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A Course in Statutes

Ernst Freund

professor needs an operation upon the nose, if not upon the brain. And no candid professorial mind can listen to Mr. Kocourek's remarks without realizing that no one is adequately prepared to teach any branch of the law unless he knows something of the science of law. Certainly the law professor should study jurisprudence—should make a lifelong study of it. Otherwise he finds himself in the situation of the songster, who doesn't know where he is going, but knows only that he is on the way. And every law professor owes a debt to Mr. Kocourek for the impetus he has given to the study by furnishing materials otherwise inaccessible to American lawyers.

Furthermore, we must all subscribe to his contention that the law schools cannot simply sit tight, satisfied merely to accept and to apply a "strictly empirical tradition" as to legal education. We must be at all times alert and ready to enlarge, or to change the scope and content of, legal education whenever such enlargement or change is necessary or desirable. Legal education cannot remain stagnant. Surely it is wrong to make a mere fetish of the "case system." Surely it is wrong to take the view that, if jurisprudence cannot be taught by the case system, it should not be taught at all. We certainly do not take that view at Harvard.

Furthermore, I heartily agree with Mr. Kocourek that a college undergraduate is not equipped to study jurisprudence, and that, too, for the reason that Mr. Kocourek gives: "It is precisely because the underlying data are not and cannot be understood" by him. One cannot generalize until he has the data upon which to base his generalizations.

But it is for this very reason that it seems clear to me that a law student also is not equipped to study jurisprudence until the end, or near the end, of his course. It is for this very reason that at Harvard jurisprudence is given as a fourth-year subject. The course is open to students in their third year, however, and a number of them take it with pleasure and with profit. But Mr. Kocourek would have the law student take introductory courses in jurisprudence at the very beginning of his law school career. This it seems to me is unwise. "What understanding," asks Mr. Kocourek, "does he bring to his discussion of courses in chattels, if he cannot distinguish a right in rem from a right in personam?" It seems to me somewhat cruel to ram down a student's throat one professor's conceptions as to the nature of rights when the student is helpless to defend himself, because, like the college undergraduate, he lacks the necessary data on which to base an independent judgment. Jurisprudence surely cannot be studied in vacuo. Jurisprudence very probably cannot be taught by the use of cases merely, but surely it should not be taught dogmatically, as John Austin taught it, as all the law was once taught.

But, says Mr. Kocourek, "It is idle to suppose that an instructor can interrupt the busy hour of class work to make the explanation, or that he will succeed if he attempts it." I must take exception to the idea that in teaching a branch of the law it is "an interruption" to consider it scientifically. I have, for ten years, taught the subject of Trusts. One of the most difficult theoretical questions in the law is the question as to the nature of a trust. Maitland pictures a German jurist asking the question: "Are we to place this pre ious Rechtsinstitut under the title of Sachenrecht or Obligationenrecht?" Dean Pound and Dean Stone, as some of you may recall, did not entirely agree upon the nature of a trust when the question was mooted here at our last meeting. Think what an advantage it would be to one of these gentlemen (if they taught law in the same school) if he could get the jump on the other by impressing his views upon the legal neophyte by giving an introductory course in jurisprudence.

In some schools it is said that legal education is not as a rule sufficiently practical. The remedy they suggest is to devote an enormously large part of the curriculum to courses on procedure. Mr. Kocourek contends that we have too much of the "tradesman" point of view in legal education, and suggests as a remedy the devoting of a considerable part of the curriculum to jurisprudence. In some schools they would perhaps combine these two ideas, giving lots of time to procedure, and lots of time to jurisprudence, and squeezing in from time to time a bit of substantive law. The question is, of course, one of degree, one of the relative value of many good things. But I, for my part, am not sure that the utilitarian value of law school instruction is in proportion to the amount of adjective law taught, nor that the inculcation of legal idealism is in proportion to the number of courses in formal jurisprudence. I should say this: By all means let the teachers of law study jurisprudence, carefully, prayerfully, continuously, consistently. Let the student study it, too, if you will, but at the end, not at the beginning, of his course.

A Course in Statutes

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Mr. Freund, referring to the fact that since the meeting of 1916, at which his paper on Statutes was originally to have been presented, he had published an article upon the subject, fully developing his ideas, in the Illinois Law Review (volume XIII, p. 264, November, 1918), asked permission to speak

informally. The following is a summary of the points made in his address.

1. A course in Statutes, to be a distinct addition to the law curriculum, should be different from the treatment of statutes in other courses (such as Bankruptcy), and, above all, should not duplicate the course in Constitutional Law.

2. A course in Statutes might be conducted with a view to discussing formal requirements (title, form of amendments, etc.), questions concerning operation (taking effect, repeal, etc.), and questions arising out of the violations of statutes (nullity of acts; liability). The practical value of such a course would be considerable; but it would be like any other course conducted on the basis of cases, and would present no novel problems of scope or method.

3. A course in Statutes might also be a course in Statutory Construction; but such a course, having no other end than the discovery of rules of construction, would be unsatisfactory, in that all judicial construction of legislation has an arbitrary element in it; a court being always at liberty to find a specific intent at variance with any general rule. The study of judicial construction would be valuable mainly as a study of tendencies and possibilities, indicating how changes of favorable or adverse construction should affect the drafting of statutes. Familiarity with construction, in other words, is an indispensable aid in the study of statute making.

4. The study of Statutes assumes a new aspect when, instead of asking how a given situation arising under a statute is to be dealt with, we inquire how a given situation is to be dealt with by a statute; when, instead of looking upon a statute as something to be judged after enactment, we look upon it as something to be fashioned before it becomes a law.

5. Applied to statutory terms and phrases, this means that the object of inquiry is the relation of latitude or definiteness of expression to the conditions under which the statute is to operate, and to the organs to which its language is addressed, and by which it is to be construed in various stages of application, administration, and enforcement. (Indefinite terms in defining subordinate and in defining adverse interests; indefinite terms in penal statutes, in enabling acts, in imposing civil liability, in adjusting property rights, etc.)

6. Applied to the subject of statutory powers, it means that, after it has been ascertained, upon the basis of judicial decisions, what are the tendencies in favor of or against implying unexpressed powers, a systematic study will be made of the question how far general enabling provisions will serve beneficial purposes, and how far they should be guarded by qualifications.

7. The question of statutory responsibility will be handled, not like that of criminal responsibility at common law, as one of causation or guilt, but as the problem of accomplishing an object of public policy in the most effectual manner and with the least possible hardship, annoyance, and injustice.

8. In prescribing conditions for the validity of legal acts (a substantial proportion of all statute law), the problem will be: How much can be demanded, with the expectation of reasonably convenient and certain compliance, and without jeopardizing the security of transactions by the risk of technical error? Everything additional means an additional peril, if the requirements are treated as mandatory or jurisdictional; if treated as directory, they are liable to be ignored. It is one of the tasks of a science of legislation to find a solution for this dilemma.

9. In choosing methods of control, legislation is confronted with the task of achieving its object with the least amount of restraint and friction. The solution of this task involves the technique of publicity and licensing requirements, of statutory liability and compensation, and the question of the legitimate province of standardization of private action.

10. The province of a course in Statutes will thus be the discovery and development of rules that can be predicated on the basis of the data of the legislative, administrative, and judicial history of statutes, concerning the production of the maximum of benefit by the minimum of restraint or requirement imposed by legislation.

11. A systematic synopsis of topics and problems with regard to which rules applicable to legislation can be formulated will be found in the special report of the Special Committee on Legislative Drafting of the American Bar Association for 1919.

12. Assuming a great body of rules to exist, or to be capable of development, that should guide and control legislation, it should further be recognized that these rules are of a legal nature. They can be clearly differentiated from norms of legislation, that belong to the domain of economic science or sociology. The relation to rules of Political or Administrative Science is closer; but here, too, the line can be drawn with great clearness.

13. A rule of legislation is a legal rule, if it is based upon information and processes of reasoning which constitute the lawyer's equipment and habit of thought. The habit of legal thought is directed to clear and sharp issues, fit for judicial determination, while political thinking looks to action on the basis of adjustment and compromise, and formulates its issues accordingly. The province of law in legislation is the function of the legal formula in anticipating and avoiding controversy.

14. The law that enters into the making of legislation differs from the law that enters

into the making of a judicial decision, in that the latter operates with logical processes, the former with empirical data. The nice problems in judicial law are problems of logical refinement; those of legislative law are problems of adjustment, of the fitness of given methods to produce desired results. In this respect a course in Statutes differs fundamentally from other law school courses.

15. This fact of fundamental difference presents an initial difficulty in teaching Statutes. The law student is used to reasoning out propositions, not to considering the fitness of means to ends. There is the constant temptation of giving him what he expects, namely, case law on Statutes. Moreover, he wants something that will be helpful in practice, and he does not look forward to being a draftsman of statutes. It is therefore wise to insist constantly on the close connection between drafting and construction, and never to let him forget that in trying to find the most adequate legal formula he becomes familiar with the meaning of formulas, adequate or inadequate, that he finds in statutes.

16. The pedagogical value of a course in Statutes is twofold. It teaches the student to read a statute, so that he can recognize the strength and weakness of its provisions, and see, not only what is in the statute, but also what is not in it, but ought to be. It also teaches the student to think constructively, instead of thinking only critically. In other courses there is likewise the possibility of constructive thinking, but as a rule there is no time to develop that phase of a subject.

17. From the point of view of jurisprudence or legal science, the value of the course lies in opening the eyes of the student to the part played by legislative thought in the development of the law. In the law school, statute law becomes taught law only in so far as it has passed through the mind of a court for judicial purposes. The student never realizes that there is much in the way of necessary legal development that judicial thought, by reason of its inherent limitations, is incapable of producing, and that must come, and in large part has come, from the constant thought that is given in the community to problems of legislation.

18. A course in Statutes cannot be conducted profitably on the basis of a collection of cases. Even where cases are valuable, what counts is generally not to be found in the reasoning of the court. The unwisdom of a given formula may be capable of being demonstrated by a series of decisions, but it would be waste of time to make the students read them. The decision of the Supreme Court, sustaining the constitutionality of a provision, may be less important than a serious of acquittals, to be gathered only from newspaper reports, in judging its success or failure.

19. The proper material for teaching Statutes must be statutes. They are often dry and discouraging reading, but occasionally the dryness can be relieved by illuminating glimpses into legislative or judicial history. In private law, marriage acts, adoption acts, conveyancing acts, are typical statutes; in public law, liquor laws, labor laws, railroad laws, and public utility laws furnish abundant illustrations. Statutes which merely codify common-law principles do not throw light on the specific problems of legislation that can be made the subject of instruction.

20. In a course of about 44 hours, it is possible to cover only a small part of the topics outlined in the report above referred to. The most useful topics would probably be Part I, B (definiteness of terms), E (enabling provisions), F (formal requirements), G (remedial and savings provisions), and Part II, B (publicity provisions), and C (licensing provisions).

21. The subject as outlined deals with the Technique of Legislation, with such phases of statute law as are not peculiar to any particular subject of legislation. There are wider aspects of legislative jurisprudence—above all, the problem of legislative standards and equities. It would probably be possible to make a study of legislation from this more substantive point of view, and contrast it with common law and with equity. But that phase of legislation should be divided among teachers of different subjects, if it is to receive competent treatment. It might furnish material for fourth-year or postgraduate courses, while a general course in Statutes should form part of the regular curriculum.