instruments is given in connection with, and as supplementary to, the usual case book treatment of the subjects to which it is related. The advantage of this method of treatment is that analysis and synthesis are developed together, while the principles are in process of developing and are fresh in the student's mind. Much emphasis is laid on the various formal requisites. The principles are first analyzed and picked out of the cases, and then the student is required to assemble them and construct a document in proper form to make the principles operative

on somewhat different sets of facts. Obviously the courses on contracts, wills, pleading, etc., which are so taught must be lengthened to provide for this additional instruction. There are some manifest disadvantages in giving the synthetic instruction in connection with the analytical treatment. Pleading (especially common law pleading) usually comes early in the law school curriculum. At the time this course is concluded the student does not have a very extended view of the field of law. The principles that he can embody in his pleadings are of very narrow compass. He cannot meet difficult obstacles. His pleadings cannot be drawn with reference to proposed evidence, because he has not yet studied the law of evidence. There can be little or no resourcefulness and initiative of the student manifested because of his limited range of knowledge. The tendency, therefore, if drafting be taught at this stage, must be to place most of the emphasis on formal requisites. If the instruction comes later in the course, however, while the student may not have the principles of some of the subjects as freshly in mind as if the instruction came earlier, he will have a much broader horizon. He can now be taught constructive work, not merely in the law of contracts, of wills, or of pleading, but in larger fields of law. He can be made to co-ordinate his knowledge of the various subjects, and while he is learning the necessary formalities, which may be mere memory work, he is also learning how flesh and muscle clothe the skeleton, and how it takes on life. The drafting problems that are now given will not be simple in character. They will not be confined to one field of the law. But the instructor will frame the problems in such manner as to lead the draftsman into difficulties, unless he carefully considers the bearing that several different fields of the law have on the problem. The student should be opposed by all the obstacles that his strength will permit of, and he should be taught to keep to the highway in the face of many alluring by-paths. A problem will illustrate the principle:

> Henry Jones desires you to draft his will. He is a man of considerable wealth, consisting of various kinds of real and personal property. He is interested as a stockholder and director in several large businesses, in some of which he has a controlling interest. He and William Jenks are partners in the lumber and coal business under the name of Jones-Jenks Lumber & Coal Company. He has several life insurance policies payable to his estate. He has a wife from whom he has become estranged, although they live in the same house for the sake of their children and appearances. He has two daughters, Jane, 7 years old, and Emily, 19 years old, and a son, George, 22 years old, who is bright, and has many of his father's characteristics, but is wild and extravagant. The son

is attending a university, and is devoting most of his attention to athletics and girls. Emily has shown a liking for a young man whom Jones thinks is courting her for her money. He desires to keep his estate intact as nearly as possible five years after his death, and at that time to give George and Emily each a fourth of his estate, provided George has settled down, and shown some aptitude for business, and provided Emily has not married a money-seeker. In the event of either of these contingencies not happening, he desires that each be paid the income only from his or her fourth, and that the principal be adequately protected until the contingencies happen. He desires Jane to get one-fourth when she attains her majority, subject to the same provisions as are made for Emily. He desires his wife to have the income from one-fourth for life, and this discontinued if she re-marries. On death or re-marriage of his wife he desires her portion to be equally distributed among the children. If a child dies before the time of distribution, his or her share shall be distributed among the survivors, unless there are grandchildren, when they are to take. If his beneficiaries should all die before him, or after him without heirs, his desire is that some charitable disposition be made of his property, either to further investigation into a cure for cancer, or to found a hospital for tuberculosis patients.

Draft the will, providing for all possible contingencies, including death of several in a common disaster. If the will of testator cannot be accomplished in any particular, accomplish it as nearly as possible, and attach a note of explanation. Have will properly executed, and attach the best attestation clause you can devise. If you do not have sufficient particulars in any respect, fill in as you would recommend or suggest to testator.

In a course in the drafting of pleadings in a common law state the following problem was given:

John Brown, a farmer, was run down and killed by an express train of the Baltimore & Ohio Railroad, January 5, 1915, at a highway crossing at Lower Bend, while he was driving a team across the track. Negligence is claimed on the part of the railroad company. There is some difference of opinion among witnesses as to the cause of the accident. Brown left a widow and infant child surviving him. Draft a declaration in an action by the proper person against the railroad company to recover damages for wrongful death, which will permit any proof that will probably develop.

In that state there was a form book on common law pleading prepared by an eminent practitioner and a former dean of the law school, and in it was a form of declaration in actions by an administrator to recover for a wrongful death. In this form it was alleged that the plaintiff brought the suit as administrator, etc., but failed to allege the appointment and qualification of the administrator. The form had

been in use for twenty years or more, and had not been questioned until quite recently, when the highest court of appeals in the state had held a declaration in that form demurrable. Naturally the students went to the form book, and in no declaration that was handed in was there an allegation of the appointment and qualification of the administrator, although the necessity of such allegation had been taught in the previous course in common law pleading. The instructor in the course had recently come from another state. In discussing the declaration with the class he called attention to the form of allegation showing a right in the plaintiff to sue, and asked if it were sufficient. All declared that it was. The instructor was aware of the form and of the decisions. He called for an analysis of the principle of pleading, but was informed, amid smiles and winks, that the law of that state did not require a following of the common law principles, and cited the form book. The student furnishing the information was asked to read a part of one of the recent decisions before the class. It came as quite a shock, for an idol had been shattered. The error was then traced and it was found that the form had been copied from the late edition of Chitty, which was based upon a section of the Common Law Procedure Act, which provided that it was not necessary to make profert of letters of administration. It was thought by the editor that this made an allegation of appointment and qualification unnecessary. A similar statute existed in that state. Without the recent decisions it would have been difficult to convince these students that the editor of Chitty and the local author were in error, but the result of this and a few similar experiences was that the students were very careful in their use of forms, and some refused to use them altogether, drafting wholly from principle. Some of the latter drafts were a bit inelegant, but the substance was there, and these young men were in a fair way to becoming excellent pleaders.

The instructor in this course made a practice, after a paper had been handed in, of discussing at the next meeting of the class the principles embodied in the problem, and then having a student, at his dictation, place a draft upon the blackboard. Fortunately there was ample blackboard space for this purpose. As each portion of the pleading or instrument was written out, using abbreviations and short cuts to save time, there was a discussion as to whether it would accomplish the desired object, and what contingencies might possibly arise and whether these were provided for. Clearness and brevity, but not brevity at the expense of clearness, were emphasized. At every phase of the work there was insistence upon an understanding of the principles involved, and wherever a form was used, the students were

required to analyze the form and test it, and to suggest wherein it did and wherein it did not contain useful suggestions. Whenever possible documents that had been drawn by skilled draftsmen were submitted for their inspection, a report was required on them, and they were discussed in class. The students were taught to know no obstacle other than a positive rule of law, or several of them, which blocked all possible progress. They were taught that the meeting of an obstacle merely put them on their metal and tested their resourcefulness. The problems given would usually offer some way to accomplish the end, or at least to approximate it. I do not want to be misunderstood as claiming that all or any of the students in these classes became skilled draftsmen during their training. Some showed no aptitude for the work at all. As in all other classes there were poor, mediocre and good students. But they were given some insight into methods of attack, and the better ones will not furnish their clients merely formal documents and pleadings.

Another advantage of postponing the drafting work until late in the course, and placing it all in the hands of one man, is the fact that there are many principles of allegation and construction common to contracts, wills, deeds, articles of incorporation, etc. Consolidation in one course saves duplication. All instructors do not have the same gift or skill on the synthetic side of the instruction, and better results are likely to be accomplished by one who has had considerable experience in that field, and who has made a special study of methods of presentation.

Let us now consider some of the methods of teaching trial practice. The moot court, with its arguments of questions of law as upon a demurrer or on an appeal, is familiar to us all. In many schools this sort of work has long since been relegated to law clubs formed by students, and is carried on in a more or less desultory way. It presents only a very small part of the work a trial lawyer is called upon to do, although it is valuable as far as it goes. The drafting of adequate briefs on points of law can be taught in connection with this work, if it is under the supervision of a member of the faculty, and is frequently done. This work is of such a minor and incidental character that it is not generally included in a discussion on teaching practice. The troubling questions are connected with an attempt to teach the various steps in the trial of an issue of fact, to create a legal clinic comparable to the laboratory and hospital work of the medical student.

It is generally recognized by schools which have attempted this work that very little profit can be gained from a practice court

until the student has acquired some knowledge of the various steps in a litigation. At this point there has been another objection. With the practice of what jurisdiction is the student to be made familiar? In a state law school where the students come wholly from the state and expect to practice within the state the solution is easy. But few law schools are of that character. What kind of practice shall be taught in the large schools which draw students from every state in the union? Certainly not the practice of every state, for that would be impossible. The answer of some schools has been the practice of one state, preferably of the state in which the school is located or from which it draws the largest number of students. The answer of other schools has been that, while there are many minor variances in the practice of the different states, the main features of a litigation are substantially the same in all, and these main features should be taught. Two case books on the subject of trial practice have been prepared on this assumption, one by Professor Edward W. Hinton, of the University of Chicago Law School, and the other by Professor Edson R. Sunderland, of the University of Michigan Law School. Each begins with an analysis of the process in an action and proceeds through the various steps of maturing the cause for trial and of securing the jury, treats of the right to open and close the case, of the production of the evidence, of non-suits and directed verdicts, of instructions to the jury, of the verdict, of the various proceedings thereafter, and of preparation for appeal. Trials before the court without a jury are also treated. The development is the usual one by adjudicated cases so arranged as to bring out the various steps progressively. This preliminary part of the course is conducted in the usual way and might well be called a supplementary course in evidence, as much of the material is related to the production of evidence. The schools teaching the practice of one jurisdiction use cases selected from that jurisdiction, arranged as above, in connection with the local code of procedure, or cover this preliminary ground by lectures. The theory of these schools is not fundamentally different from those using Hinton's or Sunderland's case book. It is that the teaching of one system thoroughly embodies enough of every other system to enable a student to readjust himself to the minor changes of his own jurisdiction in a short space of time. It has the disadvantage of offering no opportunity for comparative study, and is not so likely to produce a search after principles. It tends to formalism.

Unless this preliminary course deals with something more than rules, it seems to be open to the objection that it is too formal in character. It is necessary that a modern trial lawyer know these

formal rules. A law school can teach them much more effectively and with more economy of time than they can be acquired in practice. A beginner who has acquired them will be saved much embarrassment, and his client will be saved money that otherwise might be spent in paying for the lawyer's education in practice. This is all worth while. But it is not all that can or should be done. If the tendency to restore the common law powers of courts over proceedings before them, which was taken away in the years following 1850, continues to manifest itself, it may be possible that much of this technical learning will disappear. Prominent legal educators find indications of such a movement in the reports since 1890. This is the day of change and it is difficult to foresee what will come. But if the instruction in technique is paralleled with instruction in the nature of the office of an attorney, his duties to himself, his client, the court, and to society, and his privileges in and out of court in representing his clients; if the study is given a professional background, and the student is taught not only what he may do within the bounds of law, but also what he ought to do, that some mechanism is necessary, and that it is well for him to know all there is, but, after all, that it is mechanism, and that artificial rules should be used only in the furtherance of the administration of justice, and not to obstruct it; that a thorough knowledge of these rules will often enable an attorney to prevent a miscarriage of justice and to block a less scrupulous opponent; that an attorney of high ideals with no knowledge of the technique of trial practice as now conducted stands very little chance before a well armed adversary in such technique who is in the game to win; the knowledge will be valuable as long as the present practice continues, it will tend to alleviate the burdens of the courts, and, whatever the practice may be tomorrow, the true characteristics of an advocate will be stamped upon the young attorney, and his learning will not be superfluous.

There has been much complaint that the ethics of the profession are not being instilled in the younger generation of lawyers. To meet the criticism many law schools have been calling prominent members of the bench and bar to lecture to the students on this subject. I have heard many such lectures. During my law school days I sat through a series of them. I presume they were excellent. But I have no more recollection of their substance than I have of the sermons I heard preached on the Sabbath about the same time. A series of five or six lectures once a year does not produce much effect upon the student, whatever the subject may be. If it be a prominent man who gives the lectures the interest is more likley to be in the man

than in his subject. I know of no more effective way of teaching the principles of legal ethics than for the instructor in practice to set his course in their atmosphere, and to deal with them as a vital, living subject, as important, or more so, than any other course in the curriculum. An announcement of a case book on legal ethics has just come to my attention. It seems to me that the place for the study of these cases is in connection with the practice work, not separate and apart from it. The extent of the study will have to depend upon the judgment of the instructor based upon the time at his disposal. But this instruction should be from within the law school and not from without.

Several methods are employed in the management of the practice court in the schools which believe in the utility of such a court. The least valuable of all would seem to be the plan of taking the record of a case that has been tried and having the students reproduce that trial, following the record. A very similar plan is one where the instructor constructs a case, prepares the evidence that is to be produced, and puts it into the hands of the students with instructions to stage it. Both of these methods are highly artificial. The students are mere automatons. There is an entire lack of initiative on their part. They do see the formal parts of a trial enacted and participate in the dramatization. This brings the rules into a bolder relief and has some value. It will not, however, go very far toward making an efficient trial lawyer. It is very likely to be dry and uninteresting to the students.

Another method that has been devised is for the instructor to plan the happening of a certain event that he desires to make the foundation of a case, and to have it occur in the presence of several student witnesses. A litigation is directed to be brought based upon the facts that have actually occurred, which the student witnesses have seen. The thought is excellent, if the execution of it were practicable. Simple situations can be created in this fashion with comparatively little difficulty. If the practice instructor could have at his command a moving picture troupe and studio and facilities for getting scenery and apparatus, this would probably be the ideal plan. Unfortunately some of the fields most valuable for practice court purposes are extremely difficult for amateurs, having no apparatus, to reproduce, and the moment substitutions are employed there is danger of a low comedy production. Situations involving fraud, conspiracy, and willful and negligent torts are extremely difficult to reproduce for the benefit of witnesses. If they are not reproduced exactly as the witnesses are to describe them, it is difficult to see where this plan has any advantage over one where the facts are wholly hypothetical.

One school professes to get its material for the practice court from actual life. The plan is to get the principals and witnesses to actual litigation which has been terminated by suit or settlement to appear in the practice court and submit to an interrogation by the students, and to indict or sue the owners of local factories for creating nuisances by the blowing of their whistles, etc. This plan would not be practicable in very many localities. Aside from the money expenditures no instructor without great local influence could ever persuade any considerable number of laymen to permit students to rake over their personal affairs in a practice court. It is admitted that when a cross-examiner asks a particularly personal question, no matter how important a bearing it may have in the litigation, the witnesses will frequently become angry and refuse to answer. The practice court judge has no disciplinary powers over such witnesses and parties, and that particular phase of the trial has failed. Besides, the propriety of stirring up old scores which have been adjusted is very questionable. It is readily conceivable that these differences may not stay adjusted and that ideas obtained during the practice trial may be the cause of further litigation.

The difficulties of obtaining real facts as the basis for the practice trial have led the remaining schools which attempt this work to rely upon hypothetical facts, the bases of which are contained in an outline prepared by the instructor. The evidentiary facts are left to the creation of the students. The degree of initiative and creative powers that is left to the student varies in different schools. The plan generally adopted is to use comparatively simple situations involving the application of not more than one or two principles of law, and to limit the powers of creation within very narrow boundaries. In this way the instructor will always know just about what will result, and the creation of the evidentiary facts is no great burden to the student. His energies are not devoted so much to developing any particular legal theories as to methods of getting certain evidence into the record. The outlines given are frequently prohibitive of a valid claim or defense, and are given solely to test the ability of the student to produce testimony according to the rules of practice. Some schools have not found this method entirely satisfactory and have resorted to legal aid work to supplement the deficient practice court by supplying the personal element. The working of this plan was clearly and forcibly set out by Professor E. M. Morgan in a paper entitled "The Legal Clinic", read before the Association of American Law Schools in December, 1916. The paper is printed in the Handbook and Proceedings of the Association for 1916, and in the February-March,

1917, issue of *The American Law School Review* (Vol. IV, page 255). In the discussion following the reading of this paper I pointed out what I thought were some of the weaknesses of the plan, and wherein a practice court conducted with a somewhat different object would be an improvement.

Briefly the objections to the legal aid clinic are these: The legal aid organizations are essentially charities, and if they justify their existence as such, they must consider the complaints of all applicants. A great many of these are not legal in character, and many of them which are legal are petty. While the character of work handled is varied, the kind of training in practice obtained is very limited. This may seem a paradox, but an examination of the tables presented by Professor Morgan, showing the character of work done by students in a legal aid society, brings out the significant fact that 72 per cent. of it had to do with petty wage claims, domestic troubles, collections and advice on everything that came. In only one or two instances out of 281 cases did the student go into a court room or attend a judicial proceeding. It consisted largely of running errands, riding several miles on street cars to serve papers, examining court records, and office consultations. No one will deny that considerable value can be obtained from the doing of these things. Unfortunately most of the work of this character must be under the supervision of young attorneys of limited experience, as the older and more experienced attorneys will spend little of their valuable time in legal aid work. The instruction cannot, under such circumstances, be skilled instruction. It prepares a student only for a petty practice, and lays no foundations other than technical ones. It is very wasteful of the student's time. Very much of this kind of work in a three year curriculum would certainly seem to be time misspent, because it could be better spent.

Experimentation has convinced me that there is a better way of overcoming the artificial features of a practice court, and one which is productive of better legal scholarship. Perfection is not claimed for it, and I will be much surprised if some one does not level at it more adverse criticism than I have directed at some of the other methods. There has been some adverse criticism already, a part of which I will try to answer after setting forth the plan.

The thought back of the plan is similar to that back of the drafting courses that I have previously described, i. e., to develop the initiative and resourcefulness of the student at the same time he is being made acquainted with the technique of trial practice, and to carry the professional atmosphere and professional ideals through all the work.

After the preliminary course previously described student attorneys selected to represent the plaintiff's side of a proposed litigation are given an outline of some situation having possibilities of development into a liability for damages, grounds for equitable relief, or grounds for criminal prosecution. Whether it is so developed will depend entirely upon the students having it in charge. Many primary facts are supplied in the outline, but some essential ones are omitted or stated in an equivocal manner. Instead of presenting a more or less rigid set of facts calling for the application of but one or two principles of law, the situation is made somewhat complex so that the student will have to be on the lookout for conflicting or overlapping principles. My observation has been that a fault with many law students, even in the last year of the course, and after they begin practice, is their inability to co-ordinate the principles learned in the various courses. They are well drilled in the principles of torts, contracts, equity, corporations, pleading, evidence, etc., but when a problem presents the possibility of the commingling of several of these principles they become absorbed in one or more of the principles that stand out and entirely overlook some modifying principle that is not so conspicuous. Some law school instructors so frame their examination questions as to bring out this quality of the student, but many consider such examinations as too technical, and the questions as catch questions. However proper or improper such an examination may be, the practicing attorney must be prepared to meet the "catch" element that may appear in a litigation. It would seem that the practice court affords the opportunity to give this training. An outline presenting a simple situation is so easily seen through by the students that there is no opportunity for maneuvering and for strategy. Thorough preparation on perfectly obvious points of law closes the door to all paths but one. A complex situation can be equally well prepared for, but it requires the ability of a resourceful lawyer to do it. This is just the ability that it is sought to develop.

The power to create facts consistent with the outline is limited only to the field of probability. At a specified time, process is directed to be issued and served on the party or parties who are thought to be proper defendants. Persons are designated who stand in the place of defendants for purposes of service. The provisions of the local code are followed except where the suit is on the equity side of the federal court, when the rules of the Supreme Court are followed. Provision is made for substituted service and service by publication. The time provisions of the code are made use of by a scale of reduction. With the process a complaint, which the students have drafted, must

be served. With the drafting of the complaint the outline falls into the background, having served its purpose. Plaintiff is permitted to prove any facts within his complaint. If defendant desires more detailed information, a bill of particulars is the remedy. The instructor, by consultation with plaintiff's attorneys, sees to it that the complaint does not depart from the outline. Students selected to represent defendant are required to plead to issue as in actual practice. Their preliminary preparation is based upon a copy of the outline which has been furnished them. A clerk's and sheriff's office are maintained to comply with formal requirements of practice and assist in maturing the issues, but no detailed clerical duty or bookkeeping is prescribed. The function of the course is not to teach how a clerk's or sheriff's office should be conducted. The records are kept in outline only, although the files are required to be kept carefully and in order, so as to be open to inspection at any time. When a cause is matured for trial, it is placed upon the trial calendar and tried in its order. The trial is before the court or before a jury as the nature of the case requires. Some cases are directed to be tried before the court to give that practice.

At a fixed time before the case is called for trial attorneys for plaintiff are required to submit to the court a copy of their outline of evidence and of their trial brief. The outline of evidence must be preceded by a statement of the issues made by the pleadings, and of the facts that plaintiff deems it essential to prove to make his case. The outline proper contains the name of each witness to be called, his characterization, and a condensed statement of what he will testify to. The trial brief must support the theory adopted and the outline of facts necessary to be proved. It must also contain authorities supporting any doubtful evidence that is to be produced, and anticipate, so far as is possible, the various points that may arise on the trial. If a course on brief making has been previously given, the forms of the briefs will correspond to that instruction, but if it has not been given there should be some instruction at this point in methods of making briefs, with emphasis laid upon the fact that a trial brief is supposed to be useful, and that all devices for making it as useful as possible during the unexpected happenings of a trial should be resorted to, and that some key word or statement of facts in connection with each case cited will often assist in picking out the particular case needed at a particular time. Any outline of evidence showing insufficient preparation, or which tends to present a frivolous exhibition, will be rejected, and the student demerited. No case is permitted to go to trial until this preparation is made.

I have usually assigned two or three students to a side of a case, depending upon the size of the class, and required them to alternate as witnesses and as examining counsel, so as to effect a distribution of the work and experience. In many respects it would be more desirable to use underclassmen as witnesses. They would not be so familiar with the law of the case, and the cross-examination could be made more effective. I have not used them because of the demand on their time, and because there is less likelihood of disappointment in witnesses failing to appear where they are confined to members of the class over whom the instructor has disciplinary powers. The production of the testimony is as in an actual trial. A witness called is permitted to create any facts that have a basis in the outline of his testimony which has been furnished the instructor. Defendant's attorneys do not, of course, have access to this outline. If the witness departs from the outline the instructor calls his attention to that fact and confines him to proper limits. If counsel fails to get the evidence of a witness admitted because of the form of the questions or because of an insufficient foundation, no other witness will be permitted to be called to supply the omission. While this rule frequently breaks up a trial, it extends counsel to the limit of their resourcefulness in attempting to get the evidence admitted and insures preparation in every detail. Cumulation of testimony has no place in a practice trial.

It has often been said that there can be no real cross-examination in a practice court trial, because of the lack of real facts and real witnesses. The witness will flatly deny any proposition advanced, and to attempt to get him to contradict himself will be useless. It is at this point that the complex case has the advantage over the simple one. It affords many opportunities for shadings and differentiations based upon conflicting and overlapping principles. Preparation of defendant's attorneys on all of these possibilities makes them as conversant with plaintiff's case as are plaintiff's attorneys. The preparation of plaintiff's attorneys has been along one main line, and many by-paths have probably been overlooked because they have not planned to go that way. Where they will lead they do not know, and are especially unlikely to realize during the excitement of a trial when they appear for the first time. Defendant's attorneys have been looking for conflicting and overlapping principles which will change the result by the addition or subtraction of a very few facts. In this kind of a case it is not at all impossible on cross-examination to put a question which will call for the statement or denial of a fact which the witness has not previously considered. The situation is not at all unlike that of a lying witness on the stand who is willing to state any

fact that will aid the side of the case which has called him. Defendant's attorneys are in the position of a trial lawyer trying to ascertain whether the witness is lying, and to trap him in his lies. The more attractive the subject matter of the question is made the more likely is the witness to be lead into a damaging statement without knowing it. Let me illustrate.

In an action against a railroad company for wrongfully causing the death of a locomotive engineer the allegation of negligence in the complaint was allowing a stretch of the track to become out of repair and the ties and rails to become loose and insecurely fastened, so that the locomotive was derailed while passing over it. Two very good students representing plaintiff produced testimony that a repair gang had been making repairs on the track and had left it with rails insecurely spiked and the ties untamped. On cross-examination they were eager not to be misled into leaving an opening for some other cause of the derailment, and the same witnesses who testified they saw how the track was left were willing to testify that they saw how the accident happened, and that the rails spread at this particular place. They knew it because only a very few minutes had elapsed since the repair gang temporarily suspended work and the happening of the accident. They testified that the tools and men were still on the ground, but they had suspended work to eat a meal. Plaintiff's witnesses saw no harm in this testimony, but at the conclusion of plaintiff's evidence defendant's attorneys moved for a non-suit on the ground that the negligence alleged was in permitting the track to become out of repair, whereas the negligence proved was failure to give warning of the making of temporary repairs. I granted the non-suit. This line of cross-examination was carefully thought out and planned, although rapidly done during the progress of the trial. The exhibition required the resourcefulness of a skilled trial lawyer. Frequently there will have to be some fencing for an opening and a testing of the preparation of the witness on this and that phase of the case. The cross-examiner may find no opening whatever. He does not always find it in practice. The witness is truthful or exceedingly clever.

It is true that the above variance could be readily obviated on any trial, and all of the cleverness of defendant's attorneys put to naught. But the practice court is a place for training not to do that particular thing but to develop resourcefulness, quick thinking, the ability to maneuver for an opening, the ability to test a witness, and the ability to keep cool and see a clear course in the midst of diverting circumstances. It is a training to co-ordinate all the powers of a

legal mind. It seems to me the training, regardless of the outcome of a particular case, or of a particular examination, has a tendency to develop these desirable qualities. It is wholly immaterial, for practice court purposes, that any other court would have allowed an immediate amendment. To give the requisite training the procedure in the practice court must be strict.

When I gave the above illustration in a discussion of practice court work recently I was accused by a prominent law teacher of teaching my students to entrap a witness and thereby to work a miscarriage of justice. This criticism was based upon the hypothesis that all witnesses testify truthfully and should not be trapped. There is a possibility, of course, of skill thus acquired being misused. The check against a misunderstanding of the proper uses of a cross-examination must come from the atmosphere in which the training is given and the emphasis laid upon the principles underlying the canons of legal ethics.

It has also been urged by some prominent legal educators that this kind of work teaches subornation of perjury and lying. I could not consider such an objection seriously, if it did not come from such eminent sources. The students do create testimony, and are taught how to create it so as to make a case or defense. But they deceive no one, and know they are deceiving no one. They know that this whole procedure is merely a device for overcoming a lack of real witnesses and real facts. Their entire interest is on the legal problems. The plan is most effective in teaching how a case should be prepared for trial and the elements that should be looked for. To say that because a student creates needed facts in a practice court he will do the same thing in practice is much like saying that Mansfield or Booth acquired criminal instincts while impersonating murderers and stage villains, and that such performances should be discouraged because of their degenerating influence upon the public. Some medical students who learn the vital parts of the human anatomy through dissection, may through criminal instincts take a human life because of his acquired technical skill, but we will hardly discontinue instruction in anatomy and vivisection because someone will abuse the knowledge. I have always believed that the instruction in legal ethics would counteract any such tendencies, and, if it does not, that the student is a degenerate and would manifest his criminal tendencies without such instruction.

By a rule of the practice court no witness for defendant will be permitted to deny a statement made by any of plaintiff's witnesses. This rule prevents categorical denials, which are worthless for

practice court purposes, and the getting of houses on different corners and people in different cities. All defenses must be in avoidance. The attorneys for defendant are instructed to lay the basis for their defense as largely as possible on facts elicited from plaintiff's witnesses, another use of the cross-examination. One or more defenses can be prepared in advance of trial. Defendant will not be permitted to advance any defense not within the pleadings. If an entirely unexpected defense is developed from the cross-examination that is not within defendant's pleas, the court may depart from its usual rule and reward diligence in cross-examination by permitting a plea to be filled instanter covering that defense. Defendant's attorneys are required to furnish an outline of testimony and trial brief, but as their defense is expected to meet the exigencies of trial this is not required until a reasonable time after the defense has opened.

During the progress of a trial the students not engaged in it sit as jurors and hearers, but are required to furnish a detailed report of every trial in which they are not engaged, with criticisms on its various parts. This latter requirement assures attention and gives the class the benefit of each man's work. If the class were very large the work would have to be given in sections. Arguments to the jury are limited to a very few minutes on a side, and the verdict is a mere formality. The verdict of the jury is determined by a majority vote as to which side has made the best presentation of its case. It is sought as much as though the rights of parties were at stake.

In some of the practice court trials I have observed the trials occupied no longer than two or three hours each. This was because the issues were few and clearly defined. It has seemed to me that this is a mistake. The trial should take as long as a proper presentation in all its aspects requires. I have never placed any limit on the length of a trial, other than that it must be moving forward every moment. Continuances and delays are an unknown quantity. Discretion is nearly always exercised against the one asking it. I have always proceeded on the theory that students should learn to do a thing right in the first place, and should never be encouraged to see how badly they can do a thing and get away with it. One who learns a strict practice can take care of himself under a loose system, but the converse is not true.

Practice work of the kind described requires considerable time from the curriculum, but not so much as might be supposed. The drafting courses described were given one semester hour each, that is, the classes met once a week for a semester, but the tax upon the student's

time was probably more nearly equivalent to that required by a two hour course. The preliminary practice study had three hours, and the practice court four hours for a term. None of this work had time enough to develop it to a high degree of efficiency, but much was done in that time.

We return now to the argument that practice work is not worth while because it does not give the trained mind of a lawyer. If the trained mind is what is desired, would any four of the elective courses, which we have conceded this work will displace in a three year curriculum, develop a better mind? The loss of the knowledge to be acquired in those courses and of the further analytical training, is to be deplored, but relatively speaking are the doctrinal courses more valuable, if one or the other must be left to the period after practice begins? The answer may still be, yes, but I have endeavored to present some considerations leading to an opposite conclusion.

The addition of a fourth year to the curriculum of law schools, which seems assured in the not distant future, may afford more time for both of these kinds of instruction, and also time for more extended study in legal history and jurisprudence.

There will be many who will say that the claims made for the practice work and the ideals set are not possible of accomplishment. The only answer I can make is the suggestion of Justice Doe, quoted at the beginning of this article, "try it."