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4. Note down the arguments presented by other groups and consider them.
5. End of class session.
6. Appellate Court members meet and consider the arguments before the next class session.
7. Appellate Court gives its opinion and decision. Evaluate the reasoning and decision.

THE PROBLEM METHOD ADAPTED TO CASE BOOKS

W. H. BRYSON *

Although it is obvious that the teaching style of every successful academic must be the product of his own personality and experience, I do, nevertheless, believe that the exchange of ideas on the subject of legal education is constructive. It may suggest ways to make minor changes and thereby to improve one's own methods or approaches. Therefore, I present here some thoughts on the Socratic method of teaching law and the results of my own experimentation with cases as problems for classroom debate. This approach has been successful for me, and it is my hope that these ideas may be useful to others in one way or another.

I do not pretend to have any new and revolutionary ideas; my only possible contribution, as I see it, is to merge two successful systems, the time honored case approach and the newer, but obviously worthy, problem method. One value, I believe, of this combination is the ability to use the problem method in those courses where the only teaching materials available are case books. Another advantage is that real cases are more believable than artificial problems which have been obviously invented. In that truth is stranger than fiction, they may better hold the student's attention. Moreover, the student by knowing that the problem once actually happened may believe subconsciously that it may happen again and that one of the future litigants may be his client. Although it is still but a law school game, it is not such an improbable one.

The Socratic game is simply this. A case is to be read; in class one student is asked to make the argument for the plaintiff; a second student is given the defendant's position to explain; after any rebuttal and discussion, a third is asked to give a judicial ruling with reasons. This can be then carried a step further by asking the assigned counsel who lost his case what advice should have been given to his client to avoid the problem.

Take for example the case of *Werner v. Graham*, 181 Cal. 174, 183 P. 945 (1919), in A. J. Casner and W. B. Leach, *Cases and Text on Property*, (2d ed., 1969), pp. 1055-1062. The student who is asked to argue the plaintiff's position begins by explaining that the issue in the case is whether the language in the original deed under which his client holds created a condition or a covenant. Then he states the facts of the situation. In 1902 Marshall owned and developed a certain tract; Marshall sold a lot to the plaintiff's predecessor in title subject to certain conditions which restricted the use of

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the land in various ways; in 1905 Marshall released all of his rights and interest in the land to the then owner. At this point the student lawyer argues his case and concludes that the court should quiet the title of his client in regard to the release restrictions on the use of the land.

The argument of the issues, the facts, and the law is, of course, the objective of the exercise. It can be conducted in more than one way. The plaintiff's counsel can go first with all of his points and be followed by the defense *in toto* and then have a rebuttal (if called for); alternatively the plaintiff can make his first point and be refuted immediately on that point alone.

The students have difficulty in distinguishing the sound points from the grasping at straws, and so it is necessary to comment as unobtrusively as possible on the merits of the arguments as they are being made. I try to do this by simply saying "good" or "very good" at the appropriate times. To say "poor" in the middle of the arguments is to put a damper on the enthusiasm of the students, and this visibly affects for the worse the quality of the argumentation.

Whether the other students should be allowed to ask questions before both plaintiff and defendant have completed their argument is debatable. At the risk of losing the attention of the rest of the class, I have them wait until after the dialogue has been completed. Then the rest of the class joins in, and I direct the students' questions to the plaintiff's counsel or the defendant's according to whichever is the appropriate one to respond. The general classroom discussion is concluded by calling on a student at random to be the judge and to give a judgment and deliver an opinion therefor; this may or may not coincide with the decision in the case book. It is not until after this stage that I, the teacher, indulge in any comments, criticism, or discussion. This requires the students to have their own ideas and express them without being influenced by what the teacher may think. Of course, the students will not come up with all of the possible arguments (unless they have someone's notes from the year before), and the instructor may have to ask leading questions or suggest lines of argument.

Let us return to *Werner v. Graham*, a gold mine for legal ideas; it can be used as a very good example of how the student discussion can proceed or be directed. After the plaintiff's appointed counsel has set out the issue and stated the facts of the case as he sees them, he argues that the language in the deed (quoting from lines 1-7, page 1056) created a condition subsequent. Any reversions, and rights of re-entry or reverter were personal to the grantor, his heirs and assigns; they were assigned to the owner of the lot in question by the quitclaim deed and to no one else; the restrictions were extinguished by the doctrine of merger; thus the defendants have no rights or interest in the plaintiff's land. The defendant answers that another part of the deed (quoting from lines 10-13, page 1056) created restrictive covenants for the benefit of all the land in the development owned by the grantor. These covenants touch and concern and run with the land; they burden the plaintiff's land and create rights in the owners of the defendant's land to enforce the covenants.

The plaintiff might argue that there was only one set of restrictions and that they should be construed to be conditions (which have been released);

the general policy against restrictive covenants and restraints on alienation requires this result. The defendant answers that there are two sets of restrictions: one in the form of conditions for the benefit of the common grantor even after he has sold all of the lots in the development, and another set in the form of covenants running with the land for the benefit of the other lot owners. If, however, the court should rule that it is a single set of restrictions, then they should be construed to be covenants for three reasons. First conditions subsequent are forfeitures and traditionally have been disfavored as a matter of policy; secondly, covenants are less offensive restrictions on land, since they can be more easily removed than conditions; thirdly, the restrictive covenants here which burden and benefit every lot in the subdivision increase the value of the land and thus increase its alienability. Therefore public policy dictates that the restrictions be construed as covenants and be enforced against the plaintiff. Here the restrictions are reasonable and beneficial and should be encouraged.

The plaintiff might then argue that even if they were covenants, they are not enforceable because there is no privity of contract or of estate between the plaintiff and the defendants. The defense to this is that privity of contract is not needed to enforce covenants running with the land and that the plaintiff and the defendants are all in privity of estate with Marshall, the common grantor, and this is sufficient. If, however, this is not acceptable to the court, then the judge should find implied reciprocal negative equitable servitudes based on the uniform plan or scheme of development known to all the parties. This is, of course, rebuttable.

The plaintiff might further argue that the deed to his predecessor does not express any intention that the restrictions should run with the land nor is there any reference to the larger tract or any mention of who the covenantees might be, etc. The defendant can point out that all these things can be inferred or proved by parol evidence.

This is, of course, only an imaginary and ideal dialogue; if all of these concepts are to come out in the normal class, the teacher will have to do a fair amount of leading. Moreover, it is only an outline for the finished embroidery.

It is a fairly elementary exercise where there are two opposing but generally held views. Take, for example, the split of authority as to who bears the risk of loss between the making of a contract for the sale of land and the delivery of the deed as in *Ross v. Bumstead*, 65 Ariz. 61, 173 P.2d 765 (1946), and *Capital Savings & Loan Ass'n v. Convey*, 175 Wash. 224, 27 P.2d 136 (1933) as found in A. J. Casner & W. B. Leach, *Cases and Text on Property* (2d ed. 1969), pp. 719-725. Both cases are assigned for the same day, and thus both students can readily find the arguments to support their cases.

The more difficult situation is the case which states an established, unquestioned, logical rule of law, such as the doctrine of equitable conversion as demonstrated by *Clapp v. Tower*, 11 N.D. 556, 93 N.W. 862 (1903), which is in Casner and Leach, *supra*, pp. 711-713. One technique, which is especially useful when the defendant is going to lose as here, is to misstate the issue, let the lawyer for the defendant argue his losing case, and then let the plaintiff's counsel state the correct law by way of rebuttal.

In this case, I myself lead off by saying that the issue is whether the executors of a will have the power to convey real estate and bind the devisees to the effect of the conveyance. A certain Charlemange [sic] Tower made an installment contract to sell land to a certain Hadley. Tower then died testate; Hadley then defaulted; the executors of Tower's will then cancelled the contract with Hadley and sold the land to the plaintiff, Clapp, my client. The heirs at law of Tower now object to our title, and we request the court to recognize the executor's deed and to quiet our title. The student defense counsel can now make a plausible answer: that Tower's will was invalid to pass realty and that, since Tower held title to the land at the time of his death, it came to the heirs at law, the defendants, by descent; the executors of the will had nothing to do with the land, and their deed is a nullity. Now the student appointed to represent the plaintiff is asked to reply, and he should begin by re-stating the issue in terms of equitable conversion and then he should argue that the rights of Tower at the time of his death were personal property which passed to the executors of his will and that the deed is therefore valid.

The alternative, which is far more difficult on both the students and the teacher, is to elevate the argument to fundamental juristic ideals. In every case the two sides can be seen as basic opposites of one sort or another. (Disputes involving sham claims or defenses rarely get to the appellate level much less into case books.) Examples of such opposites are common law-equity, general predicable rules-individual *ex post facto* justice, natural law-sociological jurisprudence, tradition-modernism. I myself have yet to succeed on such an advanced level, but perhaps one will have better luck with third-year students or those with philosophical backgrounds.

The problem is to make a legal argument on behalf of one's client, who is in the situation determined by the facts of the case. This teaches the student to evaluate the case and to use it as a source of legal ideas even when the real judge held against his client. If there is a dissenting opinion or if the previous case in the book followed a different rule, then, of course, the task is greatly simplified. It helps open up the mind to the fact that there is more than one way to view almost every dispute. Every case in the case books has been heard at least once before, and the appellate court believes that their decision requires an opinion to justify it. This must often be pointed out to the student because the skillfully written opinion will appear to be airtight and the losing side will appear to be utterly without merit. The student, in addition, receives practice in oral advocacy, as does the student judge, who must give a reason for his judgment. It teaches the student to be an advocate, a lawyer.

Perhaps the skillful teacher can use the dialogue aspect of the legal argument to accustom the students to the idea that reasonable men can disagree and that they can and must be gentlemen about it. Out in practice, today's opposing counsel may be tomorrow's co-counsel; one's intellectual clashes, much less one's clients, should not be allowed to deteriorate into personal animosities. Perhaps the overbearing student when assigned to a losing side will get used to the idea that he cannot be right all the time, and perhaps when he realizes that losing an argument is not catastrophic he may relax a bit and be less assertive. And perhaps the timid student can be encouraged to be intellectually aggressive. Both types would be better lawyers, if these

admittedly idealistic goals are attainable or even approachable. Though success for the teacher may be very difficult, it is a worthy target at which to aim.

The Socratic possibilities of this method are obvious. The teacher can interrupt at any time to ask for clarification, definitions of terms, etc. If one student argues weakly one of his points, the teacher can summarize or put the argument to the other student for refutation by paraphrasing it, thus demonstrating effective argument and getting the substance of it across to the class. The teacher can likewise bring up arguments not thought of by the students. If repetition is felt needed, then the judge can be interrogated as to his ruling. Furthermore, if it is desired to vary the facts of the case, the students can then be asked to reargue the case, or more quickly the judge can be asked to rule on the new situation. On the other hand, the teacher can lower his profile to near zero, if he so desires, by merely calling on the first student to state the case and argue the plaintiff's position, by then directing the second student to rise to the defense, and by concluding with nothing more than appointing a judge to sum up and rule on the arguments.

I have found that by calling on students to act as counsel in a predetermined order, they are better prepared because they know more or less when they are going to be called upon to perform. The rest have the incentive to come to class more or less prepared and to pay attention to the discussion because the judge is chosen at random. This makes it extremely embarrassing for the student to admit that he is unprepared because it also means that he must admit he was sleeping during the arguments of counsel. Only the most self-assured student will feel that he can deliver a well reasoned judgment solely on the basis of the arguments of his fellow students. Although in many cases even the average student can bluff his way through, few have the confidence in their fellow students' abilities or in their own to try it. Moreover, those who do are exercising legal skills in class, rather than sleeping, writing letters, or mechanically taking dictation with their brains turned off.

Therefore the class room adaptation of case books to the problem method is but a modern use of the traditional Socratic approach to law teaching. It, moreover, transforms the basic courses into practice courses. One thinks of practice type courses as those involving proceedings at the trial court level, but the student should be able to benefit from practice in advocacy at the appellate level as well. The student is given a legal problem to solve, i. e. get a judgment for his client; this is what lawyers do, and the experience at this in the classroom will be directly beneficial to a career at the bar. Furthermore this classroom procedure guarantees that most of the discussion will be done by the students rather than the teacher. The argument and discussion require legal thinking, and the more of this which is encouraged in the students the better. After all, practice in legal thinking is what law school is all about.