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Cases and Materials on Legislation

Kenneth Craddock Sears

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A few brief observations in conclusion. While Mr. Garlan proclaims his allegiance to the "philosophical school" of legal realism, he pursues his course without raising any philosophically controversial issues. His study is thus unaffected by any special theories of law. To the philosopher this is a merit of the study. In the rereading of Mr. Garlan's pages the reviewer was struck by the frequency of the term "elastic." It would be easy to gain the impression that his work is dynamic of traditional legal procedures. However, in his chapter The Unity of Justice, he attempts, not wholly satisfactorily, to soft-pedal his negative analysis. He is more successful in this than in his discussion of the "problematic" and the "indeterminate in justice" where he finds that legal formalism provides within itself for elasticity both in the inherent vagueness of the rules as applied to concrete cases whether by judge or lawyer, and by the inclusion of "general formulae." His point of view may fairly be summed up in the quoted words of Vinogradoff that "law, being a human institution, ages not only in its single rules and doctrines, but in its national and historic setting, and the call for purification and reform may become more and more pressing with every generation" (p. 71). For Mr. Garlan the legal process is a phenomenon whose history exhibits what may be called an elastic stability. From the philosophic standpoint the formal structure of law and its social phenomena are not in themselves subject to ethical criteria and criticism, but specific structures in and through which the ethical may be realized.

HERBERT MARTIN*

CASES AND MATERIALS ON LEGISLATION (National Casebook Series).

The Formulation of Legislative Policy, the first chapter in Professor Horack's casebook, is one hundred seventy-one pages in length, is divided into five paragraphs, and there is much subdivision. If I were to use this casebook, I would eliminate this chapter entirely, unless perhaps the students were a first-year class. Some of the material is interesting enough for casual perusal, but a large part of it was dreary reading to this writer. The court decisions contained in this chapter are simple cases in criminal law, torts, contracts, equity, and constitutional law. They would be of interest to first-year law students, but otherwise would probably constitute the threshing of old straw. There is difficulty in reconciling the author's belief, expressed in the preface, that Chapter I is

* Retired Head, Department of Philosophy, University of Iowa.
† Professor of Law, University of Indiana.
important with this later statement: "By far the largest bulk of scientific legislative writing concerns the question of legislative mechanics, that is, of procedure, statutory interpretation, and drafting. There has been a significant silence concerning means and technique [if any exists] by which a legislature decides what legislation it wishes and the character, scope, and limits of its policy." Observe also this quotation from T. V. Smith, "only a philosopher and an ignorant man:" "The legislator knows whereof he speaks, when he says that legislation based upon scientific knowledge is mostly myth." But the author apparently believes that legislation has its common law and that, "The development of legislative policy follows as predictable a system as does the judicial opinion."

Chapter II is concerned with Legislative Organization and Procedure and is primarily informational in character. Much, if not most, of it is not court decisions but excerpts from statutes, constitutions, legislative rules, the Congressional Record, and a variety of comments. A reading of it will give a student an acquaintance with, but not a complete picture of, legislative procedure, since it is believed that no chapter of less than one hundred fifty pages can accomplish that much. My chief doubt about this chapter is as to its usefulness as a teaching tool. As a basis for some question to ascertain whether one's students have absorbed the information, or as a basis for a few lectures on the technical legislative process in the enactment of statutes, Chapter II would be useful. But where are the problems for solution? Where is the tough material that produces mental discipline? I failed to find much of it even though there are some twenty-two court opinions in the chapter. The best of them, from the viewpoint just stated, are three concerning the finality of the enrolled bill filed by the Secretary of State, i. e., McGrain v. Dougherty,¹ The Pocket Veto Case,² and Edwards v. United States.³ Some of these are not unknown to casebooks on constitutional law.

Among other words, the following are found in Section thirteen of article four of the Illinois Constitution: "...and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act." Other state constitutions have similar provisions. If one wishes to have his students study cases that present difficult and confused problems on this phase of the legislative technique, all he has to do is to copy a number of the Illinois opinions interpreting this provision, and some from other states construing similar provisions. By that time the students will have recognized that there

¹ 273 U. S. 135 (1927).
² Okanogan Indians v. United States, 279 U. S. 655 (1929).
³ 286 U. S. 492 (1932).
are tough though narrow problems in this part of constitutional law that are usually placed in the course entitled "Legislation" or "Statutes." It seems strange that these cases apparently have been ignored by Professor Horack. They might well have been placed in a later chapter.

The author's treatment of Influencing Legislative Action contains sixty-six pages of interesting reading. But what can be done with it in class? It is simple material that requires no more effort to understand than the reading of The New York Times. In fact, for a student who has been consistently interested in current events, being quizzed about or lectured to concerning pressure groups and lobbying seems hardly necessary. Of the five cases reported in this chapter, *Lochner v. New York* is more appropriate for the course in Constitutional Law. On page 366 there is a quotation from Holmes. There is no citation, but apparently it was the author's intention to quote part of the dissenting opinion by Holmes in *Abrams v. United States*.* Unfortunately, the quotation is badly garbled with a consequent injustice to Holmes' memory.

Chiefly informational and illustrative is the next chapter on Types of Statutes. The comment on page 384 to 387, inclusive, and particularly note 8 would appear to be more complete if it had included the principle involved in such cases as *Stewart v. Kansas City* and *Trenton v. New Jersey*.' There are a number of court opinions dealing with problems of constitutional law, but apparently these are to be used primarily for illustrative purposes. The material on resolutions seems to be good, although perhaps it should have been developed more extensively.

It seems safe to state that Chapters V and VI constitute the best part of the book. The material is adequate to present the problems of interpretation and those confronting the bill drafter. I should be tempted to start teaching with one of these chapters. If I had time left, I would know the students could benefit themselves by drafting statutes. Professor Horack could have assisted in this by copying samples of poorly drafted legislation. The students could then make these samples into model legislation. However, an instructor can have such samples mimeographed for his classes.

Part II of Horack's work should be a good casebook for advanced law students, although I am skeptical about this part for beginners. Part I of this casebook is, in my opinion, of doubtful value, certainly for students beyond the first year.

KENNETH C. SEARS*

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*198 U. S. 45 (1905).
* 250 U. S. 616 (1919).
* 239 U. S. 14 (1915).
* 262 U. S. 182 (1923).
* Professor of Law, University of Chicago.