THE USE OF CASES IN TEACHING LAW.

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The great interest now being manifested in the methods of teaching law, may lead us, if we are not on our guard, into mere "theories" and "fads." This was the result, in common school work, of increased attention to methods, and for a time, the whole system of pedagogy was corrupted by the indiscriminate use of machine methods.

Each successful teacher has his own peculiarities growing out of his personal relation with his surroundings, and any attempt on the one hand to copy the particular method of another, or, on the other hand to put a trade-mark upon peculiar ways of teaching, will necessarily prove abortive. Nevertheless each teacher may improve his own methods by considering elements of success in the work of others, and a discussion here of the varying experiences which teachers have had under peculiar circumstances, cannot but be of advantage. It is only in view of the benefit of such a discussion, apart from the value of any particular suggestion, that I venture to take part in it.

In considering methods it needs to be borne in mind that two quite distinct objects must be kept in view: 1st, giving the student discipline in legal thinking; and 2d, giving him knowledge of the so called rules or principles of law. In no other calling, perhaps, is mere discipline recognized as counting for so much, in comparison with mere knowledge, as in the practice of law.

Discipline, that is the learning how to do, being the main thing, as in other branches of applied science the student is to *learn how to do, by doing*, and this is peculiarly true of the law, because its greatest difficulties are those arising from the application of general principles to particular facts. It is therefore a mistake to attempt to make the law easy, by putting it in abstract form. As Professor Abbott has already forcibly shown, it will be found in the law as in other sciences, to be easier and more natural to work

from the concrete to the abstract, than from the abstract to the concrete.

Therefore to take a text-book, based on the decisions of the courts, and abridge it, or prepare a "review" of it, and then make a set of questions for quizzing; finally arranging the whole matter in some analysis, or diagram, or table, and first present the subject to the student in these most condensed and abstract forms, is entirely wrong. Such a method will facilitate superficial knowledge of something available in passing an examination but will not give legal discipline. Such aids as these may be useful at the end of the course of instruction on a subject, for the purpose of classifying what has been acquired and assisting in its retention, but they furnish a wrong point of view on the first approach. The danger in the use of any such aids is, that they make possible a superficial knowledge, not accompanied with proper discipline in legal thinking. Indeed, this is the danger of any contrivance for making the acquisition of the knowledge of law easy. Absurd as it may seem to compel a student to perform the manual labor of copying lectures, or the mental drudgery of wading through a complicated statement of mere matters of detail and exception in a lawyer's text-book, it is a mistake to abbreviate either of these processes, except as the time saved thereby is fully employed in some other and better form of application to legal study.

From this point of view as to the disciplinary value of constant application and attention, it is important that class-room work be arranged with a view, not of ascertaining whether the student has acquired certain knowledge, but of giving him exercise in the proper application of such knowledge. A little skill and care in varying illustrations from those used in the lecture or text-book, will enable the teacher in his quizzing to make clear to the student who has not already grasped the subject, that which he ought already to have learned, and at the same time, to give to the student who has understood, a valuable exercise in the application of his knowledge. It is by all means important, whatever may be the particular system used, that the interest of all students, whether they are quick or slow of comprehension, shall be constantly maintained at a high pitch. For this reason mere reviews and repetitions, which do not give additional information or new exercise in the application of knowledge acquired, are of questionable advantage. The object sought, that is the reënforcing or recalling what has already been considered, can be attained without the disadvantage of loss of interest on the one hand, or, on the other, slack attention in the first instance, with the notion that the

subject will be further explained at another time. The student should feel that he has but one opportunity to gain the particular information offered.

For the purpose of considering what can best be done with the study of cases in giving legal discipline, it may be worth while to notice wherein lecture and text-book methods are apt to be defective in this respect. The lecturer who, having reduced his matter to set form, dictates it to the students, who write it as nearly as may be *verbatim*, and thus are enabled to take away with them an exposition of the law on the subject, with citation of cases for subsequent investigation, can hardly claim that he gives to the student very much exercise in legal thinking. The knowledge which he imparts is of importance, although even in this respect the student probably finds in the course of time that for subsequent use a fuller text-book serves a better purpose than his lecture notes, and loses greatly his confidence in their value, if he does not, at the same time, lose something of the respect he has entertained for the preëminent learning and ability of his teacher. The lecture system implies acquisition of knowledge first, and discipline in applying it afterwards, which as has already been suggested seems not to be the natural nor most effective order.

The use of an ordinary lawyer's treatise, stating in brief form the points decided in a large number of cases arranged according to some more or less satisfactory system, comes nearer to a study of law in the concrete, but the fundamental difficulty of such a text-book is that, on the one hand, it does not, and cannot, give the facts of the cases referred to with sufficient fullness to enable the mind to grasp and retain them, while, on the other hand, it lacks entirely in perspective, so that the minor and insignificant proposition which is a mere deduction, is given as great prominence as one which is fundamental. Indeed, as the most important propositions are so well settled that they are not often expressed in adjudicated cases, they are likely to be lost sight of entirely. The use of the text-book does undoubtedly give legal discipline, but it does not give exercise of the kind which lawyers and judges consider to be of the highest type, for the lawyer or the judge, to a great extent, ignores the statements of propositions found in text-books as a source of information as to the law, and uses them only as a means of reaching the cases involving the questions under discussion. To obviate these objections to the ordinary text-book, special books for the student have sometimes been prepared, and more might be done in this way to facilitate the acquisition of knowledge of principles. But the use of such a book, no matter

how excellent it might be, would facilitate knowledge, rather than impart discipline, and moreover the books of this character which have heretofore been prepared have been, in the main, open to the very serious objection of stating general and abstract rules, rather than giving to the student concrete conceptions

The method of giving instruction in law by the use of cases, to the exclusion of text-books or formal lectures, need not be specially referred to, as a consideration of the merits of that method is not germane to the present purpose, but it is believed that by proper use of cases in connection with instruction by text-book or lecture, the advantages of the case system may be realized without forfeiting those of the other systems.

Judicial thinking, in order that it may be reliable, involves not only an acquired capacity, but also a habit or characteristic of the mind, to be attained only by persistent exercise under proper direction and guidance in legal thinking; and my proposition now is, that the best attainable exercise in this direction is by the study of reported cases, decided in appellate courts. I intend by this statement to exclude cases tried at *nisi prius*, because, first, they are not available without great expenditure of time on the part of the student in attending court, but principally, because they are complicated, lack unity, and involve the consideration of many things not appearing on the face of the proceedings. Even if reports of cases tried at *nisi prius* were generally accessible, they would be unsuitable for study for the reasons last suggested.

The most fully perfected and simplified examples of legal thinking are to be found in the opinions of judges in appellate courts, who have before them for decision cases divested as far as possible of complicated and extraneous circumstances, and which they determine by the application of legal reasoning. In the study of such cases it is possible to get a definite understanding of the facts to be reasoned about, the considerations brought to the mind of the judge in behalf of the various positions of the opposing parties, the weight given to these different considerations, and the final result reached. The mind is thus inducted into the correct conception of the law, and the correct method of applying it.

There is nothing new, however, in this view of the advantage of studying adjudicated cases. Teachers by whatever method constantly refer to such cases, and urge the student to examine them. It is in the method of using them, and in the relative importance to be given to such study, that they greatly differ, and my object is not to advocate any particular method of teaching law, but rather to urge a more effective and satis-

factory use of cases, whatever may be the particular plan of instruction.

The usual form of citing cases in a lecture or text-book leads the student to look upon the case merely as a corroboration of what the lecturer or writer has already said. In this way the entire inductive value of the case, and its disciplinary value as well, are lost. The case becomes not a source of information, but a mere illustration, for what teacher following the so-called lecture or text-book method ever calls upon the student for independent knowledge acquired from the study of cases cited, and not derivable from the lecture or text-book itself?

There is no greater incentive to the acquisition of knowledge than a recognition of the necessity for it. Let the student realize his ignorance as to a particular question, before you attempt to give him a solution of it. Plunge him into the midst of a difficulty and then let him help himself out, as a lawyer or a judge would, by means of an adjudicated case, and he at once recognizes the utility and discipline of case study. But tell him what the case decides and describe to him the means of solution, before the difficulty becomes apparent, and the exercise loses all its value.

There are, however, very great dangers attending this method of study which the teacher can guard against only by the exercise of care and skill. The difficulty raised in the student's mind must be capable of solution, and the correct solution must be eventually attained, or he will conceive of the law simply as furnishing an uncertain and haphazard adjustment of the complications growing out of human relations. The fact that there are questions, some of them real, many more of them wholly imaginary, which cannot be satisfactorily solved by ordinary legal processes will soon enough become apparent. The most important and useful impression that the student can get at first is, that these human relations fall into well-recognized categories, for each of which there are ascertainable rules, and that legal reasoning furnishes a common sense and satisfactory solution for most of the questions which puzzle one who is not familiar with legal methods.

The conclusion that would be reached from the suggestions here made is, that when resort is had to case study, some general statement of the question to be considered and the difficulties surrounding it should first be made to the student; that then without any statement of the law on the question he should read one or more very carefully selected cases, deciding the question in the light of legal reasoning, the cases being such as to either adjudicate the question directly, or furnish a general rule which may be

applied to it; that he shall then by some sort of colloquy or quiz be compelled to generalize and correctly apply the same legal reasoning to other similar questions, until he understands its scope and its limitations; and that finally, if practicable, some brief statement of the law be given him which may be easily remembered and will assist in recalling the principle of the cases in its proper connection. Under this plan the lecture or text may still play a very important part in the process of legal education, but will not be put into a false position as the original source of information as to what the law is.

What has already been said in regard to use of cases in imparting discipline to the mind, has also suggested the functions which cases can properly play in giving knowledge, for it is evidently impracticable as it would be unwise to divorce these two objects. But in the beginning the disciplinary feature ought to be given controlling importance. When the habit of legal thinking has been formed, legal knowledge may be much more readily acquired and assimilated.

It would seem wise, therefore, that at first the student's attention be directed to the very fundamentals of the law, the elementary principles of torts, contracts, property, pleading, evidence, criminal law, and like subjects, and that the knowledge of these subjects be acquired largely by the study of actual cases under the constant and skillful guidance of an experienced teacher. Afterwards those branches of the law which are merely applications of these elementary doctrines, may be taught by lecture or text-book, without so much pains being taken to present special cases leading to each proposition, for it will be evident to any one who has tried it that the study of cases is a slow and laborious, though a thorough and, in the end, satisfactory means of acquiring legal knowledge. To cover each subject of the law in this way, will not be practicable within the ordinary limits of a law course. Rather than to omit on the one hand, the discipline involved in the use of cases, or on the other hand, to turn out students lacking any definite information as to considerable branches of the law as practically applied, it would seem better to adopt a compromise course, which, while preserving the study of cases for its disciplinary value, recognizes other means of imparting information for the sake of giving a more extended knowledge. The student who has by actual experiment learned how general propositions are derived from particular cases, may be safely given general propositions in the first instance on secondary branches of the law.

The serious difficulty in the use of cases in connection with

lecture or text-book instruction has been, that even where the students have had access to good law libraries, they have not all been able to read the same cases, and class exercises could not be based on the assumption that they were all familiar with the cases cited. There seems to be no solution for this difficulty, except to reprint selections of cases on particular branches of the law, which may thus be in the hands of each student. In thus reprinting cases some have thought it desirable that all the head notes and other aids for ascertaining the point decided without actually reading the case and following the line of reasoning pursued in the opinion, should be omitted. Others prefer to keep in view the important object of familiarizing the student with cases as he will find them in the reports, and wish to have the head notes retained. The important matter in this respect seems to be that the teacher should make it impossible for the student to participate satisfactorily in the class exercises, unless he has actually mastered the whole case. In order that a collection of cases shall give, at the same time, discipline and knowledge, it should be large enough to cover by actual examples, not merely the general propositions, but the principal applications of those propositions relating to the particular subject under consideration, and in order that the student shall constantly realize that every doctrine is the result of a process of development, the cases on any particular topic should be read in such order, as that the law of development shall be apparent. Moreover the cases selected should not be text-book cases in which the judge attempts to announce the whole law on a subject, whether applicable to the question involved or not, but rather those in which a particular point definitely arises and is ruled upon. But it will be proper and often desirable, to present cases which are apparently in conflict, in order that in reconciling them or discovering the real point of difference, the student shall have exercise in case criticism.

Emlin McClain.