

The Rebuilding of Duke University's School of Law, 1925-1947

Part I

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The creation of a full-fledged, nationally recognized law school proved to be one of the most difficult tasks that President William Preston Few faced as he led in the organization of a major research university around Trinity College after December, 1924. Early in that month James B. Duke had announced the creation of the Duke Endowment and specified that the university, which Few had proposed to him several years earlier, was to be a prime beneficiary of the perpetual trust. When the trustees of Trinity College later in December, 1924, accepted the philanthropist's offer, Duke University was officially launched.¹ Although Few began almost immediately to search for an outstanding legal scholar to serve as dean and help plan and staff the law school, the search ended up taking five, frustration-filled years. Once found, the new dean of Duke's law school, Justin Miller, played the key role in getting it off to a brilliant start insofar as its faculty and program were concerned. Yet by 1934 President Few and some of his close advisers had, for a variety of reasons, grown disenchanted with the young, ambitious dean, and Miller resigned from his position at Duke in somewhat ambiguous circumstances early in 1935. Prior to that time, however, Few at one point felt that the long, careful search for a dean of the law school had ended up most auspiciously indeed. What initially justified that verdict and what happened subsequently to change it?

In launching a full-fledged law school, Duke built on a respectable foundation that had been laid in Trinity College. Although Trinity had offered an undergraduate course in law as early as 1868 and there had been intermittent attention to instruction in law after that date, not until 1904 did Trinity establish a school of law. Underwritten by annual payments from Benjamin N. Duke and his younger brother, James B. Duke, the school was headed by Samuel Fox Mordecai, a colorful teacher and strong legal scholar. At a time when many law schools required no previous college work of its

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¹For a fuller discussion of the relationship between the Duke Endowment and Duke University, see Robert F. Durden, *The Dukes of Durham, 1865-1929* (Durham: Duke University Press, 1975), 199-260.

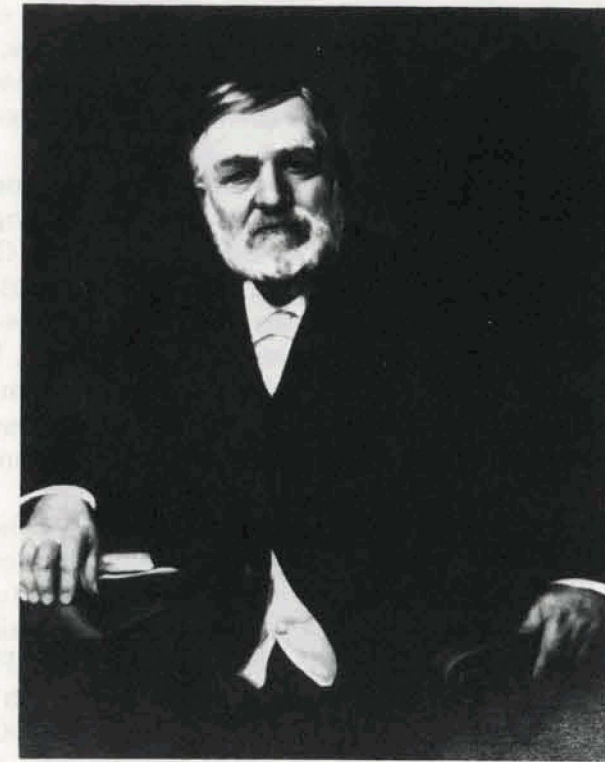
students—indeed many persons still prepared to become lawyers by “reading” law with a practitioner rather than by attending any college or law school—Trinity joined a select group in requiring from the first that entrants in the law school had to have completed two years of college work. In its second year Trinity’s law school was invited to join the new Association of American Law Schools, which then had among its thirty members only one other institution from the South, the University of Tennessee. Employing the case method that Harvard had pioneered in the late nineteenth century, Trinity’s law school remained small, but it stuck by its high standards and remained indifferent to numbers.²

With Dean Mordecai in his mid-seventies and unwell by the time Duke University was under way, Few at first took what was for him a most uncharacteristic stance: he sought a southerner to head the expanded, full-fledged law school. Few, like his predecessor at Trinity, John C. Kilgo, and like others in key faculty and administrative posts at Trinity, took great pride in Trinity’s maintaining a broadly national and “reconstructed” outlook. Shunning both neo-Confederate romanticism and embittered sectional defensiveness, Trinity College sought to exemplify forward-looking aspects of the New South. The fact that both Washington Duke and his sons were staunch Republicans who combined deep Tar Heel roots and attachments with national economic interests only served to strengthen and underscore Trinity’s orientation. Yet when Few began the search for a dean of the law school, he privately confessed: “For this particular place I feel that the preference should be given to a man of Southern antecedents or associations, though I have never before intimated this as a requirement for men in any of the posts here. In fact more than half the men on the Trinity College staff are not from the South.”³ Few never elaborated on his regional preference concerning the legal deanship, but the fact was obvious that law possessed more state and regional peculiarities and ramifications than, for example, medicine or theology. At any rate, Few would end up with a nonsoutherner, but the original preference was one factor in the long delay in the naming of the dean.

Concerning the law school, Few worked closely with William R. Perkins, legal adviser to James B. Duke and chief author of the indenture establishing the Duke Endowment. A native Virginian and graduate in law from Washington and Lee University, Perkins served as an influential trustee of Duke University. In fact, after the death of James B. Duke in October, 1925, Perkins, together with George G. Allen, became a primary inheritor of much of the late millionaire’s power and a chief interpreter of his philanthropic plans and intentions. It was no wonder, then, that Few early on informed

²Earl W. Porter, *Trinity and Duke, 1892-1924: Foundations of Duke University* (Durham: Duke University Press, 1964), 143-146, hereinafter cited as Porter, *Trinity and Duke*. For the launching of the Association of American Law Schools in 1900 and the larger national picture of legal education in the early twentieth century, see Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 38 and passim, hereinafter cited as Stevens, *Law School*.

³William P. Few to W. R. Vance, April 9, 1925, William Preston Few Papers, Duke University Archives, Duke University Library, Durham, hereinafter cited as Few Papers.



In establishing a law school Duke University built upon a foundation laid at Trinity College. Trinity offered an undergraduate course in law as early as 1868 and created a school of law in 1904. Samuel Fox Mordecai, a colorful teacher and strong legal scholar, headed the Trinity law school. Portrait from the Duke University Archives, Duke University Library, Durham.

Perkins, “I shall look rather especially to you for help in matters connected with the Law School.”⁴

Writing to a friend of Perkins in Yale’s law school, Few requested the suggestion of a “thoroughly first-rate man” to head up the Duke school, “a man of the calibre that you would require in a dean of the Yale Law School.”⁵ Letters soliciting suggestions also went to Huger W. Jervoy, dean of law at Columbia, and to a Harvard law professor. One of the men whose name cropped up in response to these initial inquiries actually visited Duke at Few’s request in April, 1925, but Few soon advised Perkins that, “I am not quite sure that he is just the man for dean.”⁶ Meantime as Few took the lead in the search for a dean of the new School of Religion as well as participated in the searches for various key appointees in the arts and sciences, Robert L. Flowers, Duke’s vice-president for finance and Few’s longtime associate, interviewed various law deans and prospective appointees in the North.

⁴W. P. Few to William R. Perkins, April 10, 1925, Few Papers.

⁵W. P. Few to W. R. Vance, April 9, 1925, Few Papers.

⁶W. P. Few to W. R. Perkins, April 21, 1925, Few Papers.

Another strategically placed ally was George B. Pegram, an alumnus of Trinity who served as dean of Columbia's School of Mines, Engineering, and Chemistry. At Pegram's request, Harlan Stone, associate justice of the United States Supreme Court, wrote Few with a list of suggestions for the Duke deanship.⁷

Having successfully recruited the new dean of the School of Religion, Edmund D. Soper, at Northwestern University, Few promptly requested him to seek advice from the dean of the law school there. Officials of the Rockefeller Foundation in New York, with whom Few conferred in June, 1925, also recommended the Northwestern dean as a likely source of sound advice, and Few promptly began corresponding with him. Warned of the substantial salaries being paid in top law schools, Few calmly replied that he was quite familiar with that aspect, but "still I am desirous of getting for dean here a man of just such calibre as would be required at one of these [top] places."⁸

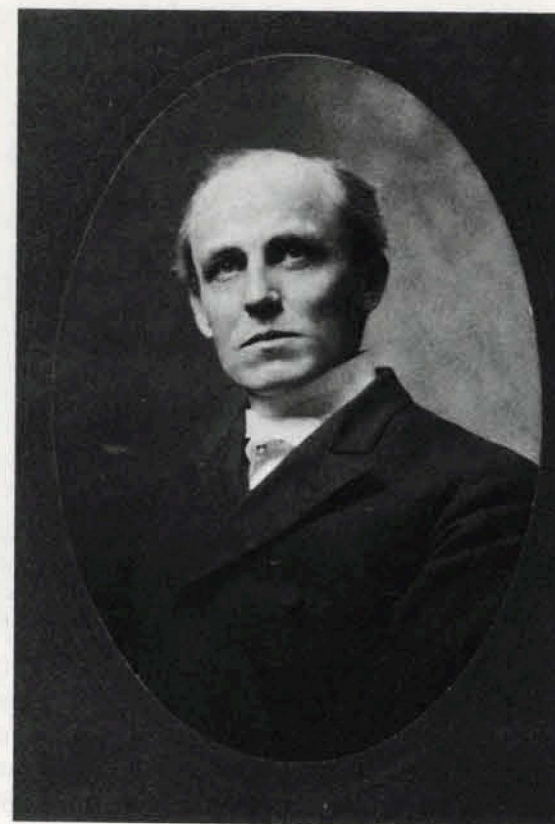
One bit of advice to which Few quietly, but firmly, paid no heed came from a Trinity alumnus in law. His premise was that various developments at Trinity College early in the century—such as President John C. Kilgo's "independent attitude" and the trustees' defense of academic freedom and unorthodox racial views in the famous affair concerning Professor John Spencer Bassett in 1903—had estranged the lawyers of North Carolina from Trinity and inspired them to criticize it as a "Northern Methodist institution." Since Duke now needed the goodwill and interest of the South's lawyers, 85 percent of whom the alumnus believed to be "in sympathy with the traditions of the Old South," Duke must "legitimately cultivate their friendship." It could only do so, he argued, by avoiding the mistake of other institutions in naming a "big, scholarly man" as dean and choosing instead a lawyer who had practiced extensively or served as a judge, one who had ability as an executive and a "publicity man."⁹

Although Few had a knack for graciously sidestepping unsolicited advice with which he disagreed, a "big, scholarly man," preferably of southern origins, was precisely what he wanted for the Duke deanship. And in the spring of 1926 he finally believed, after several false starts and disappointments, that he had found just the person to fill the bill. Huger W. Jervey, forty-seven-year-old dean of law at Columbia University, was a native of Charleston, South Carolina, and a graduate first of the University of the South (Sewanee) and then of Columbia's law school. Recommended to Few

⁷Harlan Stone to W. P. Few, June 9, 1925, Few Papers.

⁸W. P. Few to Edmund D. Soper, June 30, July 14, 1925, Few Papers. See also W. P. Few to J. H. Wigmore, July 29, 1925, Few Papers.

⁹George P. Pell to B. S. Womble, November 27, 1925, enclosed in Pell to W. P. Few, November 28, 1925, Few Papers. As a young historian at Trinity College in 1903, John Spencer Bassett wrote an article in the *South Atlantic Quarterly* deploring the calculated exploitation of the race issue by the North Carolina Democratic party and such newspapers as Josephus Daniels's *Raleigh News and Observer*. Daniels whipped up public opinion against Bassett and demanded that Trinity fire him. The trustees, adopting a statement of academic freedom, refused. Porter, *Trinity and Duke*, 96-139.



According to some critics, various developments at Trinity College—such as President John C. Kilgo's "independent attitude"—had estranged the lawyers of North Carolina from Trinity. As a result, one of the college's law alumni warned Duke University President William P. Few to cultivate the goodwill of the state's attorneys in selecting a dean for the law school as he began organizing the university in 1925. Photograph of Kilgo from the Duke University Archives.

by various persons as well as by his prestigious position and geographical origins, Jervey negotiated—or perhaps dallied—with Few about the post at Duke over an unusually long period. A visit to the campus in March, 1926, had to be canceled because of Jervey's illness. Then when Few subsequently tracked him down in June, 1926, at the Mayo Clinic where Jervey was being treated for an ulcer, Jervey preferred that Few not make the trip out to Minnesota but wait until Jervey traveled to Charleston for a rest. Since his health had become problematical, Jervey felt that tackling a new job would be impossible. "Get your dean," he urged Few, "and if some day he and you feel that you would like a Southerner to teach Constitutional Law to Southerners, it may be that the urge to go back to the South would be more than I could resist, although a thousand things might happen between now and then to make it impossible." The transplanted Charlestonian asserted his belief that, although his conscience fought against his leaving Columbia, the "South is the critical point of a good deal of our national development

today." Duke had a "glorious opportunity" and, frankly, "selfish feelings lead me to wish I could have shared in it."¹⁰

Was it a yes, no, or a maybe? Few, unfortunately as it turned out, interpreted the letter as a maybe and replied that Jervy was "the only man I know who is at once thoroughly familiar with our field and with the problems of a first-class modern law school." Few therefore looked forward to talking with Jervy when he returned to the East and felt like conferring.¹¹ That time was slow in coming, for in July and August, 1926, Few could not locate his elusive quarry. By the time Few finally reestablished contact in November, 1926, his own sense of urgency about the law school was on hold, at least temporarily.

The less important, transitory reason for Few's slowing down about the law school was that the building program for Duke's physical plant was unusually vast as well as complex. The old Trinity campus, beginning in the late summer of 1925, was to be totally rebuilt, with eleven new red-brick structures of neoclassical or Georgian design added to a few of the older Trinity buildings that were to be retained. Upon the near completion of that campus, work was to begin on the even more extensive Tudor Gothic buildings on the new campus a mile or so to the west of the old one. Until that campus was ready for occupancy (in September, 1930, as it turned out), the old Trinity campus had to house Duke's undergraduates, male and female, as well as the growing number of graduate and professional students, not to mention the burgeoning faculty. In short, when the first phase of the building program fell somewhat behind schedule in 1926, Few and his associates found themselves increasingly short of space on a crowded, construction-filled campus. Few admitted to Perkins, that under the circumstances, Duke was probably fortunate not to have "a budding law school" on its hands in September, 1926.¹²

A more substantial and long-range reason for Few's temporary and partly accidental decision to slow down on the law school was that money was not actually as abundant at Duke as a dazzled public, including many at Duke and in its constituency, long and erroneously believed. The truth was that Few had sold James B. Duke on a most ambitious plan: two undergraduate colleges (one for men and one for women), a graduate school of arts and sciences, and professional schools in theology, law, business, and medicine. (Schools of nursing and forestry were not in the original plan but were added later.) Like Trinity earlier, Duke University was committed to excellence and, in words used by James B. Duke in his indenture creating the Duke Endowment, to "attaining and maintaining a place of real leadership in the educational world. . . ." Concerning the law school, Few in an early and still optimistic phase had privately boasted that funds had been allocated to make Duke's "the best endowed law school in this country; and a large amount has already been set apart from the building fund for the purchase

¹⁰Huger W. Jervy to W. P. Few, June 15, 1926, Few Papers.

¹¹W. P. Few to H. W. Jervy, June 28, 1926, Few Papers.

¹²W. P. Few to W. R. Perkins, August 9, 1926, Few Papers.



Pictured here is the Duke University law faculty and class of 1925-1926. Photograph from the Duke University Archives.

of a great law library."¹³ The embarrassing truth about inadequate funding gradually became clear, but, unfortunately, only after James B. Duke died in October, 1925. Two years later Few privately confessed to one of his advisers:

I am frankly worried. It was just as clear to me the day Mr. Duke died as it is now that we do not have either in hand or in sight sufficient resources to develop the other departments of the University as Mr. Duke expected us to develop them and also support the sort of medical school and hospital that the public expects of us and that all of us want to see here.¹⁴

One possible solution to the painful dilemma was to seek additional endowment in the form of gifts. Given the tremendous, even if often misleading, publicity concerning J. B. Duke's very great generosity to the university, Few could hardly go public with his campaign. Behind the scenes, however, he quietly canvassed among a number of the wealthy

¹³W. P. Few to W. S. Barnes, June 15, 1926, Few Papers.

¹⁴W. P. Few to Dr. Watson Rankin, September 16, 1927, Few Papers.

businessmen in New York who had been associated in one enterprise or another with J. B. Duke. One who greatly assisted in this effort was Clinton Toms, the president of the Liggett and Myers Company and longtime, staunch friend of both Few and Trinity-Duke. In response to Few's appeal for help, Toms advised that he liked Few's memorandum concerning the law school, and if C. C. Dula, chairman of Liggett and Myers' board of directors, showed no interest in helping with a school of business, then Toms would talk with him concerning the law school. Many months as well as many conversations and letters later, Few supplied a more fully developed statement about the law school for Toms to use with Dula: "A million now and a million in his will might do it," Few coolly suggested, "if he can't be brought to give all now."¹⁵ Dula fell short of having Duke's law school named for himself, for Toms could only secure from him a gift of stock worth \$200,000.¹⁶

While searching, mostly in vain, for substantial new endowments, Few temporized concerning the law school. The law students had to be taught, however, and Mordecai's death in 1927 left a void. Few took one measure to alleviate the situation by making two appointments. The first in July, 1927, was W. Bryan Bolich, a Trinity alumnus who had gone on to take, with high honors, degrees in jurisprudence and civil law at Oxford University before entering the practice of law in Winston-Salem, North Carolina.¹⁷ The other appointment was Thaddeus D. Bryson, a graduate in law from the University of North Carolina who had become widely respected in the state as a judge of superior court. Bryson's appointment was partly a bid for recognition and support for Duke's law school from the North Carolina bar and, as such, it worked indeed well. Among others who praised the appointment, Angus W. McLean, governor of North Carolina, considered Bryson one "who understands fully the genius of our people" and the appointment "most fortunate for Duke University and the State."¹⁸

Still pursuing Huger Jervey, Few had consulted him before making the two new appointments. Few's efforts to confer with him in the spring of 1928 failed, but when Jervey finally visited the Duke campus in June, 1928, he was still ambivalent about the Duke post; that is, he stated that he would like a professorship in the law school but remained uncertain about serving as dean. Moreover, he was worried about an adequate law library as well as proper support from the trustees. Few continued to hope that Jervey would at least give the deanship a try without making a final commitment.¹⁹ By late 1928, however, Few was clearly losing patience; and, though the record

¹⁵Clinton Toms to W. P. Few, May 16, 1927, and Few to Toms, November 1, 1927, Few Papers.

¹⁶Clinton Toms to W. P. Few, December 5, 1927, Few Papers. See also Few's letters about the proposed medical school to Bernard M. Baruch, May 17, 1927, and Baruch's noncommittal reply, May 20, 1927, Few Papers.

¹⁷W. Bryan Bolich to W. P. Few, March 15, 1926, July 13, 1927, Few Papers. Few also consulted with B. S. Womble and other prominent Trinity-Duke alumni in Winston-Salem concerning the appointment. See Few to Womble, May 28, 1927, Few Papers.

¹⁸Robert L. Flowers to W. P. Few, August 3, 1927; Few to Thaddeus D. Bryson, August 30, 1927; and Angus W. McLean to Few, September 2, 1927, Few Papers.

¹⁹W. P. Few to Clinton Toms, June 23, 1928, Few Papers.

is not clear, either he abandoned the pursuit early in 1929 or Jervey finally rejected the offer unequivocally. At any rate, by that time Few was fortunately primed for another line of attack on the problem of the law school deanship.

An old friend of Few's from his years at Harvard's graduate school, Francis G. Caffey, had become a prominent lawyer and then federal judge in New York. Caffey wrote Few about a chance conversation with William Draper Lewis. Formerly dean of the University of Pennsylvania's law school, Lewis had become the founder and director of the American Law Institute, a prestigious organization of academic lawyers and practitioners who were undertaking to produce authoritative restatements concerning various aspects of the law. Lewis expressed interest in advising Few about the planned expansion in law at Duke.²⁰ Few, pursuing other leads, and particularly Huger Jervey, at the time of Caffey's letter, did not promptly follow up on the suggestion about William Draper Lewis. There was correspondence, however, and early in 1929 Few and several of his associates conferred with Lewis in Pinehurst, North Carolina. When Few rejected Lewis's proposal that Duke's law school become primarily a research-oriented affiliate of the American Law Institute, Lewis suggested that a committee of leading figures from the law schools and legal profession might be assembled to advise Duke about its law school. Few liked the idea and requested Lewis to engineer "the whole thing for us, of course allowing us to pay the expenses." Few recalled that an official of the Rockefellers' General Education Board had made a similar suggestion concerning Duke's proposed medical school, and the ensuing conference at Johns Hopkins University in 1927 had resulted happily in the naming of Wilburt C. Davison as the first dean of Duke's medical school.

Among the half dozen prominent legal scholars whom Lewis recruited to write advisory statements concerning Duke's law school were the law deans at Minnesota, Pennsylvania, and Southern California as well as prominent professors of law at Harvard, Yale, and Columbia. While emphases varied in the statements, there was among them agreement that Duke's law school should be kept small (which quite suited the traditional Trinity-Duke preference for quality rather than large numbers) and that a carefully selected faculty of legal specialists should be expected both to teach and to do scholarly research.²¹ A dinner at the Mayflower Hotel in Washington, D.C., in May, 1929, brought together Few, Lewis, and various members of the advisory panel.

The immediate upshot of the procedure that Lewis had arranged was that Few considered one of the advisers, Professor Noel T. Dowling of Columbia,

²⁰Francis G. Caffey to W. P. Few, November 3, 1926, Few Papers. Regarding William Draper Lewis and the American Law Institute, see Stevens, *Law School*, 144n.

²¹William Draper Lewis (comp.), "Reports in Regard to the Establishment of the Law School at Duke University," Law Library, Duke University; unsigned memorandum, April 13, 1929, Few Papers; Glen J. Carter, "The Rise to National Stature of the Duke University Law School, 1927-1935" (unpublished seminar paper, 1978), Duke University Archives, hereinafter cited as Carter, "The Rise to National Stature of the Duke Law School."

