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A View from the Hill

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Others apart sat on a hill retir'd,
In thoughts more elevate, and reason'd high
Of providence, foreknowledge, will, and fate. . . .
JOHN MILTON, *Paradise Lost*

The Hill is the mound of experience, observations, and reflection resulting from seventy-five years of living, fifty-two years at the law, and thirty-four years as a member of the Common Pleas Court of Lackawanna County, Pennsylvania. Interspersed in these years were almost eight years of active army duty, including combat service in Europe in World Wars I and II.

Now with retirement comes time to reflect and recollect. The editors of this journal conceived the bright notion that some review of my observations might be of interest and, hopefully, edification to the reader. I should point out that this is not a legal thesis and will not be encumbered by citations. The opinions expressed are my own, from which you are free to differ or discard as you please.

What has happened to the Law, the Lawyers, and the Courts?

THE LAW

Any consideration of the development of the law must be viewed in the light of the great central events of history in the past half century.

America's entry into World War I brought with it conscription of men and resources, rationing, and controls. The American people accepted these measures, if not cheerfully, as matters of necessity, but rejected them as soon as the necessity disappeared.

National Prohibition followed World War I. The "Noble Experiment" turned out to be an ignoble failure and had to be repealed. Unfortunately during its life, however, it provided the greatest impetus to organized crime, now a cancerous growth on our national life.

The great depression of the thirties followed the Stock Market crash

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of 1929. The closing of banks, the recall of gold, unemployment, bread lines and soup kitchens in our cities, "Iron Pants" Johnson and the NRA were all symbols of the times. Although the Nine Old Men knocked out some of the economic controls devised for the National Recovery Administration, the depression caused the entry of the Federal Government into fields of law theretofore thought alien to its purposes. Witness such measures as Social Security, Unemployment Compensation, regulation of Securities Exchanges, aid to states in their assistance programs, trade regulations and communications controls.

World War II brought almost total mobilization: military conscription and the rationing of food, clothing, gasoline, tires—indeed almost everything. Again the national will accepted controls as necessary, but with the end of the war came a revolt against price controls. Selective Service, a polite name for conscription, is still with us as a result of Korea and Vietnam. Conscription, or at least the current method used in selecting draftees, is under attack, but I fail to see how a great country can provide necessary military protection for itself and support for its foreign policy without some form of compulsory service. The system itself is one for the policy makers, but the fairness of its application is one for the law and the lawyers.

Common Law Challenged

The good old Common Law and its vaunted ability to meet new conditions is being tested to the limit. The technological advances of the last few decades have produced new forms of activity, bringing new problems to the law, the lawyers and the courts. Radio, television, aeronautics, space exploration, automation, and the proliferation of the automobile have brought new problems which call for specific answers from the law, both common and statutory. Not all the answers are here, but the profession and the courts are alert to the problems, and hopefully a sound body of law will emerge.

Dramatic changes are occurring in the fields of human relations, civil liberties and the criminal law.

In tort law we are witnessing the erosion of the immunity of charitable and governmental agencies for negligence. New definitions of the responsibilities of hospitals and medical practitioners to patients are evolving and medical malpractice actions are on the increase. Products liability cases are imposing new standards of responsibility on manu-

facturers and purveyors of all sorts of products. The now famous Section 402A of the Restatement (Second) of Torts, with its formulation of the theory of strict liability, seems to be meeting general acceptance.

Civil liberties have assumed new dimensions. There is no more precensorship of motion pictures, but the exhibitor of a pornographic production can be arrested and punished. When does liberty descend to license? Or, to put it another way, when does a book, a play, or a picture which appears to be pornographic to an "old-fashioned conscience" have some redeeming social value? These questions will trouble the law and the courts for some time to come.

Criminal law is essentially unchanged in substance. A crime is defined either by statute or common law; a violator is apprehended, charged, indicted, brought to trial, examined, and judged. In a series of decisions, however, the United States Supreme Court decided upon literal enforcement of the provisions of the Bill of Rights in the Federal Constitution to criminal prosecutions in the state courts. The howl that went up from police agencies, prosecutors, and the state courts was tremendous. Personally, as a lawyer and as a judge, I could never see why a citizen of the United States was not entitled to the protection of the Bill of Rights because he lived in Pennsylvania, Arizona, or Alabama. The difficulty for the police and the state courts came about in the language of the decisions and the rules as to what constitutes critical stages of prosecutions, permissible interrogations, involuntary confessions, the reasonableness of searches and seizures, and the need for the guidance of a lawyer in entering a plea.

Since some of these decisions are retroactive in effect, the state courts have been swamped with actions of habeas corpus or applications for post-conviction relief, and the jail-house lawyer is having a field day. One would think that there are more law students in the penitentiary than in the law schools. Hopefully, the ancient cases will be cleared up in the course of time. It is clear that some of the ground rules will require modification or clarification, but most necessary will be better trained and paid police officers. Better support should be given to them by the citizenry.

The Lawyers

How do the lawyers look from my Hilltop? My friends, my companions, my brethren, my supporters, my critics: I love them all. No other

association I have known produces such a fraternity as the companionship of the Bar. Alexis de Toqueville said more than a century ago that the American lawyers were the nearest approach to aristocracy to be had in America because of their learning, guidance and leadership in public affairs. A casual reading of the preceding pages should demonstrate the current requirement of broad knowledge for the present-day lawyer, and the imperative necessity for his guidance and leadership in almost every field of endeavor.

Modern Lawyers Different

Fifty years ago, and even thirty-five years ago, we had in my court many lawyers of the old school—skilled in the forensics of the courtroom—to whom every trial was a contest. When some of the leaders of the profession were trying a case the courtroom was usually crowded with young lawyers who were there to observe and learn trial techniques.

Are the present day lawyers better than their predecessors? My answer is that they are different; not better, not worse. I have observed that the lawyers admitted to the bar after World War II seem to be better prepared and more mature in their approach to trial work. Perhaps the law schools have been giving better instruction. Perhaps the fact that many of them have had military service broadened their viewpoint. Many were married during college or law school, which is certainly a maturing influence.

Pre-trial procedures have just about abolished surprise as a weapon in civil trials. The lawyer now uses the art of reason to discover the truth about disputed facts, which, as I recall, was Professor Wigmore's definition of a trial. This approach does limit courtroom pyrotechnics, but I do not mean to imply that forensic oratory is a lost art or that a skillful cross-examiner may not occasionally produce a "rabbit out of the hat." What I do mean is that the use of these skills is different, as are the lawyers. I have no worry that the current bar cannot provide for the public in as well-trained, as skillful, and as adequate a manner as has its predecessors at any time in our history.

The Courts

What of the courts? My observations are based on experience as a state trial court judge where the controversies are between man and man or between man and his government. Judges of these courts can

punish you for anything from minor theft to murder. They can separate you from your wife or your husband. They can take away your children. They can take away your property and give it to somebody else. They can abrogate your contracts. They can decide how much the public must pay you for property taken for public purposes. They can impose on you reparations for the harm you have done to others, and they can restrain you from actions which they believe to be contrary to public or private rights. These are enormous powers committed to the hands of mortal and fallible men.

The great majority of the judges I have known have accepted these grave responsibilities and have worked diligently. In recent years the National Conference of State Trial Judges and similar state conferences have encouraged examination by the judges of their own performance, the operation of their respective courts, and the study of improved techniques in the conduct of the business of the courts. A national college has been established for the express purpose of instructing newly-appointed or elected judges in the intricacies of their business. Curious, is it not, that in the English and American legal systems there is no way of training a lawyer to be a judge until after he becomes one? He is a lawyer one day and a judge the next, and he must learn by doing—strict on-the-job training.

There are obvious defects in the system as evidenced by the fact that trials in the populous counties are delayed from one to three or more years. We have proved in the medium-sized counties that trial calendars can be so managed that cases may be brought to trial within a few months of issue date, but these systems probably would not work in the metropolitan areas. The exercise of the rule-making power by the highest state courts has produced reforms in practice and procedure, but the courts cannot make changes in the system as such.

The demand for reform and modernization of the judicial system must come from the people the courts are designed to serve. If the courts are to serve the people adequately in this complex age they must be supplied with sufficient judicial manpower; competent administrative, technical, and clerical help; a sufficient number of courtrooms and other physical facilities; and wise administration of the available judicial resources. These improvements cost money, but considering the enormous sums spent for public education and public welfare, it should not be too much to expect that the system designed to protect

the rights and liberties of the people should be adequately staffed and financed.

Pennsylvania has made some constitutional strides in judicial reform by providing for a unified court system under the administrative supervision of the Supreme Court and permitting the assignment of judges where needed. The constitution makers, however, summarily tossed aside the proposal for the Merit System of selection of trial court judges, and the voters in a lackadaisical election rather casually rejected the merit plan as applied to state-wide courts. My good State of Pennsylvania remains a political state so far as the election of judges is concerned.

Let us be thankful for such progress as we have made, and let us devoutly hope that our political leaders will rise above purely political considerations and provide for us judicial candidates of integrity, learning, and ability.