

BOOK REVIEWS

STEPHEN J. FIELD, CRAFTSMAN OF THE LAW. By Carl Brent Swisher. The Brookings Institution, Washington, D. C., 1930. Pp. viii, 449.

Oswald Spengler in considering the morale of Western mankind says "Everyone *demand*s something of the rest. We say 'thou shalt' in the conviction that so-and-so in fact will, can and must be changed or fashioned or arranged conformably to the order, and our belief both in the efficacy of, and in our title to give, such orders is unshakable. *That* and nothing short of it, is for us, morale. In the ethics of the West everything is direction, claim to power, will to affect the distant." One will find in the subject of this memoir an apt illustration of the philosopher's thesis. Here indeed was the will to command, to direct, to dispose, in full and fruitful action. Seldom have brothers achieved such renown in their day as David Dudley, Cyrus and Stephen Field. Sons of a congregational minister of the oldest New England stock they typify a generation that exchanged its interest in Calvinistic theology for material progress. Apparently the Puritan had for the time being lost interest in domineering over the religious beliefs and social habits of his weaker neighbors and was ready to devote his tireless energy and boundless ambition to the organization, development and control of the great industrial and agricultural empire to which he had fallen heir. It was to California that Stephen J. Field was drawn in the early years of the gold rush. Dr. Swisher draws a spirited picture of the part played by his hero in those eventful years. And who indeed was better equipped to play a leading part than Field, then in his early manhood, educated at Williams College under Mark Hopkins, broadened by European travel far beyond the experience of most Americans of his time, introduced to the practice of the law by an elder brother who was not only a leading figure at the bar but has left an indelible mark upon American procedure? Although his career was stormy enough he soon showed his superiority to the swarm of adventurers and riffraff with whom he was thrown in contact. He drafted the California Code, built up a large practice, at forty-one was elected to the Supreme Court of California, and six years later he, a Democrat, was appointed by President Lincoln to the Supreme Court of the United States, where he sat for more than thirty-four years. When Judge Field took his seat in the Supreme Court of California that body was in low repute, and with characteristic energy the new judge set out to bring order out of the chaotic state of the law, particularly the property and mining law, due the unprecedented circumstances of the settlement. Large sums were involved and judgments could not be rendered that would satisfy all the greedy speculators involved. There were scandalous accusations levelled at the members of the court in anonymous pamphlets and in the press to which Judge Field's reply was a contemptuous silence. Some of his decisions then, and others later in the United States Circuit Court, especially those protecting the Chinese from oppressive legislation, were very unpopular. The majority of Californians, while proud of his national reputation as a jurist, with the characteristic inconsistency of democracy, came to regard him as hostile to

popular interests. He was, in fact, too consciously and obviously a superior person. In the Supreme Court of the United States Mr. Justice Field took part in the momentous decisions of the reconstruction period and the era of Western expansion. He was regarded by his contemporaries as one of the strong members of the court, a view that is still held by students of constitutional law. In the end he became a dissenting judge; his individualistic outlook on life and suspicion of government, partly the inherited tradition of his race; partly the result of practical observation of the character and conduct of most politicians, put him out of step with the movement for the expansion of administrative agencies and social control, inevitable in an industrial age. In 1880 the judge was seriously brought forward by his friends as a candidate for the Democratic nomination for the presidency, but fortunately for himself, in the light of the subsequent experience of another eminent judge, he did not receive strong support in the convention. His judicial work continued until failing health led to his resignation in 1897, two years before his death. He had written, it is stated, six hundred and twenty opinions for the Supreme Court, fifty-seven for the Circuit Court and three hundred and sixty-five for the Supreme Court of California, an impressive record. The long life of this distinguished jurist was so intimately associated with the political movements of his day that his biography is almost necessarily a panorama of historical events, and Dr. Swisher has so regarded it, placing special emphasis on the picturesque formative influences that moulded his career and the social and economic influences that affected his thought. In an effort to be impartial he has repeated much malicious gossip from hostile newspapers and from the scurrilous libels of his enemies. It is a familiar paradox that we believe almost nothing that we read in the daily papers for ourselves, but take seriously the same dubious stuff when it is dished up for us by a historian. In the debunking process who will ever debunk the press for us? That Judge Field was guilty of the corrupt motives imputed to him by disgruntled critics there is not the slightest evidence worthy of serious belief. Without resorting to the familiar methods of the little fellows in politics he could easily have acquired a large fortune in the legitimate practice of the law, but he preferred the dignity and authority of the bench and died comparatively poor. In his treatment of the sordid and tragic Terry affair the author has dealt very gently with the notorious and unpleasant principals and the silly conduct of some minor officials in California. The Judge, however, belonged to the strenuous, active type that almost courts criticism. Supremely self-confident, and thoroughly contemptuous of mediocrity, he would have echoed heartily Browning's "What had I on earth to do with the slothful, with the mawkish, the unmanly? Like the aimless, helpless, hopeless, did I drivel being who? One who never turned his back but marched breast forward, etc." The Judge lived in a great period of expansion and like his contemporaries admired and respected constructive achievements, some of which candor compels one to admit, took on at times the aspect of ruthlessness. Like most men of action Judge Field is somewhat naïve in his belief in self evident truths and offers an amusing contrast to his intellectual contemporary Henry Adams, whose "Education" is not only a penetrating survey of the American scene but the best autobiography since that of Benjamin Franklin. In one respect, as a lawyer

sees it, this excellent contribution to historical research might have been stronger; the center of interest is too exclusively personal and political for the biography of one who was pre-eminently a lawyer and a jurist. It is very true that in a book intended for the general public, technical discussion, unless strictly limited, would weight it too heavily; but the fact remains that Judge Field was well versed in the technicalities of the common law, and, with the possible exception of his brother David Dudley Field, knew far more about procedure than any of his contemporaries. This side of his character is not sufficiently stressed although the economic aspects of his judgments are fully treated. We would like to hear more of what his colleagues on the bench and the leaders of the bar privately thought of him, and a few extracts from his vigorous opinions on questions of substantive law and procedure would have offered a better rounded portrait of the judge in action. Indeed, it is here, perhaps, that his contributions to American law may, in the long run, prove more lasting and significant than in the constitutional cases, which made a great noise in their day but now lie buried in the deeper catacombs of the political graveyard.

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ESSAYS IN JURISPRUDENCE AND THE COMMON LAW. By Arthur L. Goodhart. Cambridge: at the University Press; New York: The Macmillan Company, 1931. Pp. xvi, 295.

The essays of which this book by the learned editor of the Law Quarterly Review is composed, have all appeared previously in separate articles, but they are well worthy of collection in a single volume.

Space forbids a discussion of more than a few of the interesting questions that the author raises. The first chapter on "Determining the *Ratio Decidendi* of a Case," invites comparison with the pronouncements of other learned persons. The essayist accepts as sound a statement from Sir John Salmond,¹ to the effect that it is the *ratio decidendi* or principle of a case which alone has the force of law, and then argues that the principle of a case is found by taking account of the facts treated by the judge as material, and of his decision based on them. It is not permissible to go "behind the opinion to show that the facts appear to be different in the record." This is in striking contrast with the attitude of some American scholars who seem to assert that the only authoritative features of a case are found in its actual facts and the decision, because these contain the data for determining what courts do, as distinguished from what courts say they do. For American purposes, at least, it seems as if both parties somewhat over refine the matter. A realist can hardly deny that courts in varying degrees and with varying facts presented to them, give weight in considering a prior decision to its actual facts and the decision on them, to the facts assumed by the court as distinguished from the actual facts, to the reasoning of the court and even to statements which were unnecessary to the decision from any point of view.

¹ SALMOND, JURISPRUDENCE (7th ed. 1924) 201.

Probably judges assert and exercise greater freedom in the United States than in England in dealing with precedents; and this forms the basis of an argument in an essay on "Case Law in England and America," that the bond between England and the United States of a common system of law is weakening. The stricter adherence to precedent in England must be followed, the author says, by a growing divergence of the law in the two countries. There is no doubt some force in the argument, though it seems overstressed. Mr. Goodhart quotes from Salmond with approval a statement that under the English doctrine not only lower courts are bound to follow decisions of upper courts, but both the House of Lords and the Court of Appeal are absolutely bound to follow their own previous decisions. If this is even approximately true, it gives an importance to determining with minute exactness the principle of a previously decided case; but it is scarcely too much to say that such a doctrine seems absurd to an American lawyer; and he will find it hard to believe that an English lawyer who asserts it does not recognize that he is indulging in a fiction. It certainly is true that on many points the English law today is diametrically opposite to what it was two hundred years ago, or one hundred years ago; and the changes have not all been due to statutes. Instead of the old rule of *caveat emptor, caveat venditor* would much more nearly express the modern English law. The law governing Impossibility and Frustration for Breach of Contract, is unquestionably only about seventy years old. "The original rule of English law was clear in its insistence that where a party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. That principle was applied with full severity during the eighteenth century."²

It would be easy to find other examples of rules reversed. Possibly the law of the next century or two may bring fewer changes than those that the past one or two centuries have brought, but that there will be many changes is certain. If precedents are always slavishly followed these changes can come only by statutes or by decisions that make distinctions without differences. It is true that the English law is becoming increasingly based on statute, but Bentham's dream of the total abolition of the Common law seems still far distant. The present Lord Chancellor, in a tribute to Mr. Justice Holmes seems to indicate a possibility of flexibility in the English law somewhat greater than Mr. Goodhart would allow it:³

"I value not less the way in which his work has been throughout permeated by a philosophic grasp of first principle, on the one hand, and of changing social conditions on the other. In this sense he has taught us all the manner in which law may be best adapted to new needs and new purposes."

In an interesting chapter on "Blackmail and Consideration in Contracts," the author points to a distinction between what he calls moral and immoral liberties, the latter being acts which are not punishable by law, but which are nevertheless regarded as opposed to public policy. Exercising an immoral lib-

² Blackburn Bobbin Co. v. Allen [1918] 1 K. B. 540.

³ Sankey, *Mr. Justice Holmes* (1931) 44 HARV. L. REV. 680.

erty, he points out, is insufficient consideration for a promise and the enforcement of a bargain to refrain from exercising an immoral liberty he deems so opposed to public policy as to preclude enforcement of the bargain. He criticizes a statement in the Reviewer's treatise on Contracts, that refraining from exercising an immoral liberty may be sufficient consideration. The criticism may be sound; but possibly there are differences of degree even in immoral liberties. Some may well be so seriously immoral that to sustain a bargain to refrain from exercising them would be opposed to public policy. This might not be true of all immoral liberties.

The essay on "Costs" indicates one reason why England can carry on its legal business with so much a smaller number of judges in proportion to its population than the United States. The expense incurred in English litigation in the higher courts is heavy, in view of the toll taken by solicitors and barristers; and when to these and other necessary expenses that a party must pay are added the costs to which the winner is entitled from the losing party, it surely becomes important to be sure that you are right before you engage in litigation. Costs include expense incurred in preparing a case as well as in conducting it. Mr. Goodhart cites two cases where the costs that the losing party had to pay the winner were respectively £70,000 and £40,000. Here, as throughout his essays, he is conservative in his views and faithful to the English tradition. He says in substance, "somebody has to pay the cost, and the losing party, presumably the party in error, is the one that ought to do it." Most American lawyers would agree that it is wrong to assume as a "necessary conclusion that the defeated party was morally culpable in bringing action, or in resisting suit, as the case may be. Nothing could be further from the actual facts of life."

The Reviewer, a number of years ago, laboriously and with an endeavor to be judicial, prepared an opinion for New York counsel that confirmed the latter's belief in the validity of his contention in threatened litigation in London. The result was unfavorable, and the New York counsel subsequently remarked that if a client of his was ever again sued in London for £5000 he would advise an immediate payment of £6000 on account, in order to diminish the costs.

The provisions in the English rules putting the imposition of costs in the discretion of the Court is worthy of all the author's commendation, but it must be assumed that in general the loser pays the whole or substantially the whole expense of the litigation, including the cost of preparation.

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THE LEGAL HISTORY OF TRADE UNIONISM. By R. Y. Hedges and Allan Winterbottom. London and New York: Longmans, Green & Co. 1930. Pp. xix, 170.

For Americans the study of English labor law is more than rich with interest; it is essential. One reason is that the controlling ideas in American labor law are of ancient English origin. Without a recognition that the wage

contract is quite distinct from the ordinary business contract—a distinction which has its origin in the treatment that the ruling society has accorded it since, if not before, the Statute of Laborers¹—the legal treatment of that contract is inexplicable.² Without sensing the galvanic current that runs from the Elizabethan Statute of Artificers through the latest labor injunction, the law loses that seamlessness that gives to it its meaning. Without an understanding of the utility of the flexible concept of conspiracy as an instrument to hold criminal and, in later days, tortious, conduct which to the judges of yesterday and today threatened the complexion of their several social structures, labor law becomes a barren collection of rules and precedents. In short, the dynamic forces that dominated the moulding of this branch of law can be seen, like architectonic qualities, only in the wide perspective that English law has to offer.

Again, England since 1824 has struggled whole-heartedly with the problem in a way that America has still to do. It would be hard to find another century and another field of law so packed with purport. The ability of judges to emasculate legislation to which they are hostile,³ the inability of judges to

¹ "The history of the common law shows beyond question that its principles were framed in the interest of the employer, and that in the mutual relations of master and servant the servant was at a disadvantage." Taft, *Presidential Address* (1914) 39 A. B. A. REP. 359, 370. ". . . usage is inveterate that the employee shall trust the employer for compensation rather than the employer pay first and trust the employee for the performance of his undertaking; and parties must be understood to contract with reference to the usage. Perhaps the origin both of the usage and of the law is that the employers have been in a position to establish both." 2 WILLISTON, CONTRACTS (1924) § 830.

² It is impossible to conceive of ordinary business contracts being given the extensive protection that the anti-union contract has been given in such cases as *Hitchman C. & C. Co. v. Mitchell*, 245 U. S. 229 (1917); *International Organization, etc. v. Red Jacket Consol. C. & C. Co.*, 18 F. (2d) 839 (C. C. A. 4th, 1927). Similarly until *Britton v. Turner*, 6 N. H. 481 (1834), the breach of an employment contract by the employee was visited with a denial of civil remedies unique to that type of a contract. See *Legislation*, (1930) 43 HARV. L. REV. 647. The doctrine of *Lumley v. Gye*, 2 El. & Bl. 216 (1853), had long previously been established in the employer-employee relationship. See *Ordinance of Labourers*, 23 Edw. III, c. 2 (1349); *Mass. Acts* (1718-19) c. 14.

³ Five successive legislative enactments were necessary to secure to workmen the right of "peaceful picketing". In *Reg. v. Rowlands*, 5 Cox, 436 (1851), and *Reg. v. Duffield*, 5 Cox, 404 (1851), Erle, J., overturning the earlier construction given Sec. 3 of the Combination Act of 1825, 6 GEO. IV, c. 129, by *Reg. v. Selsby*, 5 Cox 495n (1847), held that peaceful picketing was unlawful. To permit this where the strike was for higher wages or lesser hours was the purpose of the Molestation of Workmen Act of 1859, 22 VICT., c. 34. Its effectiveness was, however, destroyed by the broad interpretation given to "intimidation" by *Bramwell, B.*, in *Reg. v. Druitt*, 10 Cox, 592 (1867). The Criminal Law Amendment Act of 1871, 34 & 35 VICT., c. 32, as interpreted by *Reg. v. Hibbert*, 13 Cox, 82 (1875), similarly destroyed the effectiveness of this act. The Conspiracy Act of 1875, 38 & 39 VICT., c. 86, again sought to establish the right. See G. R. Askwith in *Minutes of Evidence before the Royal Commission on Trade Disputes and Trade Combinations*, Cd. 2826 (1906), p. 9. The courts, however, construed it otherwise. *Reg. v. Bauld*, 13 Cox, 282 (1876), *Lyons v. Wilkins* [1899] 1 Ch. 255. The right was finally accorded by Section 2 of the Trade Disputes Act of 1906, 6 Edw. VII, c. 47.

see the outmoded quality of the views that they translate into law,⁴ the straining effort of judges to reconcile the irreconcilable,⁵ all these are writ large upon the pages. But more than this one can learn much of the tasks and hazards of legislation—the necessity for effective processes preparatory to statute-making,⁶ the intrinsic difficulties in defining the limits of allowable conduct when the conduct will not regiment itself into general rules,⁷ and the importance that statutes which alter settled judicial doctrine shall represent political forces if effectiveness is their aim.⁸ Indeed, 1824 to 1927 and beyond, is in this field a veritable epic of the law. To Americans, moreover, the English effort which in trade disputes made permissible collective effort of practically every kind and relied upon the criminal law to impose the necessary restraints, presents a strange contrast to the American effort which at every step has distrusted

⁴ Cf. *Reg. v. Hibbert*, *supra* note 3; *Rex v. Dixon*, 6 C. & P. 601 (1834); *Hornby v. Close*, 2 Q. B. 153 (1867), repudiated by the Larceny and Embezzlement Act, 1868, 31 & 32 VICT., c. 116, and the Trade Unions Funds Protection Act, 1869, 32 & 33 VICT., c. 61. Hedges and Winterbottom give these acts their real due rather than ascribing the remedy to the Trade Union Act of 1871, 34 & 35 VICT., c. 31. Pp. 53-57. Cf. SLESSER AND BAKER, *TRADE UNION LAW* (3rd ed. 1927) 9-10, 112. But see ERIE, *THE LAW RELATING TO TRADE UNIONS* (1869) 4.

⁵ The most fascinating of these are, of course, the famous judgments of the House of Lords in *Allen v. Flood* [1898] A. C. 1, and *Quinn v. Leatham* [1901] A. C. 495, which in themselves contained curious constructions of the effect of earlier judgments such as *Keeble v. Hickeringill*, 11 East 574n. (1706), and *Carrington v. Taylor*, 11 East 571 (1809). The efforts to understand the purport of these two House of Lords decisions on the part of the lower courts may possibly now be relaxed since the decision in *Sorrel v. Smith* [1925] A. C. 700. It is interesting to note that the basis of distinction there taken was one which Dicey had earlier rejected. See 18 L. Q. REV. 1.

⁶ The English statutes from 1870 onward were in nearly every instance preceded by investigations undertaken by Royal Commissions, whose reports formed a basis not only valuable in the framing of the statutory remedies but also important to a thorough criticism of the statutes during their progress through Parliament.

⁷ The allowable limits of picketing were particularly difficult of determination and hence of definition. See Report of the Royal Commission on Trade Disputes and Trade Combinations, Cd. 2825 (1906), p. 11. The same problem faces American chancellors in their framing of picketing decrees. See *Jensen v. C. & W. Union*, 39 Wash. 531, 81 Pac. 1069 (1905).

⁸ In the Parliament that passed this act, "the two leading officials of the National Union of Miners, became the first 'Labour members' of the House of Commons." See WEBB, *HISTORY OF TRADE UNIONISM* (1920) 289-291. The Trade Disputes Act of 1906, the most significant of all the labor measures, inasmuch as it overruled the doctrines of the House of Lords as announced in *Quinn v. Leatham*, *supra* note 5; *Taff Vale Ry. Co. v. Amalgamated Society of Ry. Servants*, [1901] A. C. 426, and *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, was the resultant of strong pressure by the Labor party upon a Liberal cabinet. The Trade Union Act of 1913, 2 & 3 GEO. V, c. 30, which overruled the judgment of the House of Lords in *Amalgamated Society of Ry. Servants v. Osborne*, [1910] A. C. 87, had behind it a similar strength. Indeed, the era of effective labor legislation coincides with the awakening of political consciousness on the part of labor. To what extent the ineffectiveness of the Clayton Act is attributable to the lack of political solidarity on the part of American labor is an interesting subject for speculation.

the criminal law and sought through the exercise of wide equity powers to fashion its own instruments of control.⁹ With American labor law now on trial, the English experiment cannot be neglected.

The wider social history of English trade unionism has already been well done.¹⁰ But the legal history of the movement was wanting.¹¹ This need this slender volume of Messrs. Hedges and Winterbottom has admirably filled within the limits they set for themselves. The first part of their book carries one from the Elizabethan period to the Trade Union Act of 1871. Fortunately unlike most English law books, the authors make use of material other than mere cases and so succeed in filling in the barrenness of precedents with the meaningful society upon which law played its part.¹² From the purely technical standpoint, the narrative is accurate and surprisingly complete.¹³ The three

⁹ ". . . broadly speaking, the political genius of our people has evolved this system—that we have not sought to make strikes illegal, but we have sought to control, and rigorously control, what was done during the strike. The American policy has been exactly the opposite. The Americans have sought to make strikes illegal . . ." Sir W. A. Jowitt, the Attorney General, in 247 Hans. Deb. (Comm.) No. 42, p. 392 (Jan. 22, 1931), quoted in Frankfurter and Greene, *Congressional Power over the Labor Injunction* (1931) 31 COL. L. REV. 385, 410.

¹⁰ WEBB, *HISTORY OF TRADE UNIONISM* (1920), is the outstanding text on this subject. Among other noteworthy volumes are COLE, *A SHORT HISTORY OF THE BRITISH WORKING CLASS MOVEMENT* (1925); HAMMOND, *THE RISE OF MODERN INDUSTRY* (1925); and RAYNER, *THE STORY OF TRADE UNIONISM* (1929).

¹¹ Prior to the present volume the most significant treatment of the subject was the brochure of Geldart, *The Present Law of Trade Disputes and Trade Unions* (1914) POLIT. QUART. No. 2, 17. ASSINDER, *LEGAL POSITION OF TRADE UNIONS* (1912), is of negligible value. Other English works on labor law, though competent, treat the subject primarily from a practitioner's viewpoint. Among them are SLESSER AND BAKER, *TRADE UNION LAW* (3rd ed. 1927); HENDERSON, *TRADE UNIONS AND THE LAW* (1927); COHEN, *TRADE UNION LAW* (3rd ed. 1913); ERLE, *THE LAW RELATING TO TRADE UNIONS* (1869); FERGUSON, *TRADE DISPUTES AND TRADE UNIONS ACT* (1927); GREENWOOD, *LAW RELATING TO TRADE UNIONS* (1911); HEWITT, *TRADE UNIONS AND THE LAW* (1927); PENNANT, *TRADE UNIONS AND THE LAW* (1905); SCHLOSSER AND CLARK, *LEGAL POSITION OF TRADE UNIONS* (1913); SLESSER AND HENDERSON, *INDUSTRIAL LAW* (1924); SOPHIAN, *TRADE UNION LAW AND PRACTICE* (1927).

¹² One regret, from the reviewer's standpoint, is that more use of these materials has not been made. Particularly is this true of the scope of litigation in the lower courts, mainly unreported, detailed in WEBB, *op. cit. supra* note 10, which gives a better idea of the practical effect of the various statutes. Parliamentary documents, and the materials to be found in the Parliamentary debates, are also sparingly resorted to.

¹³ In dealing with the rise of the common law doctrines of criminal conspiracy, the Anonymous case in 12 Mod. 248 (1698), is overlooked. Materials, other than the decided cases, tend also to give a fuller picture of the common law background of this doctrine than would be gleaned simply from *Rex v. Journeymen Tailors*, 8 Mod. 10 (1721); *Rex v. Eccles*, 1 Leach 274 (1783) and *Rex v. Mawbey*, 6 T. R. 619 (1796). Much reliance was placed upon these materials by counsel and judges in the early American conspiracy cases, when the issue was presented to American judges as to whether *Rex v. Journeymen Tailors* correctly stated the common law of England. See especially the full report of *People v. Melvin*, 2 Wheeler C. C. 262 (N. Y. 1810), in 3 COMMONS

latter chapters of the second part carry this history down to the Trade Disputes Act of 1927. The intermediate three chapters, dealing with the enforceability of trade union agreements and the effect and implications of the famous Osborne judgment,¹⁴ have a narrower significance in that they present problems more or less unique to English law. Indeed, the technicalities of this portion of the subject and its dependence upon statute law tend to make these chapters more of a commentary upon the provisions of the relevant parliamentary enactments than a picture of the relationship of labor activities to law.

Of course, such a book as this needed doing. It will undoubtedly be done again and, with this work as a basis, it will be fuller and so even better done. But it has been done well and in such a succinct fashion that, like other concise texts, this book will not easily be replaced. The broader university outlook is something of a rarity in English legal literature, as in ours. A volume, which retains that outlook and also misses none of the legal technicalities, deserves high commendation.

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AND GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, 251. See also BRYAN, DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY (1909), *passim*.

¹⁴ *Amalgamated Society of Ry. Servants v. Osborne*, *supra* note 8.

LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT. By Herman N. Finkelstein, Columbia University Press, New York, 1930. With an Introduction by Professor Karl N. Llewellyn. Pp. xxviii, 295.

Any work relating to commercial letters of credit naturally brings to mind the pioneer articles by McCurdy,¹ Hershey,² and Mead.³ Their excellence sets no mean standard for subsequent writers upon this general subject.

In two hundred ninety-five pages Mr. Finkelstein has covered the general field of his predecessors, added detail, and given consideration to some additional topics. Indeed, one may doubt if any question relating to bank letters of credit which had received judicial consideration before his manuscript was closed, escaped the author's attention. An introductory historical résumé of the development of letters of credit is followed by a summary of the classes of instruments of bank and commercial credit and the relationship to these of a modern bank letter of credit. Promises to accept or to pay drafts are reviewed at length in connection with a consideration of the enforcement remedies upon a letter. Relations of the several parties to a letter, including the position of correspondent and requesting banks and purchasers of drafts, are particularized and compared. Conditions in letters, both those which call for documents and those which do not, are reviewed generally and also specially as to the

¹ McCurdy, *Commercial Letters of Credit* (1922) 35 HARV. L. REV. 539, 715. *The Right of the Beneficiary Under a Commercial Letter of Credit* (1924) 37 HARV. L. REV. 323.

² Hershey, *Letters of Credit* (1918) 32 HARV. L. REV. 1.

³ Mead, *Documentary Letters of Credit* (1922) 22 COL. L. REV. 297.

requirement of the conformity of documents with the letter and as to the effect of forged and fraudulent documents. Damages for breach are treated in a special chapter. In the final chapter the author reviews the several legal theories which stand in the legal background of these transactions.

In his preface the author indicates extended contact of himself and of his manuscript with various members of the faculty of the Columbia Law School. Among those to whom special acknowledgments are made for their criticisms and assistance are Professors Llewellyn, Patterson, Yntema, Underhill Moore and Douglas.

It seems open to question if legal problems of modern bank letters of credit are most effectively treated by delimiting them from other accommodation contracts for credit, especially those of sureties and guarantors. In dealing with the modern commercial letter of credit as a "primary obligation" the author observes as follows: "The issuing bank has incurred a distinct independent obligation contingent upon the performance of certain conditions contained in the letter of credit. The rules governing obligations of sureties and guarantors have no application." This conclusion is too broad. A particularistic survey of the obligations of sureties and guarantors as well as of modern commercial letters discloses that, as respect their fact bargains, there are sureties and sureties and guarantors and guarantors, as there are modern letters of credit and many of them. The legal position of the contracts of some sureties and of some guarantors and of some bank letters of credit is exactly similar on many issues. Those legal aspects which are exclusively applicable to modern bank letters of credit assume less importance than the author's presentation tends to indicate.

The author seems to have felt purpose or pressure to picture in places the "economic" and business aspects of portions of his subject. This impression is gained from parts of the text notwithstanding its restricted title and notwithstanding inferences which may be drawn from Professor Llewellyn's extended introduction to the book wherein he undertakes, as he states, to set forth a "non-competitive line of discussion," namely, "to sketch something of the business and economic background of the institution Dr. Finkelstein has chosen for his study." Without passing upon Mr. Llewellyn's exposition of the "business and economic background of the institution," it seems manifest to the reviewer that Mr. Finkelstein attempts the same thing on occasion. These areas of the author's endeavor provoke further adverse criticism. From his effective particularization in other parts of the book, the reader is taken into involved summations not unlike those of a classical economist. Institutional forms are reared by over-generalization on variable forms of business transactions for no useful—even introductory—purpose. They are informative at most only within the confines of the author's own sentences constructing them. (See, for example, portions of the observations upon bank and commercial credit, pp. 8-14.) This technique is accompanied by a process of simplification and further summation which recurrently declares the "essence" or "the true function" of the institution.

An aspect of this process at times threatens the merit of the author's work with his legal materials. Thus, as to many of the propositions of law which are set forth concerning the "modern commercial letter of credit," the cautious

reader frequently doubts whether the author evaluated the facts and documents in the particular case and with reference to the particular issue involved or had reference to an "*omnium gatherum*"—his "modern commercial letter of credit." The vice of the technique is also manifest in the over-simplification of the comparison of the obligation of sureties, guarantors and commercial letters as criticized above.

Subject to the foregoing reservations, somewhat supercritical, perhaps, one cannot deny the author's thoroughness. The book merits much praise.

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MANDATES UNDER THE LEAGUE OF NATIONS. By Quincy Wright. University of Chicago Press, Chicago, 1930. Pp. xvi, 726.

This book is a critical, exhaustive attempt to set out the history and present situation with regard to one of the most important results of the great war. The first impression that the book makes is of the immense labor necessary to produce it. This is shown by the great mass of material that has been gathered together from all quarters. But gathering a great source of material is only one step in the construction of such a work. That material, when gathered, has to be sifted and compared and out of it selection has to be made; in other words, the principles of historical criticism have to be applied. But the most important step is yet to come, the interpretation of the material itself, what the material means after it has been evaluated, the historical construction that is to be put upon it. In all of these respects this work seems to show a high standard of performance. It is very exhaustive, consisting of 668 pages not including the Table of Cases and the Index. It has in it a most excellent and inclusive bibliography, occupying about 30 pages. It also has an appendix with valuable maps of mandated territories, trade and financial statistics, statistics on the area, population and trade of German colonies before the World War, and of area, population and railroads of mandated territories. The appendix also contains the text of the mandate articles of the League of Nations covenant and other materials of great consequence.

The first chapter on "The Origin of the Idea" is an interesting one and gives an intelligent approach to the whole subject. It shows clearly how the ideas of expansion, colonization and imperialism jostled one another in the final make-up of the idea of mandates. The development of trusteeship of backward people had its origin as far back as the time of Queen Isabella and of the Spanish Crown in their attempt to control the calamitous effect of actual Spanish administration in South America. It was not, however, as this chapter shows, until the eighteenth century that these humanitarian efforts became in any way organized, and, as so often happens, the propelling force in them was economic expediency. It is made clear here that the whole conception of dependency was shifting from that of property to that of personality. The tutelage of backward communities followed naturally from this conception, and the part of the

United States in it in connection with Cuba is well shown by a note from the finding of the Supreme Court in *Neely v. Henkel*.¹

Another conception that is seldom brought out, but emphasized in this chapter, is the growing conviction that imperial responsibility of trusteeship and tutelage towards dependencies is not merely a moral responsibility but a responsibility under international law which has a legal basis. Such was the situation when the war closed and something had to be done in regard to the German colonies and certain European states that were left stranded by the war.

Chapter II on "The Establishment of the Institution" together with the footnotes gives us a clear view of the struggle that developed over mandates. Should mandates, as originally conceived by General Smuts apply only to the broken empires of Austria-Hungary, Russia and Turkey, or, as President Wilson conceived it, to the German colonies?

Another question of great importance treated in this chapter—What shape should the mandates take, annexation, independence, or the limited relation now understood under the mandate system? President Wilson is largely responsible for prohibiting annexation. It is not necessary to go further into details, but the chapter winds up with the pregnant statement: "But though mutilated in details, sullied by the spirit of barter, delayed in confirmation and minified by the mandatories, the system was finally put in operation."

The heading "The Reception System" (Chapter III) is also interestingly treated. It is notable that German writers show an increasing tendency to accept the system, insist upon full adherence to its principles and urge that the League supervision be strengthened. One reason for this clearly appears from the work of Dr. Heinrich Schnee, who asserts that France is employing the natives of German colonies in warfare of any kind, aggressive or defensive, in any part of the globe including the European continent. Of course, the Soviet Union and Turkey could be expected to be hostile, and the attitude of the United States has not been over-friendly. It is of first importance, however, that the League of Nations has taken the system seriously and is laboring to make it a success. The degree of acceptance by the mandated people can hardly be arrived at for the reason that classes B and C are not highly developed and it would be impossible to ascertain popular opinion. The attitude of the mandatory governments has not been all that one could desire, as is so fully shown in this section of the work.

Part II on "The Organization of the Mandate System" is well done; it includes Confirmation of Mandates, the Agencies of League Supervision, namely, the Council, the Assembly, the Secretariat, the Permanent Mandate Commission, the Permanent Court of International Justice; they are all thoroughly treated. So is the procedure of the various League organs in the discovery of facts upon which all future action must depend. "The Supervision of Mandatory Administration" in Chapter VII is good, and Chapter VIII on "The Establishment of Standards" is exceptionally important and a very interesting treatment of the difficulties in the way of practical administration.

¹ 180 U. S. 109, 21 Sup. Ct. 302 (1901).

As complete a review of this book as its importance justifies is quite impossible for lack of space, but one must note Part III that has to do with the more theoretical and scholarly discussions of the principles underlying the application of mandates. This part turns out to be also one of the very best parts of the book. It seems sound and fairly inclusive in its treatment. Chapter IX discusses the system of international law as related to mandates, and the very fundamental question of sovereignty as affected by the attempted mandatory system. There occur at the outset these pregnant sentences: "The United States Government was able to function for years with the divided sovereignty devised by Madison and Hamilton in spite of the insistence of legal purists that divided sovereignty was impossible. The British Commonwealth of Nations seems able to do business in spite of the doubt as to whether sovereignty has or has not passed to the self-governing dominions. So also the mandatory system has worked successfully for nearly a decade though there has never been an official assertion as to the location of sovereignty and though the opinions of unofficial jurists on the subject have been almost as numerous and diverse as the jurists who have devoted themselves to the study." Yet this matter must be settled and a thorough discussion of it in this book is very timely. The conclusion of this chapter is: "Under it (the classification of sources in Statutes of the Permanent Court of International Justice) the most authoritative source of law for the mandate system is the applicable conventions, *i. e.*, Articles 22 and 23 of the Covenant of the mandates. The actual practice of the League organs, the mandatories and other states is gradually establishing customs which are the source of second importance. After these, one must look to the general principles of law recognized by states in past contacts with problems of this character, and to the accepted legal meaning of terms such as 'mandate', 'tutelage' and 'trusteeship' in the documents. Finally, one must examine the opinions of courts and qualify jurists on the institution."

The remainder of the book is taken up with examination of these four types of sources. Of these, Chapter XI on "The General Principles of Law" is especially significant. Its discussion is worthy of careful reading. And finally, Chapter XV on "The Achievements of Mandatory Administration" is enlightening, dealing as it does with the question of land tenures and wages, education, security and freedom, as well as the more practical questions of public works and services. The author concludes that the success of the system depends on full understanding of the facts by the League organs in order that their supervision may be wise. Better standards and better sources of information are needed, and informal visits by secretariat officials and members of the commission would be useful.

"The question of extending the system to other areas in the administrative sense is of less importance than the extension of its principles. The League's major work, however, is to focus attention on the problem, to coordinate investigations and experiments towards its solution and to see that the mandated areas are administered in the interests of the natives and the world according to the best learning and experience in the world, thus setting examples for the administration of backward areas everywhere."

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