

Yale Law School
Yale Law School Legal Scholarship Repository

Faculty Scholarship Series

Yale Law School Faculty Scholarship

1-1-1944

Walter Wheeler Cook

Charles E. Clark
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers



Part of the [Law Commons](#)

Recommended Citation

Walter Wheeler Cook, 38 Illinois Law Review 341 (1944)

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Walter Wheeler Cook

Charles E. Clark*

MY real acquaintance with Walter Wheeler Cook began in the summer of 1919, when I went on the Yale Law faculty as its greenest member. Cook was then finishing his work at Yale for what proved to be only a temporary hegira to Columbia. Since he was an inveterate office visitor, congenitally disposed to debate everything from the latest theory of jurisprudence to the smallest detail of school operation, and since he took an especial interest in the younger faculty, I would undoubtedly have seen much of him in any event. It so happened, however, that I was given a small office which opened up into his. Hence chance thus put me in the natural flow of the burning lava from his mind, and in consequence daily and almost hourly I basked in its glow when I did not wither in its heat. This was for me a postgraduate legal education of inestimable value. By it, as I can now see, my legal thinking and my approach to legal education and the judicial process were permanently shaped. I regard Cook as, save Holmes himself, the earliest and still in some ways the most pre-eminent of our legal realists; and though the debate as to the definition of a realist is likely to continue, I doubt if there will be real question of Cook's outstanding place in the movement and hence in American legal thought.

It is now an easy criticism to make that the realistic philosophy was negative in character, that it was limited to pointing out the truism that legal thinking had been much, or too much, shaped by undisclosed and unadmitted preconceptions, and that its trend was towards destroying whatever certainty there was in the law. That, however, seems to me to say little more than that the objective of its central drive, now after the event, appears both so obvious and so accepted that we forget the need which gave it birth. One has only to go back to some of the former constitutional decisions, and to observe there—and, indeed, in numerous other branches of the law as well—how unblushingly conclusions were carefully deduced from premises all too blithely assumed, to be convinced that a change in the direction of greater straightforwardness was healthy and refreshing, in truth the healthiest development of our time in the legal field. Perhaps such a development was inevitable;

* Judge, United States Circuit Court of Appeals, Second Circuit; former Dean, Yale University School of Law.

it certainly was in accordance with modern habits and attitudes of thought generally. But it was the stimulus of vigorous and inquiring minds, such as Cook's, which actually shook the hold of conceptualistic thinking on law. And he brought to legal thinking not merely a constant and determined challenge to all juristic clichés, but, in addition, a special contribution in the scientific approach, the application of scientific method, to law. He had been trained in, and had taught, physics and mathematics, and was convinced that an objective approach was as feasible and as necessary in law as in scientific experimentation generally. And he constantly taught by example, so much so that his impress is large in the law school world and on the profession itself. One cannot foretell the future; but I venture to think that we shall not soon again see that kind of blind deduction from debatable premises which made our latest constitutional crisis so bitter and its direct resolution so disturbing to conservative minds. For this we have the leadership of Cook and of a few other kindred minds particularly to thank.

As a matter of fact, the driving force which kept him ever restless, even as he circulated among law school offices, as well as among different law schools, was perhaps his outstanding characteristic. Often he seemed to rush headlong into difficulties which a more compromising individual might well have smoothed over. On an occasion or two, particularly in later years, I came in contact with some of these movements of his, and faced the unfortunate necessity of having to assume opposition to some, as I believed, ill advised positions he had taken. But as I look over his career, I am not disposed to regret his lack of facility in compromise; for I recall how often being conciliatory or tactful means in essence a yielding and ultimate retreat from principle, making immediately for quietude, it is true, but ultimately for forfeiture of leadership. I prefer Walter Cook as he was—an eternal fighter who offered even his allies only the goad and the hair shirt—than as a tactful retreator from positions taken; and these, I fear, are the alternatives involved. At bottom in his make-up there was a great deal of human shyness or bashfulness. I suspect that he was often driven to his advanced positions because shyness initially suggested the withdrawal which his intellect would not countenance. One could only see him in his very pleasant home life to realize how human, even boyishly attractive, these qualities could be.

Others will undoubtedly speak of Cook's pre-eminence in his chosen field, including those seemingly so diverse as criminal law, conflict of laws, equity, and jurisprudence. I should like, however, to emphasize his unique contribution to a field crossing all these subjects, but, I believe, giving each of them its unique ap-

peal to him, namely, that of pleading and procedure. Since Cook spent all his life as a student—and a scientific student, too, who would make the law itself a science—there were those who thought him impractical. Actually his was the most practical of minds, as he viewed court litigation, much more practical than lawyers and judges whose eyes have been glued to a particular code. And his studies in the conflict of laws, where substantive doctrine is wrapped in the folds of differing procedures, in equity, where the modern union of law and equity worries so many legalists by its very simplicity, and even in common-law pleading, where, notwithstanding many technicalities, the fundamental rules are clear and simple—all these led to his notable emphasis on the straightforward approach which should be the aim of all procedure and is the goal of modern procedural reform.

In this field many particular topics which he made peculiarly his own by clarity and brilliance of treatment deserve special mention. Among these are his clear-cut analysis of the powers of courts of equity, including consideration of the conflict of equity and law, the pleading of the so-called "equitable defenses" in the modern civil action, the methods of enforcing equitable judgments, the utility and need of a system like the Australian for the enrollment and enforcement of judgments in other states of our federal system without the necessity of separate suit, and the effect of judgments under the full faith and credit clause of the Constitution. But there is one topic to which I wish to call particular attention because it seems to show so typically the razor-sharp quality of his mind, which so easily penetrated through a maze of abstractions, ponderous and confusing, to bring out the essential simplicity of the process actually involved. I refer to his two outstanding articles, sixteen years apart, on pleading facts: *Statements of Fact in Pleading under the Codes*¹ and *'Facts' and 'Statements of Fact.'*² These deal with a subject certainly trite enough in seeming; but all the maze of pseudo learning which had developed around law, facts and evidence, ultimate facts and evidential facts, and the other abstractions, had made simple pleading a dreadful and a fearsome task. It is not too much to say that the modern highly successful trend to simplified pleading is built upon Cook's demonstration that these abstractions were not absolutes, only at most differences of degree, which should turn not on formalistic rules, but on the need or convenience of the business in hand, and the amount of persuasive pressure the pleader desires presently to apply.

There has been much in American legal realism, at least in its outer fringes, to arouse and disturb the bar by causing the lawyers

¹ 21 Col. L. Rev. 416 (1921).

² 4 U. of Chi. L. Rev. 233 (1937).

to wonder whether its philosophy would allow any law at all to remain as a guide for the devout. It is refreshing, therefore, as well as instructive, to see how the thinking of one of the great leaders of the movement actually came out at the point of the most simple and practical system of court procedure yet devised.

Homer F. Carey*

THE death of Walter Wheeler Cook on November 7, 1943, marked the passing of one of the last of a very small and distinguished group of legal scholars who had given shape and direction to legal education in this country. For many years he was acknowledged to be an outstanding legal educator. His efforts extended beyond the domain of advancing formal standards for admission to study and practice; they went deeper—into the substance of law.

It is not necessary to detail here the specific contributions of Professor Cook to law by reference to his many writings upon a wide variety of legal subjects. In passing it may be observed that his writings are not voluminous, for the fine quality and outstanding character of his workmanship precluded this. A fair appraisal of his larger accomplishments and contributions to legal scholarship would include, among others, the following:

(1) His casebooks in equity and allied subjects brought together the relation between law and equity, historically and in contemporary law. The evolution and growth of obliterating tendencies in procedural systems was emphasized. Because the cleavage between the two systems had not vanished entirely with the years, the question of what relief could be afforded by our judicial system upon a given set of facts had the decided merit of realistic presentation. His analysis of the powers of courts of equity in terms of the *in rem* and *in personam* concepts has afforded a jurisdictional basis for equitable relief through fictional adaptations.

(2) In the field of conflict of laws, his basic conceptions of the judicial process in all conflict cases as involving in final analysis the application of the law of the forum were marked contributions to the subject. These conceptions are so fundamental that they form the basis for the cleavage between what might be called two schools of thought in conflicts, one of which follows the late Professor Beale; the other Professor Cook. The all-pervading extra-territorial force of the applicable rule of "law," a conception of the Bealian school, has unfortunately too fully permeated the re-statement of the subject. Professor Cook also emphasized the practical considerations that influence the choice of rules by courts

* Professor of Law, Northwestern University School of Law.