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Jural Relations, by Albert Kocourek

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REVIEWS

JURAL RELATIONS*

In this book Professor Kocourek has set forth, not his philosophy of law, since he says the book is not concerned with the nature of law or the sources of law, but his system of Formal Jurisprudence. "It represents the view that the science of law is conceptual in all of its elements and operations and that the basis of this conceptual structure is one of purely objective facts."

The first characteristic of the book to attract attention is its terminology. So many are the new terms—mostly from Greek roots—that one cannot be quite sure whether he is reading a book in English or in some foreign language, and a glossary of eighteen pages almost convinces one that the book is written in a foreign language. Perhaps Professor Kocourek is right when he suggests that his book may help to make the legal profession "learned" in fact as well as name, but the reviewer confesses that a first reading of it is likely to leave the average member of the legal profession with sort of a feeling of bewilderment. Such terms as contra-duty, non-duty, capability, conditioning relations, disability, inability, dominus, servus, frangible relations, infra-jural relations, contraries, sub-contraries, personateness, polarized relations, post-venient relations, reciprocals, rescindable and abscindable relations, and unitary relations will not bother him. But his difficulties will begin with such terms as: Abnormal concatenation, abnormal intercalation, accrescent relations, active ligations, adjunction, allophylaxis, anomie relations, autophylaxis, biactive integral conflict, congruent, conjunctive, decrescent, degenerable, ectophylactic, endophylactic, heteradic, heterogenous, heterologous, heteromeral, heteromorphic, heterotaxic, homadic, homogenous, homologous, homomeral, homomorphic, homotaxi, intercalation, mesonomic, nexal, regenerable, remedial prolepsis, taxonomy and zygnomic. And his bewilderment will be complete after reading that "Jural relations are congruent when the dominus or servus of plural relations is the same person"; that "the two power relations (i. e., to perform and not to perform) are conjunctive congruent relations"; that "in logical conflict of a mesonomic and a zygnomic relation, the mesonomic relation if evolved prevails over the zygnomic"; and that "the acceptance of an offer of a promise for a promise is the causal involutive fact of a conjunctive binary relation." But, after learning that the correct term for the fact that a creditor may destroy a non-recorded mortgage relation is "abscindable, sanctional, uniaactive, integral, conflict-

* *Jural Relations*, by Albert Kocourek. xxiii, 482. Bobbs-Merrill, Indianapolis, 1927.

ing, conjunctive, plurinary relations," he will be ready to fall down and give up the ghost. The reviewer does not wonder that Dean Wigmore expresses the hope, "May the profession show the courage to master it"! If Mr. Wigmore's own phrase, "autoptic preference," is still the subject of genial jest, of what will Mr. Kocourek's phrases be the subject?

If the present reviewer were to criticise Mr. Kocourek's terminology, it would be on three different grounds: (1) It seems to this reviewer that some of his terms are arbitrary; there is no particular reason why these terms should have been chosen rather than some other terms. Among such terms may be named "ligation", "zygnomic", "regenerable", "intercalary", and perhaps "mesonomic". (2) Some of his terms and processes are interesting but not useful, as, for example, those found in Chapter VII and the last part of Chapter XII. (3) Some of his terms are of doubtful accuracy. This last criticism involves more than mere terminology, and therefore needs more elaboration.

Some minor points will first be discussed. It would seem that "will spade" (p. 102) should read "will promise to spade." Why is the relation (p. 107) called mesonomic when the law will constrain by mandamus or by damages? Why should a breach of the duties of innkeepers, carriers, etc. be called quasi torts? It would seem to be better to give these duties a place of their own in the law, as trusts and quasi contracts have. Is the phrase "investitive facts" better than the phrase "operative facts"? Is it correct to say that a zygnomic relation cannot be regenerated when security can be given for an unsecured claim? The statement (p. 204) that in the offer of a promise for an act the power of acceptance may be assigned is erroneous. So also is the statement (p. 204) that there is nothing to assign in a bi-promissory relation until an actual communicated acceptance; because in such case the promisee may be given the power to accept in some other way, as by silence or by some other non-communicated act. Promissory conditions may be precedent as well as casual (p. 207). In the problem (pp. 236-7) are there as many legal relations as there are sovereignties? It is now held that "Bonds" (p. 241) are taxable like tangible chattels. "Default" (p. 284) does not destroy a contractual right, i. e. discharge a contract, unless the other party elects to treat it as a discharge (instead of to sue for specific performance etc.), although it does create a new secondary right-duty relation, and the same criticism would seem to apply to so-called tort duties. The reviewer is not yet convinced that in joint debts there are as many debts as debtors instead of one debt by one legal entity. The book is tinctured too much with the Austinian ideas of law and sovereignty with their notions of force (pp. 13, 64, 65, 67, 351) and command.

Professor Kocourek, following the late Professor Hohfeld, uses the term "rights" in the generic sense (p. 7) and substi-

tutes the term "claim" for right in the specific sense (pp. 7, 16, 21). The reviewer thinks this a mistake. He thinks the term "right" should be restricted to its specific meaning, and the term "capabilities" should be employed for the generic term. The attempt to use the term "rights" in the generic sense only and the term "claim" in the specific sense has failed and it will always fail. It is unnatural and unnecessary. Mr. Kocourek himself affords all the proof that is needed on this point. Once in awhile he slips back into the use of "right" in the specific sense (p. 14), but he never uses the term "rights" in the generic sense. If "rights" is the correct generic term, (following the approved method of definition, which first identifies the thing to be defined with the genus of which it is a species and then distinguishes it from other species of the genus), he should have defined a claim as a right, a power as a right, a privilege as a right, and an immunity as a right, but instead in every case he correctly defined them as capabilities (pp. 6, 7, 12, 13, 31, 58, 79, 100, 125). If this isn't proof it is certainly an admission that "rights" is not the correct generic term but that "capabilities" is.

Professor Kocourek's great term is "Jural Relations." This term, according to him, includes everything legal. Every legal concept is one end or the other of a jural relation. Perhaps he is right, but there are some things about which the reviewer has his doubts. Mr. Kocourek makes no practical distinction between jural relations and legal relations (p. 75). He calls a power to make an offer a legal relation, yet he admits (p. 425) that "a legal relation exists only between 'two persons, neither more or less,'" and he admits that in this case there is "no present legal relation" (p. 220). It seems to the reviewer that here is one legal concept which cannot be included within the category of jural relations. Mr. Kocourek calls anything a legal relation which produces legal effects. Events do this. But of course they are not legal relations. Again, are the domestic relations and fiduciary relations legal relations? If so, are they domestic and fiduciary relations because the law has imposed duties etc., or has the law imposed these duties etc. because they are domestic and fiduciary relations? It would seem that certain rights, powers, privileges or immunities may, or may not, be legal relations, and may, or may not, be caused by legal relations. Hence, it would seem that Fundamental Jural Concepts would have been a better name for Mr. Kocourek's book than the one he has chosen. In that event it would not have been necessary for him to invent conceptual persons (pp. 291-303) to solve the difficulties into which his other assumptions had got him. If one posits legal relations, of course a power is terminated by death, but if one posits a power after death (as is sometimes now true) a legal relation is not required. The reviewer wonders whether in the case of suicide (p. 296) punishment is meted out on a conceptual person or this is merely a vestige of early times when inanimate objects were personified.

Professor Kocourek confines the term privilege to cases where it is in dominant logical opposition to a right. The reviewer is not yet ready to accept this result. He agrees with Mr. Kocourek that personal liberty must be set off against social control, because law is a scheme of social control which delimits personal liberty. He agrees also that privilege is personal liberty. Then is not Mr. Kocourek right in his contention that privilege is not a part of social control? Logically he seems right, but in fact he is wrong. This is shown: (1) by the fact that certain privileges are protected against social control by the United States Constitution, (2) by the fact that any privilege is sufficient consideration for a contract and may be thus surrendered by an individual for social control, (3) by the fact that as social control increases personal liberty (privileges) decreases, and (4) by the fact that the same act, as to sue, may be a privilege if one is honest on reasonable grounds, because he then has no duty not to sue, but not a privilege if he is not honest on reasonable grounds because he does have a duty not to sue. Hence in this respect the reviewer agrees with the Hohfeldians and not Mr. Kocourek.

However, the reviewer would not leave the impression, because he has made many criticisms, that the book is not a fine book. The reviewer may be wrong, he probably is wrong, in his criticisms and suggestions, and Mr. Kocourek right; but even if the reviewer is right that fact would not seriously detract from the value of the book. A book has value if it only stimulates such thinking as this book does. But there are many things in the book about which the reviewer has only unmitigated praise. Among these, mention may be made of the distinctions between rights, powers, privileges and immunities and the relation of immunities to rights and of privileges to powers, the idea of general freedom, the idea of personateness of corporations, the explanation of jural contraries and sub-contraries, the use of the terms polarized and unpolarized relations (identification test) instead of the terms in personam and in rem, the development of the ideas of affirmative and negative and conjunctive and disjunctive relations (except for the excessive terminology) and logical and integral conflict, the use of the terms rescindable and abscindable relations and of nomic and anomic, the demonstration of the importance of powers and of their mode of operation, and the explanation of the nature of remainders and reversions. The book is full of arresting and challenging statements. Notice, for example the following: "An act is the legal concept of the result either of a bodily movement or of a result attributable to its absence;" "Individual personateness is conceptual. A human being is an object of a legal relation"; "Land is space (geometric) and nothing more."

All in all the reviewer is of the opinion that "Jural Relations" is a great work. It is one of the most brilliant and thought-provoking books written by an American jurist. If it

has mistakes they are the mistakes of the lonely unaided pioneer, and they can be corrected. It is a book which should be a part of the required reading of every law teacher in the Anglo-American world.

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