DATUM POSTS OF JURISPRUDENCE

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BY

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AUTHOR OF "CONTRACTS" AND OF "PROCEDURE"

Melius petere fontes quam sectari rivulos.

Regula pro lege, si deficit lex.

"The Roman still holds dominion over this world by the silent empire of his law."

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PREFACE

A Datum Post is a point from which a reckoning is made. Every great structure is drawn from a Datum Post. Surveyors and engineers in building railroads, bridges, dams and canals, make their estimates from Datum Posts and Datum Lines. Every exact science has these fundamental positions, upon which the learned in the profession agree, and upon which their hypotheses are based. Has the law such Datum Posts, and if it has, what are they? Put this question to a number of lawyers and see how diverse the answers will be. Few indeed will name a dozen of the great maxims or of the leading cases, around which the law has grown. Inquire what maxim was affirmed in the "Squib Case," and what in Dovaston: 217. Ask which maxim governs in the construction of our written constitution, whether there is an unwritten constitution expressed in the maxims and what those maxims are. Law students are generally not trained to answer these questions, and they are consequently not familiar with the "Datum Posts" of the law. It is the object of this book to place these Datum Posts, in the shape of maxims and cases illustrating them, before the reader. The maxims on pp. 11-14 are offered as Datum Posts, and the discussions in Cases 1-100 are to disclose a *datum line* which is called the mandatory record. The practitioner without technical knowledge of that record is incapable of clearly presenting and conducting a cause.

To illustrate: It is observed that geographers have so written that all may learn the great divisions of the earth and its great circles, and prominences which are the geographer's Datum Posts. It is easy to learn that mounts Everest, Blanc, and Chimborazo are the most notable elevations. Now why can not the great basic principles of jurisprudence be gathered and so set that all can find and learn them? Ulpian, Bacon and Hamilton said they could be. Were these matchless intellects mistaken, is a question this work submits.

From mountains, rivers start and are fed as they flow downward. Maxims and their applications are the mountains and rivers of the law. *Regula pro lege, si deficit lex* (where the law is deficient the maxim rules) is a Datum Post in dealing with the history and the philosophy of the law.

The Rhine from its glacial swaddlings on the highest Alps courses on down receiving its 12,000 tributaries, until all are lost in the marshy grave the river has made for itself from Denmark to Belgium, and in the mud banks of Holland or the sands of the Zuyder Zee. The Rhine has its head in the sky and its feet in its briny marsh. As it is with the Rhine, so it is with fundamental principles of the law in the American states; they are found in the maxims, the highest source of the law, but are unfortunately lost to view in the morass of conflicting decisions. Consequently appears the wisdom of the maxim *Melius est petere fontes quam sectari rivulos* (it is better to seek the fountains than to wander down the rivulets).

To promote the interests of students everywhere, the following pages are submitted to affirm the proposition that the law has its landmarks, or beacon lights. Whoever is interested in the last proposition may well consider what is presented in relation to maxims, and the prescriptive constitution; relating to these, what is said has been in view of the fact that the American states and courts are most provincial, if not tribal, and in some tribes heterogeneous. Even the optimist must admit that the condition in New York, Indiana, Illinois, Missouri, and Colorado is incompatible with the stability and usefulness of the law; in these states no human sagacity can know the law and make juridical statements so as to meet the uniform acceptance and approval of state power. He who will deny this can not be familiar with the incompatible decisions in these states. (See *Windsor:* 1 and following cases.)

Relating to the mandatory record the decisions of several states are like an alternating electric fan. Macbeth's despairing apostrophe to the equivocal performances of the tantalizing witches might appropriately be quoted by those who perceive conspicuous antinomies; the clear acceptance on the one hand,

and the rejection on the other, of principles vital to government may well be likened to the fan.

And if he who has studied federal procedure insists that the subject is beyond human capacity, and is as uncertain as are the views of the courts of the chaotic states, it must be confessed that he can point to many irrefragable muniments of evidence to prove his proposition. Such a condition casts upon our jurisprudence a shadow, not dubious merely, but ominous. In relation to such cases as *Windsor:* 1, *J'Anson:* 91, and *Dovaston:* 217, *Murray:* 219, will be found observations upon the conceived causes of the threatening clouds which hang over our boasted American civilization. Indeed, if it be true that history repeats itself, may it not be that these causes are leading us on to a deluge?

The corruption and the failure of jurisprudence is a first and near step to a national cataclysm. We beg to quote:

> "There is the moral of all human tales;
> 'Tis but the same rehearsal of the past,
> First Freedom, and then Glory—when that fails,
> Wealth, vice, corruption—barbarism at last.
> And History, with all her volumes vast,
> Hath but one page."

The condition in several states offers pointed and abundant illustrations. However, here, mention of two will suffice; these will suggest to the student that he may be between Scylla and Charybdis. For if venerable and erudite judges cannot determine whether or not courts of sister states understand and apply fundamental principles, then how can the student? The late case: *Atlantic R. R.* v. *Benedict Co.*, — Fla. —, 42 So. 529, 532, 533, shows that a truly learned judge correctly understood and applied *Verba fortius accipiuntur contra proferentem* (every presumption is to be made against a pleader), this Mount Everest of jurisprudence. But from a thousand volumes from New York the court was unable to satisfactorily determine whether or not that DATUM POST was respected therein. Now who can clearly show that it is? Where is that fortunate student? And from Missouri is one of the late cases which reaffirmed the maxim from antiquity, in a truly notable decision holding that the statutory record can not be used for the mandatory record, the DATUM LINE already referred to. Every stu-

dent should read *Pennowfeski,* — Mo. —, 103 S. W. 542-543, and pause to inquire how it is that floods of literature and great schools have tolerated the dreadful if not alarming conditions reflected from the Florida and the Missouri cases, and in all of those jurisdictions where the "theory of the case" immolates the mandatory essentials of a constitutionalism. Let him look from the statement we make on page eleven and therefrom judge whether the philosophy of the law is at present properly written and impressed. If graduates have been given a view from molehills instead of Alpine mountains, then they may have reason to conclude that they have asked for bread and have not only been given a stone, but sufficient stones for awaiting monuments.

To enable students to perceive the causes of the bewilderment apparent from the official reports of supreme courts is a full justification for asking a book-ridden profession to fairly consider one more, and that the smallest possible.

These pages are also offered to demonstrate that the law can be written upon a condensed-intensive plan, integrating both the old and the current law, and at the same time evolving a key to the library. Finding the law being its larger part, the means of accomplishing that desideratum are not overlooked but are constantly kept in view.

These pages present considerable matter found in the author's works on Contract and on Procedure. Indeed it may be said that they are a revision of matter and of plan therein. As an auxiliary thereto these pages will be found light, portable and convenient, and will, at the same time, be found practically complete in themselves. In the many-shelved library, laden with unwieldy digests, the ever-lengthening lines of cyclopedias, the ceaseless inpour of annotated cases and the numberless gatherings of matter offered to beginners, this little work is designed to fill a distinctive niche. It is offered as a highly-condensed companion piece, as a guide and a complement to all well prepared works that relate to or discuss the old and world-wide law. The effort has been to make it as small and compact as is possible consistently with giving necessary views, and submitting leading questions. And it seems due to inform the reader that there is being prepared for

the press a work of the most comprehensive and fundamental character to be entitled "The Grounds and Rudiments of Law," which will embrace a text-index upon the plan of the author's other works referred to, and in which some of the matter in this volume will be included. This part of the larger works is offered as an introduction to the whole series, it being the belief of the author that the law is an entirety and that it can be articulated upon the plan to be unfolded.

The demonstration is burdened with an effort to introduce and impress matters of great and leading importance, or in other words, the DATUM POSTS.

Beginning with *Windsor:* 1, several important matters are considered. As to the full significance of that case, and all that it teaches, both it and the following cases should be well considered. They reveal the springs of government. From them will appear the relations of Procedure to government, and that Procedure lies at the base of government, of contract, of tort and of crime. Here is a needed lesson as to the supposed distinctions between adjective and substantive law. (See Preface Hughes' Procedure.) With that case is introduced the mandatory record (see *Pennowfeski, supra*) its functions and purposes, and from the viewpoint opened up, this record is discussed as a focus from which issue and radiate numberless rules, relating to all subjects of the law. To support the foregoing conclusions, attention is called to the facts presented in the first twenty-four cases. After these, to *Dickson:* 34, are cases presenting important rules relating to *res adjudicata* and its cognate subjects; here and early, the estoppels are introduced, and their position, as parents of many rules of "substantive" law, explained. From *Dickson:* 34, to *Bailey:* 44, the allegation, the admission, the denial and the issue have complete attention. Next is *Iverslie:* 46, and other cases impressing the rules relating to oral and the best evidence. Following these is a gathering of cases presenting the prominent rules of procedure, equity, construction, evidence, tort, crime and contract; as to the latter, see cases 300-417. Within the gathering, are presented more than 500 leading cases, under which are cited numerous cognate cases, all of which are not only burdened with the six leading subjects mentioned, but the