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THE RELATION OF HISTORY TO THE STUDY AND PRACTICE OF LAW.

By H. H. Wilson.

[Read before the Society, January 12, 1887.]

In this age of accumulated knowledge, he who would know any one thing well must be content to remain ignorant of many others. In order to bring a limited area up to its highest state of productiveness the ordinary man must leave a vast region uncultivated. When one like Mill urges that there is time for all learning, the old as well as the new, it is well to remember that but few can bring to the task the leisure, and still fewer the mind, of a Mill. The question is ever being asked, "How can I best employ a few years in preparation for active life?" To the average young man who has but a limited time to prepare for the work of his life, before he will be compelled to enter upon it, the answer to this question is of vital importance. I will suppose this question to be asked by one who has chosen the profession of law.

It may safely be said that no other professional man finds use for so wide a range of knowledge as the lawyer. The nature of the law is such that its practice touches the practical life of man at every point. There is no relation in life, there is no transaction among men, that may not become the subject of judicial investigation. There is no branch of learning that may not, at some time, be of great use to the lawyer. The doctor's profession covers a wide domain of knowledge, but there is no branch of his practice that may not furnish the basis for a suit for malpractice, to successfully conduct which the lawyer must cope with his medical brother in the knowledge of his art. The management of a vast railroad system requires special knowledge of the several arts and sciences involved in it, yet, in fixing the responsibility for an accident, the lawyer may have to know something of them all. He, however, who would master all knowledge as a preparation for the bar will never enter the lists. Merely because a lawyer

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may be called upon to try a cause involving the proper construction of a broken bridge, it would not be advisable for him to master civil engineering before coming to the bar. That his first case may be one growing out of malpractice in the setting of a limb, is not a sufficient reason why the mastery of surgery should form a part of his preparation. That chemistry, natural history, geology, and even theological creeds may enter into the subjects of his investigations would not justify the lawyer in attempting to master these branches of learning as a part of his preparation for active life. He must necessarily depend largely upon experts in these various branches of knowledge, when it may become necessary for him to use them. These and kindred sciences are merely incident to the practice of the law, and while a knowledge of them may occasionally be of great value to the lawyer, an attempt to master them would leave no time for the practice of his profession. On the other hand, there are some branches of learning which, in their methods of investigation, as well as in the knowledge they impart, are so closely allied to the study and practice of the law, that no one who would stand high in that profession can afford to neglect them. Foremost among these stands history.

In estimating the practical value of any branch of learning as a disciplinary study, for a particular object, we naturally inquire what faculties are brought into activity, and what is the tendency or bias given to these faculties by such study. For instance, mathematics employs pure reason. The mathematician deals with the absolute. When his premises are granted, the conclusion inexorably follows. That the prolonged and exclusive study of such a science gives a peculiar bias to the faculty employed, there can be no doubt. The natural scientist reaches a conclusion which, while not so absolutely certain as that of the mathematician, yet has the highest degree of probability. While reason is still our guide we feel much less certain of the ground on which we tread. We have now left the domain of the absolute and entered upon that of the relative. Here we can no longer draw our conclusions with absolute certainty; we are now called upon to weigh the evidence and determine the preponderance of proof. Probability, very strong probability, may be reached, but not certainty.

On the other hand, the historian is compelled to content himself with conclusions whose probability falls far below that which attaches to the conclusions of the natural scientist. Here we are met at the

very outset with the most contradictory evidence coming from sources which seem to be equally credible. From the very beginning we are compelled to test the credibility of our witnesses, to balance the probabilities of their testimony, and after all remain content with conclusions supported only by a greater or less degree of likelihood. It is certainly no disparagement to any branch of learning to say that the study of one furnishes the best discipline for one pursuit, and that of another for another pursuit.

To my mind it is this very inconclusiveness of its conclusions that renders the study of history so valuable to the lawyer. The historian and the lawyer alike deal with the affairs of men, the most uncertain of all subjects of investigation. The lawyer is to-day dealing with that ever-changing life of man which, centuries hence, will employ the future historian. The conclusions of the historian must always contain an element of uncertainty, because the subject of his investigation is human affairs, and his evidence is usually human testimony. Not only may this testimony be willfully false, but the witness may have been mistaken, or so prejudiced as to render his testimony of little or no value. The first lesson for the student of history is to learn the peculiarities of his author and to estimate the influence of his bias or prejudice upon his testimony; or, as the astronomer would say, we must first eliminate the *personal equation.* No one can safely read Hume without knowing his prejudice against the church, or Macaulay, without making due allowance for his bias in favor of the whigs. It is from a mass of contradictory evidence taken from sources of varying degrees of credibility, and in itself containing various degrees of probability, that the historian is to gather his facts and reach his conclusions.

The study of history is a daily exercise in the weighing of evidence and drawing conclusions of such probability as the proof may warrant. The conclusions, while never absolutely certain, may reach that high degree of probability upon which we would all be willing to act in our own affairs even though property or life itself were at stake. What better training than this can be given to one whose business of life it will be to try the differences between man and man upon the diverging and often contradictory testimony of living witnesses. The rules which he has learned to apply in settling a controverted point in history are equally applicable in the settlement of controversies at

the bar. For instance, should several witnesses narrate a transaction exactly alike in every detail, the historian, as well as the lawyer, would at once conclude that either the several narratives were copied from a common original, or were the result of conspiracy. Should the narratives agree in the main, but differ as to details, this would indicate an endeavor to tell the truth; and should the several witnesses who differed in the details of their narratives yet all agree as to a certain fact, the existence of this fact would reach a high degree of likelihood. In short, the general principles upon which the preponderance of evidence is ascertained are the same, whether applied by the historian or the lawyer, whether the question involved be the fate of a dynasty or the cause of a railroad accident.

The historian must ascertain the facts from such evidence as he may be able to command, never absolutely conclusive, seldom entirely satisfactory, yet always the best that can be obtained. These facts, however well they may be proven, if unorganized, are of little or no value. It is their relation to life, their bearing on the course of human affairs, that gives them value. It is then a part of the duty of the historian to bring these facts, thus ascertained, into their natural relation to each other, and thus show, if he can, their influence upon the course of events. Let us illustrate this two-fold duty of the historian. It will fall to the lot of some future historian to ascertain from the accumulated mass of contradictory evidence what actually did occur at the great battle of Shiloh. And surely if a few more of the eye-witnesses of that memorable battle volunteer their testimony, to find the real facts will be no small task. This done, it will be the duty of our future historian to take the facts so found, and tell future generations the effect of that battle upon the progress of the great conflict, and the effect of the latter upon civilization.

The value of this training to the lawyer is apparent when we look at the two-fold duty of the bar. While the lawyer is not the tribunal that in the last resort ascertains the facts in issue, yet it is his duty to assist in so doing. While the jury or court is to find the facts, it is the office of the lawyer to establish them by such evidence as a very imperfect and sometimes very corrupt human nature may render available. When the facts are thus ascertained, or should they be conceded, it becomes necessary to determine to what relief these facts entitle the client. In other words, it now becomes necessary to apply

the general rules of law to the facts of the particular case. At first thought, this would seem a very simple matter. Suppose, however, the point at issue is one which has never been decided in our jurisdiction. Suppose it be a question of common law, and our own state decisions do not cover the point. We must then draw our precedents from the decisions of thirty-six independent states, having thirty-six independent jurisdictions, whose decisions are by no means harmonious, even on elementary principles of common law. Add to these a vast system of federal courts, as well as English and colonial, and we have a mass of independent and often contradictory adjudications from which the lawyer is to determine what rule applies to the facts of his particular case. These decisions, however conclusive upon the rights of the parties determined by them, cannot be considered the law itself, for the law cannot contradict itself; they are rather evidences of the law, and from them we must determine, if we can, the true principle applicable to the facts in hand. But where the adjudicated cases are hopelessly contradictory, what shall be our guide? The plaintiff presents an armful of authorities holding that the facts entitle him to recover, and the defendant an equal number holding that the facts constitute no cause of action. What now shall be done? The later Roman lawyers solved this problem by the simple rule of addition. By statute the court was required to count the authorities holding for the plaintiff, and then those holding for the defendant, and then he was to decide with the majority. If the number cited was the same for either side and Papinian was among them, his side should prevail. And as Papinian had expressed an opinion on most questions likely to come up, it was a rare chance indeed if a judge needed any acquirements beyond simple addition to enable him to decide the most important and complicated cases. The modern court asks for the basis upon which the decisions rest. The weight to be given to an adjudicated precedent will depend largely upon its historical soundness. No precedent, however well established by adjudications, can stand long in the face of modern juridical criticisms unless it comport fairly with historic truth. No case to-day is so uncertain as that which stands on precedent alone, with neither reason nor justice to support it. The law is not an artificial mechanism, but a natural growth. There is a unity and continuity in the law that will tolerate no precedent long that does not harmonize with the spirit of its growth.

The history of the growth of the law is but a part of the more general history of the race, and no mere *ipse dixit* of the courts can stand long against the admitted truth of history. The lawyer of to-day who relies merely on precedent, is having his foundation gradually sapped from under him. He must learn that error, however often repeated, does not cease to be error. He must learn that truth, even though unknown to Coke and Blackstone, is the best authority upon which to rest his case, and that justice is his most eloquent argument. It is the chief glory of the common law that it had its origin in the customs of the people, and that it is ever changing to meet their needs. Century by century principles and rules become obsolete because the life to which they applied has become extinct. On the other hand new principles and new rules arise as the necessary accompaniment of the new life born of every advance of the race. The historical law, the law of the past, vanishes unobserved, and a new law, the law of the present, is ever arising to take its place. The great mass of the law is found in the habits and customs of a people long before it is to be found on the dusty shelves of the lawyer. When the members of a community have voluntarily assumed certain relations toward each other, and such relations have existed so long that all have a right to rely on their continuance, and important rights depend upon such continuance, courts of justice recognize these relations and enforce the rights based upon them. The courts take up and crystallize the law which the people have consciously or unconsciously made for themselves in their daily contact with each other. Customary law is as truly enacted by the people as though it was adopted by the formal vote of their representatives duly assembled. It is therefore clear that when the circumstances which gave rise to any rule of customary law have ceased to exist, the rule itself ought no longer to be applied. Where there was no express enactment of a law there is no need of an express repeal. It is therefore one of the familiar maxims of the law that when the reason of a rule ceases, the rule itself ceases. It needs no argument to show that in order to know what is the law of to-day one must know the history of the people among whom the law has grown up. When the lawyer is asked whether or not a certain principle or rule of the common law is the law here and now, before he can answer with certainty he must know the circumstances that gave rise to this particular principle or rule, and he must know

whether those circumstances still exist. Then, whether or not a given proposition is the law of to-day, depends, not upon whether it is found in Blackstone or Kent, but upon its history.

When we remember the strong tendency exhibited by law writers and judges to copy from their predecessors, it is not strange that we should find in text books and adjudicated cases many things laid down as law, the reasons for which have long since ceased to exist. It will be seen, however, that the common law contains within itself a perfect remedy against any hardship growing out of the enforcement of a principle or rule after its utility has ceased. That the common law is sometimes harsh and unjust may be admitted. A careful examination, however, will show that most of these defects arise, not from any original imperfection in the law, but from the fact that rules and principles have been retained and enforced long after the reasons that gave rise to them have passed away. For this, not the law, but those who administer it, are responsible. A knowledge of the history of its growth, and the moral courage to lop off the dead members, is all that is necessary to preserve the body of the common law in a healthy and vigorous condition.

A forcible illustration of the doctrine just set forth is furnished by a recent decision of the supreme court of Kansas.* The owner of a large packing house in Leavenworth rented the same for a term of years at an agreed rent of $250 per month. The landlord insured the building for $10,000. Ten days after the execution of this lease the building was totally destroyed by an accidental fire, and the landlord received the full amount of the insurance. The tenant thereupon refused to pay the rent and suit was brought to recover it. Counsel for the landlord presented a vast array of authorities that showed beyond doubt that at common law, as taught in the books, the destruction of the building was no defense to a claim for the rent agreed upon. Judge Brewer, after a masterly review of the authorities, said: "The general doctrine of the common law unquestionably was, that upon a covenant in a lease of lands and buildings for a term of years to pay rent, the rent could be recovered after a destruction of the buildings leased by accidental fire. The express contract and promise was not discharged by an act for which the lessor was not responsible. * * * * * This doctrine is challenged by the counsel for the defend-

* Whitaker vs. Hawley, 25 Kansas Rep., 674.

ants, and it is urged that it has no foundation in natural justice; that the reasons for its existence have disappeared with the changed conditions of society, and that it ought not to be recognized as the law of leases in Kansas. * * * * * The feudal system shaped and modified the common law concerning real estate. Land could not be taken on execution. Alienation was difficult and expensive. The landlord was but the successor of the ancient feudal lord, and his rights were correspondingly sacred; but now, the holder of real estate has little or no vantage over the owner of personal property. The distinctions growing out of the feudal system are disappearing, and this distinction between the lease of real property and the hiring of chattels is one which sooner or later will cease to exist.* Insurance, now so common, works a change in the relative position of the parties. Formerly, the landlord was, to a great extent, at the mercy of the tenant, who might put an end to his liability by firing the building, and being in possession could do it easily and without probability of detection. The burden of such a loss would fall upon him who had so little means of prevention or detection; hence, one source of protection was to continue the liability for rent. But to-day the rule is insurance. By this, fire only changes the character of the owner's property from buildings to money—often a welcome change. And if the landlord gets the value in money, which he may put at interest, he certainly ought not to receive rent for that which has ceased to exist, and thus double his profits, and especially when the insurance premiums are paid by the tenants. In this case it appeared that the landlord had $10,000 insurance on the building which he has received. In other words, that amount he may put at interest while demanding rent for the use of property no longer existing whose price that is."

Had Judge Brewer been one of those who yield a servile obedience to long established precedent, closing his eyes to the truth of history and turning a deaf ear to the cries of justice, he would have given the landlord double profits on his wealth, and compelled the tenant to pay rent for the use of that which did not exist. And all this, not because it is just or reasonable, not because the safety of society of our day demands it, but because another people in another age found it a necessary restraint on lawlessness. This the court refused to do. Guided by the light of history, recognizing the changed conditions of

* It was conceded in this case that no rent could be recovered for the use of mere chattels after their destruction. Page 686.

the business world, and moved by the manifest injustice of the demand, it swept away a long line of venerable authorities and established what may be called a new dispensation of the law of leases.

That the lawyer should be familiar with the history of every people among whom any branch of our law has had its growth, may be illustrated by an example from the Roman law. We borrow almost the whole of our law governing the liability for negligence from the civil or Roman law. The terms in which its principles are expressed are taken almost exclusively from the Latin, and their exact meaning can be learned only from the history of the people who used them. A striking instance of this is found in the use of the word *paterfamilias*. By the Roman law, which is also our own, a specialist who undertakes to do that which is within the scope of his specialty is bound to exercise such diligence as is commonly exercised by a *diligens, bonus, studiosus paterfamilias*, and he is liable for damages resulting from his failure to do so.

The diligence of the ordinary *paterfamilias*, as known to English and American civilization, would hardly come up to our ideas of the duty of the modern specialist. We would shudder at the thought of placing our property, our health, and even life itself in the hands of one from whom the law exacted no greater diligence than that commonly exercised by the head of a family in his own affairs. The *paterfamilias* as we know him would afford a very doubtful criterion of diligence and care. But when we learn* that the family of classical Rome was indeed a principality, and its head a monarch, whose descendants, be they ever so remote or ever so scattered, yielded implicit obedience to his almost unlimited authority, whose daily life required the exercise of the highest faculties of the mind, we get quite a different idea of the diligence commonly exercised by the *paterfamilias*. The doctor, the druggist, the railroad engineer are no longer excused by showing the diligence of the head of a family as known to our civilization, but they are required to exercise "the diligence shown by a good and trustworthy specialist when dealing with his particular duties." †

* Hadley's Introduction to Roman Law, 107.
Maine's Ancient Law, 133.
Gibbon's Decline and Fall, Vol. IV., 341, *et seq.*

† Wharton's Law of Negligence, Second Edition, 1878, page 25.
Man sich unter einen diligens paterfamilias einen durchaus tuechtigen Mann zudenken haben, der ueber seine Angelegenheiten mit voller Aufmerksamkeit und ganzem Fleisse zu wachen gewohnt sei. Die Culpa des roemischen Rechts, eine civilistische Abhandlung von Johan Christian Hasse, Seite 508. (Quoted by Wharton.)

When we enter upon the construction of constitutional and statutory law, a thorough knowledge of local history is of the utmost importance to the lawyer. The best guide to the correct interpretation of a constitution or statute is the condition of the people who adopted it, the wrongs which were to be remedied and mischief to be prevented by it. No one who does not understand the history of the colonies, their unsuccessful efforts to establish a general government, the wrongs they suffered and mischief they foresaw, would be a safe counselor in the interpretation of the constitution by which our sister states are held together. No one who does not know of the controversies, differences, clashings of interest, and final compromises that took place in that remarkable convention, could safely undertake to interpret the instrument they finally adopted. In 1824, in one of the most important causes ever decided by the federal supreme court,* Chief Justice Marshall, the great expounder of the constitution, speaking for the court, held that the power of congress to regulate commerce between the states was exclusive of state control, and that the laws of New York granting a monopoly of steam navigation in the waters of that state were therefore unconstitutional and void. With no precedent to guide him, the great chief justice drew the argument with which he sustained his position almost wholly from the history of the colonies at and before the adoption of the constitution. It was in the consideration of these great constitutional questions, untrammelled by precedent, guided only by the history of the past, that Marshall's pre-eminent abilities shone at their best. This country has never yet fully recognized the debt it owes to the historical research of this its greatest jurist. In this case Webster made one of his most famous arguments, which in its nature was almost entirely historical. This form of argument had a peculiar fascination for Webster and was always powerful when wielded by him. No one can read the argument of Webster and then the opinion of Marshall without coming to the conclusion that the former as well as the latter did his part "to set free every brook and rivulet in the country.' The concurring opinion by Justice Johnson is based almost entirely upon "the history of the times," and upon "the general understanding of the whole American people when the grant was made." †

*Gibbons v. Ogden, 9 Wheaton, 1.
†Gibbons v. Ogden, 9 Wheaton, 225.

A good example of the value of local history in construing constitutional and statutory law may be found in a decision of the supreme court of Michigan.* When that remarkable tide of immigration so rapidly turned the sparsely settled territory of Michigan into a populous state, the spirit of western enterprise demanded a vast system of internal improvements. Accordingly when the people formed the constitution under which Michigan was, in 1837, admitted into the Union, they recommended therein an extensive system of railroads and canals to be constructed by the state at public expense. The legislature, in carrying out this recommendation, burdened the people with a debt of millions; and after destroying public credit, stopped but little short of a disgraceful repudiation. For all this burden and disgrace the state had nothing to show, except some unfinished railroads, which were soon sold for a small portion of the money expended on them. When the constitution of 1850 was adopted, the people, still feeling keenly the burden and disgrace brought upon them by these visionary schemes, provided in the new instrument that the state should in no manner aid works of internal improvement. Thus the people of Michigan absolutely prohibited in 1850 that which they had recommended in 1837. Soon there occurred one of those unaccountable oscillations in popular judgment upon financial questions to which the American people seem to be peculiarly subject.† In 1869, the legislature, yielding to popular demand, provided by a general law for the granting of aid to railroads by the several municipal subdivisions of the state. Millions of debt had already been contracted by the cities and towns of Michigan under this statute when its constitutionality was first presented to the supreme court of the state in 1871.

That court, in an opinion delivered by Justice Cooley, held the law unconstitutional and void. It was urged that other states had construed a similar provision in their constitutions as prohibiting only the state as such from incurring debts in aid of such enterprises, while it left the subdivisions thereof free to give such aid as they saw fit, and pay the same by general taxation. In reply to this argument the learned justice said, that whatever might be the just and proper *construction of this provision when found in the constitutions of other*

* Bay City v. The State Treasurer, 23 Mich., 449.

† For an interesting account of the variable policy of Michigan on the question of internal improvement, see Judge Cooley's "Michigan," in the American Commonwealth Series, chap. XIV.

states, whose history had been different, the public history of Michigan left no doubt that its people intended to deprive, not only the state as a whole, but its component parts as well, of the power to repeat the folly of the past. This decision has become a part of the history of the state, and has determined its policy ever since on the question of internal improvements. It is referred to here because the construction there given to an important constitutional provision is based solely upon the public history of the state and the well known feeling of the people at the time of its adoption. Here, then, we find one of America's foremost constitutional lawyers recognizing and adopting the public history of a state as the best guide in the interpretation of its fundamental law.

When we reach the broader domain of international law, we must rely wholly upon history for our precedents. Here there is no supreme power to prescribe rules of action; no court with jurisdiction to decide or power to enforce its decrees. The law by which nations are to be judged, in war or in peace, are to be learned only from the public history of the nations we call civilized; and the history of the intercourse of one nation with another is so intimately connected with the internal history of each that no one can understand the former without some knowledge of the latter.

Much might be said, did time permit, on the value of history in solving the ever recurring problems involving the security of life, liberty, and property. All these questions have arisen and been answered in some way by every civilized people. The communistic and nihilistic tendencies of the present would seem to indicate that these problems have not been finally disposed of, and that the lawyer of the near future may be called upon to reconsider and perhaps readjust them. In any discussion of these great questions, involving as they do the rights of all, the practical answers given to them by other nations in other times must always be of the highest importance.

It is perhaps needless to say that the study of history to yield the benefits here indicated must be something more than the daily conning of a given number of pages in a text book. What the student needs to be taught is not the facts of history, but how to find them for himself. In no branch of study is it more important that the student should do the work himself than in history. No one would now attempt to teach chemistry and botany without requiring of the student practical work

in the laboratory and the field. What the laboratory is to the student of chemistry, what the fields are to the student of botany, the well furnished library is to the student of history. The text book and the instructor are valuable as guides; but after all, that which is most valuable is obtained only by the individual research of the student himself. In this research the student should be led as near as possible to the original sources from which the facts are to be ascertained. Our own national history furnishes a fertile field for investigation, and the ease with which its primary and secondary sources may be obtained renders it peculiarly inviting. And may we not hope that at no very distant day the archives of this society may contain material for a comprehensive study of the history of our own commonwealth.

The range of history, like that of law, is limited only by the boundary that circumscribes the life of man. The historian deals with life as found entombed in the mute records of the past. The lawyer struggles with life governed by the passions, the prejudices, the hopes, and the fears of the present. Both alike, in reaching their conclusions, must tread upon uncertain ground and remain content with proof far short of the absolute. Law stands foremost among the practical sciences as an aid to history, and history in turn becomes the interpreter of law. As the lawyer gathers the facts of his case from the uncertain memories of living witnesses, as he draws his principles from the contradictory statements contained in his books, so the student of history must cross-examine his authors, probe their motives, estimate the influence of their prejudices, balance their testimony against that of others, and finally determine, by a preponderance of proof, the point at issue. So intimate is the relation between history and law that the best preparation for the study of either is found in the thorough study of the other