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Board of the American Service Bureau

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THE LAWYER AMID SOCIAL CHANGES*

*Robert L. Hogg***

I N thinking about what I should say to you today, probably it would have been appropriate for me to elect to discuss some pertinent legal principle. After considering such a possibility I discarded it. After all, for fifteen years I have occupied the role of a "kept" lawyer concerned with technical things which would be of limited interest here. Instead, I should like to give you some general observations relating to the changing nature of our profession.

Since leaving West Virginia I have been closely associated with the profession in practically every state through the prosecution of litigation involving our business. Parenthetically, our litigation in almost every instance involves issues of first impression. We never take a position adversary to a policyholder, for reasons that will readily occur to you. In addition one of the two organizations with which I am connected maintains a reporting service for its member companies covering opinions in reported cases relating to life insurance. I shall not burden you with the details of this interesting work for the only purpose of mentioning it is to show that through my work I have been in a position to see the operations of the courts and profession in almost every state in the Union. My remarks stem from that experience. Particularly I want to refer to the courts and the bar of our own state in light of my experience. I can speak freely and sincerely because of my complete disassociation from those about whom I shall speak.

Having seen the work of the members of the bar of most other states, I have even greater admiration for the work of the bar of this state than when I was a practitioner here. There are some things that stand out in my mind which illustrate the source of this pride. For example, I recall the work of Mr. W. E. R. Byrne in the trial of an ejection case in the Circuit Court of Kanawha County thirty years ago. There probably was no one better qualified in this type of litigation. His work was an inspiration for any young lawyer and his skill in handling this difficult type of

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case made a lasting impression upon me. I also recall the skill of the late E. G. Smith in his cross-examination of witnesses. He had a technique of his own. With ease and deference, or what appeared as deference, he frequently had an antagonistic witness nodding assent to every one of the questions he propounded on cross-examination. The reputation and performance of the bench and the bar of West Virginia are among the highest. They furnish one of the many reasons why I am proud of the state.

The pleasure and pride derived from my work as a member of the bar of West Virginia has increased rather than lessened through the years. If I can still claim to be a lawyer at all I am a West Virginia lawyer. It is true that I am a member of the New York bar but if I were to tell you how I was admitted in that state you would see at once that that may have been a sort of fortuitous circumstance.

The opinions of the Supreme Court of Appeals of West Virginia affecting our own business are critically examined by us and also by practically every life company. While we may not be in complete agreement as to the conclusions in every instance, nonetheless the opinions are clear, logical, and well expressed. Wanting entirely is any underlying tinge of demagoguery sometimes found where one of the parties is classed as "big business."

There are 57,000 students in American law schools, more people than are now members of the American Bar Association. This number is practically one-third of the lawyers in active practice in this country in 1948, according to Martindale-Hubbell. With the current graduation of another class it is interesting to look at the work of the present-day lawyer, particularly what he has been doing for the past twenty years, and from this draw some conclusions as to what he may be doing for a comparable period in the future. Of course there have been changes. There will continue to be changes, but I do not think that when we get the whole picture there will be any real cause for pessimism on the part of the present seasoned lawyer or discouragement on the part of the newcomers to the bar.

The two most spectacular things we see in the practice of law today, as compared with twenty years ago, are the decline in litigation and the growth of administrative law. By litigation I mean the number of adversary proceedings involving an issue of fact before a court. In our own case, our litigation has declined fifty percent in the past ten years, notwithstanding the tremendous in-

crease in the business in the same period. In our loose-leaf reporting service just refered to, for the year 1948 there were only 316 reported cases. In 1938 there were 768. Twenty years ago the average West Virginia county with twenty-five to thirty thousand people had three terms of court each year with each term lasting two full weeks devoted to trial work. I understand that in this same county today it is not uncommon not even to have a petit jury for one or sometimes two of these terms. Do not think this situation is confined to West Virginia. It is nation-wide. There has been a steady decline in the number of cases considered by the Supreme Court of the United States. In the face of a rising tide of new federal legislation, in thirty years the number of cases declined from 223 to 112 in 1948.

As an illustration of this comment, about two months ago it became necessary for our business to employ trial counsel in a city of about 400,000. It was surprising how limited was the field from which to choose our man. Any of the larger cities of West Virginia twenty years ago had at its bar more competent trial lawyers than apparently were available to us now in this city of 400,000. The decline in litigation cannot be said to arise from the scarcity of people to handle it. Nor do I think that the smaller number of trial lawyers is necessarily a result of a decline in litigation. There are other more cogent reasons. Because of the fact that over the past twenty years lawyers could obtain better compensation in other than trial work, fewer lawyers became interested in it. This fact plus the diminishing demand for his services has resulted in a depletion in the ranks of this type of specialist.

In any event, there has been a sharp decline in advocacy and a corresponding increase in advisory work for lawyers. It is a situation directly traceable to the spectacular changes in the business life of the country which in turn have brought further social responsibilities. In lawyer language they are not *in paru passu*. Probably they never will be. In any event it is a problem for our lawyers to keep abreast of these changes.

It probably has been easier for the lawyer to adjust his thinking to the changes in concrete business operations than it has been to adapt himself to the social changes and their responsibilities. Changes in the social texture of our civilization have sprung from an ethical base and it has always been difficult to

deal in a legalistic atmosphere with those things that appeal to conscience.

Again looking to the litigation before the Supreme Court of the United States, not only do we see a decline in number of cases but also a significant development of administrative law. In 1918, of the 223 cases considered on their merits 56 involved a review of administrative action. In 1948, of only 112 cases 73 involved review of administrative action. Administrative action as a basis of litigation had increased from 25 percent to 65 percent. The natural inclination is to say that the triumphant march of administrative law is a corollary to the regimentation of recent years. That is true only in a very limited sense. The greatest advance was between 1918 and 1928 when the percentage rose from 25 to 45. There has been a steady advance ever since with 50 percent in 1938 and 65 percent in 1948. It is difficult to attach political significance to these figures in so far as administrative law is concerned. It is safe to say that more and more, administrative law is going to be the guiding influence upon business and consequently it is a field of ever-increasing importance to the profession. The legal profession is the one profession whose fortune is most intimately related to the business and industrial welfare of the country.

The legal profession is inherently conservative. The body of law with which the profession constantly deals is the result of precedent. Precedent will always be a guiding factor so long as we have an economy which recognizes private property. It is no wonder then that the profession, or a substantial segment of it, has shown concern over the abrupt change in the place it occupies in the business life of the country brought about by the sudden growth of administrative law. These new tribunals have their own rules of procedure. They prescribe who shall be qualified to appear before them. Many laymen probably will supplant lawyers in some of these cases. Does that mean that the stature of the profession must be lessened? By no means. I see behind this change a type of national economy demanding even greater use of the profession.

In our appraisal of the situation let us remember two things. First, administrative law is not a recent arrival in our jurisprudence. We have had it, for example, since early days in our customs and pension agencies. The big addition was the Interstate Commerce Commission. The recent and spectacular arrivals

were the Federal Trade Commission and the National Labor Relations Board. Administrative units of the Federal Government alone total more than two hundred and a large number of these in effect pronounce judgments and make formal rules.

Second, the present expansion is an outgrowth of an expanded economy. The profession has always adapted itself to a change in the economy. We follow the pattern of the national economy. We do not make it, although we are a part of it. When there is a change in the economy we must adapt ourselves to it. In the past, whenever we have been called upon to meet some new changes in business or economic life there has been some concern among us. Take the situation where the common law of master and servant fell short of meeting the social responsibility of industry. To turn over to charity an employee injured in an accident to which his own negligence contributed, did not square with trends in social thinking. The harshness of the fellow servant rule, in its application to modern business, had to be reappraised. Workmen's compensation resulted. Many members of our profession were concerned over this innovation. It was an innovation to make compensation for injury dependent merely upon scope of employment rather than negligence of the employer. Notwithstanding the concern which such a new principle caused we now see the wisdom of such an enlightened program. Nothing has contributed more towards a sound employer-employee relationship.

The workmen's compensation law was first enacted in West Virginia in 1913. A glance at the reported cases prior to that time will show the extent to which tort actions were occupying the attention of the bar. It was said that new law would be almost the coup de grace for the profession. Calamity, however, did not ensue. Industry was helped and ensuing from that the profession prospered.

Almost every business activity in one way or another is governed by administrative law. It makes little difference whether business is transacted by an individual or through a corporation. In every instance where business is to be transacted by a corporation some agency will determine whether the activity can be carried on in that manner. Quite probably a company cannot sell its stock, borrow money or declare a dividend without administrative sanction. What it pays its employees as well as its officers may be subject to the same situation. The same type of agency watches the hours of work, the purchase of material and the condi-

tions under which work is performed. Contracts for raw materials, their cost, as well as the manner and method of shipment are scrutinized. You may be told who and who cannot be officers and directors, as well as how you are to pay them. Care must be taken as to whom you sell as well as the terms of sale. You may or may not be able to buy out a competitor. You must carefully watch your contacts with competitors. What you can and cannot do in your relations with your employees is a chapter in itself. You may or may not know what your tax status is without a declaration from an administrative agency. Your good intentions are not a shield against trouble. Whether you know it or not, your action may embroil you with some administrative agency, possibly with ensuing criminal liability. How many of these restrictions were there a generation ago?

The growth of administrative law is grounded largely in social responsibility. The lawyer of past generations dealt almost entirely with well recognized personal and property rights. Today with out modern business complexities, we have social responsibilities which are to be recognized. The old law of caveat emptor is no longer a mantle for the crafty seller. The new concept is that the government has a responsibility to police the ethics of business dealings and operations and of course such an undertaking must be along lines of administrative action. With the expansion of business it has become more and more the public policy to have the rules of the game something more than unpliant and inadequate principles of law.

These are not critical observations. They are not made with the thought that the profession should have opposed the creation of these administrative units. Extension of this type of governmental operation might have been expected as a corollary to the rapid growth of business. Like any new movement it probably gained headway too rapidly and will have to be reappraised from time to time. Many phases of our economy have expanded too rapidly. There probably never was a time when the economic, the political and social changes were in perfect unity. Progress has always been accompanied by efforts to maintain this balance and possibly with a perfect balance there could be no progress.

Wherever there is a clash between a new social concept and an established legal principle, the social concept will prevail. I cite as examples the action of the courts in refusing to recognize a restrictive covenant as a property right. While not in so many

words reaching this conclusion, the effect was just the same when the remedy to enforce it in certain instances was destroyed. Similarly, in dealing with the rights of a secured creditor to require public sale of the security the courts have refused to treat the unqualified right of sale as a property right. Such conclusions are momentous. They show that legal principles will not stand in the way of new concepts of social responsibility. We as lawyers shall live in this atmosphere for a long time in the future. We shall have to work in a changed economy, again let me say. A part of the lawyer's equipment more and more is going to be an understanding of the economy. As people study the national economy and seek to understand the effects of the changes in it, the more likely we are to preserve a sound economy. To put it another way, to obtain and assure a sound economy we must be informed.

The spectacular growth of administrative law stems from the fact that our economy has departed from the law of tooth and nail and is now supposed to operate on the basis of ethics. Business, and by that term I mean what each and every one of us does, is supposed to operate on a basis of what is regarded as good conduct. The lawyer in this new atmosphere must know something more than the written statute or published opinion. He must know something of the economy of the country and that is a responsibility never before so noticeably on his doorstep. A sound economy and good business will always go hand in hand; similarly with good business and a prosperous legal profession. Today our economy is exceedingly complex. No professional group is better equipped than the legal profession to assist business in comprehending the complexities within its own house.

For this reason, administrative law offers much to the young lawyer. One of the deterrents to the entry of young people into the legal profession has been the hesitancy of the public to place its problems on young shoulders. Public acceptance formerly depended largely upon the scope of the lawyer's experience. However, in recent years, many of the areas covered by administrative law have related to entirely new business operations and relationships where experience has not been so powerful a factor. To a certain extent, the creation of a new administrative agency or the extension of administrative law into an old field has meant new opportunities for the younger members of the profession. By analogy, with the advances of medical science, the public has come to look upon the young well-trained doctor with even greater

THE LAWYER

confidence than his older colleague. To the same extent the public is inclined to accept the young lawyer in situations so recently covered by administrative law.

It is obvious from what I have said that business is more dependent than ever before upon the guidance of our profession. The advisory capacity of the lawyer is behind every business operating amid our political, economic and social complexities.

True, what has heretofore dramatized our profession, namely, work in the courts, has lessened. In its place has come an advisory status for the lawyer with even greater responsibilities.