CURRENT LEGAL PERIODICALS

The Teaching of International Law in Law Schools. Kenneth S. Carlston. 48 Columbia Law Review: 516–533.

Legal education problems are being widely discussed at the present time. One of the questions asked is: What shall be the relation of the law school to the teaching of international law? Certainly the subject should not be ignored.

The schools are devoted primarily to satisfying the demand for "the highly trained technician" known as the lawyer. One group of legal writers criticizes the case-book system as ignoring "many of the skills" needed by the lawyer. Another group would extend the curricula so as to develop lawyers "aware of the social consequences" of rules of law, while a third group is concerned with "society and its governing" and law as a "policy science". In other words the lawyer must not be "a barbarian in our society"; he must be trained for the responsibilities of social leadership and citizenship.

What then is the place of international law in the law school and how should it be taught? Interest in its teaching is growing, courses are offered in many schools and an institute for teachers of international law is projected in 1948. Case books have been written on the subject but it is suggested that the case method is unsatisfactory because the chief source of international law is not precedent but "the practice of states". However, the mere enlargement of "the scope of teaching materials" is not sufficient; the practice of international law demands a knowledge also of history, political science, jurisprudence and languages.

Lawyers today should be informed not only on international law but also on international organization. Professor Carlston would have the course include the nature and source of international law, international legislation, the fields covered by "positive" international law and its general principles in these fields. It would be concerned also with "the basic problems of the international order", the place of law in the international community and the principal international organizations, the United Nations and its agencies. Collective security, international arbitration, control of aggression and "the contributions and limitations of regionalism" would all be covered.

Such a cause would be a very ambitious one but it would be for the lawyer "as a member of the legal profession". It would be given for the many rather than the few who might practise

in the international law field. Society can not well "afford to permit lawyers to enter their profession without some knowledge of international law and its place in the international order".

Larceny: A Police Point of View. 12 Journal of Criminal Law: 213–223.

A policeman is "much concerned" with the law of larceny since statistics show that "larceny predominates over every other type of crime". The number of larcenies committed, but for many reasons never reported, must be an "astronomical figure". The British railways alone lost goods to the value of over £4,000,000 in 1947 and ship, dock, harbour and shop losses are correspondingly heavy. "Scrounging" is common and people see goods pilfered without informing the police because they fear that to do so would involve great inconvenience and waste of time. One of the police officer's functions is "to placate the irate witness" who has to spend a night and perhaps a day waiting for a larceny case and has then been told that he is not needed, since the prisoner has pleaded guilty. It is suggested that, with the consent of the defence, property might be identified and ownership proved by certificate.

Failure to recover stolen property "disillusions the citizen" and "reacts unfavourably on the police". Many kinds of goods are quickly disposed of, so that the victim is rarely compensated, while the thief after a "temporary deprivation of his liberty" is released and receives "his share of the loot". While the return of the rack is not advocated, there should be some way of compelling disclosure of the whereabouts of stolen property, say by a power in the magistrate or judge to impose a substantial sentence if this information is withheld. Justice should be done "to the victim as well as to the thief".

The criminal law is in many respects inconsistent, illogical and of "antiquarian" interest. The cases dealing with the question whether a particular object is capable of being stolen show "how rusty" the machinery of justice has been. Policemen are asked to decide whether fish in ponds, turf, bricks in a wall or oysters in bed can be stolen. The enactment in England by 1930 of a section to cover the taking away and abandonment of a motor-vehicle was "something of a minor miracle". If a man steals an old hack in England, worth a few pounds, he must be tried at quarter sessions or assizes and is liable to a penalty of 14 years, whereas theft of a consignment of whisky worth

£5000 is simple larceny and the punishment is 5 years at most unless the whisky is taken from a ship's hold or a wharf, when it may be 14 years. The law should be simple and direct and every dishonest appropriation of another's property "should carry a power of arrest".

Why should there be a distinction between offences committed by day and those committed by night? In England a man caught at 8.04 P.M. with a "picklock" is liable to be convicted summarily and sentenced to three months, but if he is caught at 9.01 P.M. he must be committed for trial and is liable to five years. An Englishman's castle should be regarded as "inviolable for twenty-four hours a day".

A new Larceny Act, with twenty sections in place of the present fifty, might well be enacted, which would widen the definition of larceny and of "anything capable of being stolen", confer a power of arrest for attempted larceny and "attempted false pretences" and widen the definition of burglary to cover any time and any place. There should be a power of search without warrant of premises occupied by the offender, and courts should be enabled effectively to demand information on the disposal of stolen property and to compensate theft victims out of any property of the thief.

Only a bare outline of the problem of larceny is presented in this article, but sufficient has been shown to indicate the need for reform. It is no wonder that the police, hampered by the "anachronisms" of the law, appear "leaden footed" in their pursuit of the thief. They would be helped considerably in applying common sense to their problems "if a modicum of this useful commodity could creep into the law of larceny".

A Rationalization of Trust Surcharge Cases. James A. Moore. 96 University of Pennsylvania Law Review: 647–675.

The purpose of this article is to analyze the factors that have been considered by American courts in surcharge cases. A case of this kind is similar to a negligence case in that three questions must be decided: first, to what standard of care should the defendant, here the beneficiary, be held; secondly, has he met that standard, and, finally, can he establish an "affirmative defence".

It was early decided that the normal standard was that of the "prudent man"; as it was expressed in one of the leading cases, trustees should employ such diligence and prudence "as,

in general, prudent men of discretion and intelligence in such matters employ in their own like affairs". Later, statutes were passed in many states, here called "legal list" states, which restricted fiduciaries to a narrow class of investments. It then became "standard practice" to put discretionary power in trust instruments, so that the legal-list restrictions have been largely removed.

A number of circumstances vary the normal standard, shifting it "upward or downward". It would seem that the measure of responsibility of an executor should be different from that of a trustee, who has a "long-range financial problem", but executors are held to a high standard where debts or pecuniary legacies are high in comparison with the size of the estate. There has been some suggestion that a professional trustee should be held to a higher standard of care than an amateur. In both the "prudent man" and the "legal list" states courts have distinguished between retention and investment.

Trustees retaining decedents' investments have a better chance of escaping surcharge than those making new investments. Where there is a power to retain or to invest in "non-legals" in a legal list state "the burden on the beneficiary is very heavy", but the protection given a fiduciary by a discretionary power in a "prudent man" state is not so great, since he already has discretion. If a decedent has been active in a corporation or has shown great confidence in it, the trustee is rarely surcharged for retaining an investment in it. Acquiescence by a beneficiary can lower the standard of care, while a demand for sale would raise it.

Having determined the standard of care, it has to be decided whether the trustee has "measured up to it", whether he has done the things he should have done and whether his decisions have been sound. He can rarely "afford to be lazy" but can sometimes "get by with stupidity". The more "positive evidence" of study of market conditions that he can prove the better is his case. In deciding whether or not investments have been wise, courts have considered what other prudent people were doing and saying about them at the time. The financial record of a company and its management are important considerations. Fiduciaries have no right, unless specially authorized, to speculate, and there are a number of tests to determine whether an investment was speculative. They have "the sympathy of the courts" and are generally protected where there are sudden drops in the market and stocks are not sold "Hindsight can never validly be applied."

A fiduciary apparently liable to surcharge may escape liability if he can establish acquiescence by the complaining beneficiaries in the decisions he has taken; he must show some knowledge and approval. Delay by a beneficiary in enforcing his rights may be a defence in a surcharge case. An exculpatory clause in the trust instrument, one which says that the trustee is not to be held liable even if he does what he should not do, is a defence, unless there is bad faith or a "reckless disregard" of beneficiaries' interests. Even though there is an affirmative defence, however, courts "go to great pains to point out other factors which favor the fiduciary".

Why Not Use the Special Jury? Jeannette E. Thatcher. 26 Oregon Law Review: 251 – 279. (Originally published in 31 Minnesota Law Review 232.)

The jury system has been called an "outworn relic", a "sentimental fetich" and "the crowning masterpiece of our jurisprudence". It is often criticized and suggestions are made from time to time for the correction of its demerits but "surprisingly little attention" has been given to the possibilities of the special jury.

The "issuance of a rule for the formation of a special jury" was said by the court in a case decided in England in 1696 to be "according to the ancient usage". In 1351 a special jury of cooks and fishmongers was called in London in a bad food case. The right to trial by special jury was confirmed by statute in 1730 and later English statutes provided for the assessment of costs occasioned by requests for special juries and the procedure followed in obtaining them. Under the 1751 Act the procedure was that counsel moved for a special jury, the clerk of rules "drew up a rule" and an appointment was made with a court official for the nomination of a panel. In the presence of the parties or their counsel the master selected forty-eight names, "giving consideration to the occupation and general reputation of the juror"; either party might object to any name for cause as it was selected. When the panel was complete a later date was appointed when each party might "strike" twelve names from the list without indicating any cause, taking alternate strikes, until twenty-four jurors were left. At the trial there might be further challenges "for defect in the array" or for cause. Then the first twelve jurors called, against whom no cause was established, constituted the jury.

Historians and reformers have generally found the special jury superior to the common one. Lord Justice Bramwell complained that it was outrageous to take the best men out of a jury that was to try a man for his life and use them to "try a trumpery running down case", and an English legal writer recently stated that "a special jury is likely to be composed, partly at least, of men who would fail in their business if they were not fairly accurate in their estimate of credibility", while a common jury "may or may not have any particular ability". In any case, the special jury has endured in England for five centuries and in the United States has been used in at least eighteen states.

A number of "intricate and important cases" are referred to here in which special juries have been used. Among these are the ten million dollar Eno will case, a railroad bond case where the defendants' liability depended on the jury's estimate of the value of a railroad, and the Tweed cases in New York in which high municipal officials were charged with conspiracy to defraud the city of millions of dollars. Special juries have often been used in cases involving stocks, bonds, and banking institutions. Difficult questions have arisen as to selection of special juries, as where several defendants demanded them. The right to separate panels has been denied. The action of a court in not permitting a party to know which jurors have been struck by the adverse party has been "held to be error".

The "expansion of commercial arbitration", dissatisfaction with administrative tribunals" and "the demand for competent tribunals in certain commercial cases" indicate the need for an improved method of handling some kinds of disputes. It is submitted that the special jury "with its use properly controlled" should be available as a "supplementary trial device" in proper cases and that it is "worthy of extensive use".

Modern Soviet Divorce Practice. The text of the recent Decree together with a commentary on its application and practice by G. M. Sverdlov, from an article in Sovietskoye Gosudarstvo i *Pravo*, 1946, No. 7, p. 22, translated by Dudley Collard for the Anglo-Soviet Law Association. 11 Modern Law Review: 163–175.

The Decree of July 8th, 1944, was intended to encourage large families and "to uphold the institution of marriage". Its first four parts provide for grants to mothers of large families, medals and orders for motherhood, state maintenance of children

of unmarried mothers, privileges for expectant and nursing mothers and taxes on bachelors and parents of small families.

Part V of the Decree is concerned with marital relations and divorce. Only registered marriages are to give rise to the rights of husband and wife; affiliation proceedings were abolished and the child of an unmarried mother takes its mother's surname while the mother may select its patronymic. She has thus "an interesting opportunity of recording the identity of the father". Divorce proceedings are to be heard in open court unless the court orders a hearing *in camera*. A petition stating the grounds is presented to the people's court, with a fee of 100 roubles; the respondent is summoned, notice of the proceedings is published, and the court conducts a preliminary inquiry, determines what grounds exist and takes steps to reconcile the parties. If there is no reconciliation the petitioner applies to a superior court which may grant a divorce. The court then decides who shall have custody of children, who shall be liable to maintain them and how joint property is to be divided. The court also grants to each spouse on application the right to use his or her pre-marital name. A certificate of divorce is then issued and a fee of from 500 to 2000 roubles is charged to one or both parties.

Grounds for divorce are not defined; the court considers the reasons in each case and has discretion to grant or refuse a petition. Courts seem to have decided that mutual agreement is a sufficient ground. Divorces have been granted over respondents' objections on proof of their guilt, of matrimonial offences on both sides, or of "impossibility in fact of continuing conjugal life, not attributable to either party", as for instance where respondent has become permanently insane.

Divorces have been refused where respondents were not to blame; in all cases of refusal the parties have had infant children. In a good many cases courts have followed divorce procedure, including attempts at reconciliation and the imposition of the special fees, where marriages should have been annulled, for instance where a petitioner has discovered that she has married a man already married. New legislation covering annulment for the whole of the U.S.S.R. should be drafted.

There is a great variety of legislation in the Republics of the U.S.S.R. as to maintenance after divorce. It is still open to the courts to provide such assistance but in not one case studied has the court ordered it. Just as on marriage either spouse may choose his or her surname, so each party on divorce may now decide whether to keep the surname so chosen or to

revert to the original one. The courts in many cases seem to have overlooked this change in the law and have ordered wives to revert to their original surnames although they have not made application to do so.

In all cases studied a fee has been fixed and this has never been less than 500 roubles. Mr. Sverdlov thinks that the courts have power to reduce or excuse the fee. He submits too that the financial position of the parties should be taken into consideration and that liability for the fee should be related to the grounds for divorce. He cites cases where innocent parties have been required to pay.

The last question considered is that of the relationship between the judgment and the registration of a divorce. If the parties were divorced on judgment, there would be no incentive to register and pay the fee. The correct view seems to be that the judgment gives a right to a divorce and that either party may enforce it by applying for registration. In some cases the registry office has refused to issue a certificate on the application of the spouse "excused from payment". The certificate should be given on application and payment should be enforced from the party who has been ordered to pay, by execution if necessary.

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OF THE ADMINISTRATORS OF JUSTICE

There are also attornies and barristers, whom we shall now proceed to give a bird's-eye view of. Every man may appear by his attorney, except an idiot, who must appear in person, for the law regards an idiot as one who is naturally qualified to enter personally into a lawsuit. What an attorney is, everybody who has got an attorney will no doubt be aware, but those who are ignorant on the point may feel assured that ignorance is unquestionably bliss, at least in this instance. We, however, are far from intending to stigmatise all attornies as bad — and the race of roguish lawyers would soon be extinct if roguish clients did not raise a demand for them. No man need have a knave for his attorney unless he chooses; and, when he goes by preference to a roguish lawyer, it must be presumed that he has his reasons for not trusting his affairs to an honest one. (Gilbert Abbott A Beckett: The Comic Blackstone: 1856 ed.)