Kentucky Law Journal

Volume 14 | Issue 4 Article 9

1926

Book Reviews

Charles J. Turck
University of Kentucky

W. Lewis Roberts
University of Kentucky

BOOK REVIEWS

THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE MARKS. By Frank I. Schechter. New York: Columbia University Press, 1925, pp. XXVIII, 211.

This is the first of a series of legal studies to be published under the auspices of the Faculty of Law of Columbia University, and if the successive volumes are as scholarly in research and as original in purpose as this initial book is, our American legal literature will be greatly enriched by the series.

Professor Monroe Smith in his introduction to this work, calls attention to the tardy recognition that the English royal courts gave to the rules established centuries earlier by gilds and by towns and applied in the customary courts. It is indeed something of a surprise to the average common law student who never ventures beyond the boundaries marked off for that law by the royal courts to know that there was something before the common law, other courts and other rules that competed with the King's court in controlling the relations of men. "The customs of merchants, however uniformly administered, was not recognized as English common law." Only gradually did the common law courts extend their jurisdiction over commercial cases that had previously been decided in the communal court, and over many phrases of family law that had previously been controlled by the ecclesiastical courts.

In seeking the origins of trade mark law, Dr. Schechter was driven beyond the law reports and the statutes to the records of organizations of merchants and craftsmen and the researches of antiquarians and archaeologists. The early records of the King's courts are practically silent as to trade marks. The reason for this silence is the fact that the trade gilds forbade members to seek redress at law for wrongs perpetrated by a gildsman against his fellow-gildsman, and in spite of an Act of Parliament in 1504 prohibiting such non-litigation ordinances by the gilds, they were regularly enforced by the gilds for over a century thereafter. It is to the records of these gilds and to allusions to the merchants' marks in many old writings of a non-

legal character that one must go to find the origin of merchants' trade-mark.

The author points out that at first merchants' marks were indicative of property in the goods to which they were affixed, a concept quite remote from the modern idea of the trade mark. They were regarded "as establishing *prima facie* and often even conclusive evidence of the ownership of the goods," and instances of this are cited where cargo is recovered in case of shipwreck or piracy and where foreign merchants sought a restitution of their goods on proof of the marks appearing on the goods. Craftsmen's marks were used primarily to affix a liability upon the craftsman rather than to create a right. The sale of wares that were defective in quality or workmanship violated the criminal law and might injure the entire gild by destroying popular confidence in it, and therefore the craftsman was compelled to put his mark on his goods that he might be identified and held responsible for such defects.

But in the course of time, these "liability marks" became "asset" marks, or trade marks in our modern sense of symbolizing good-will. This change can be noted first in trades where goods of durability and transportability were dealt in, especially in the clothing and cutlery trades. And with ever widening markets the importance of the trade mark as an asset to the maker increases. But this development came after the decline of the gild system, which was hostile to the development of an individual gildsman's good will and regarded the trade mark merely as a means of regulating the craft and not as an asset of the user to be exploited by him.

Dr. Schechter then traces the development of the trade mark in the cloth trade to the point where in the seventeenth century it ceases to be a means of identifying defects and becomes a guaranty of the good qualities of the source of the production, and as such received protection by certain administrative bodies. In the cutlery trade, this transformation is carried further, to the point where the trade mark could be bought, sold and transmitted, and a qualified system of ownership therein was recognized by the trade.

In the sixth chapter, the author attempts to find a connecting link between gild law, statute law and the conciliar law

developed by the King's Council and the Star Chamber on the one hand and the common law on the other, as regards trade marks. It is to be regretted that Dr. Schechter's book does not contain as clear an exposition of the statute and conciliar law on trade marks as of the gild regulations on the subject, but he quite properly explains that the paucity of authority in these fields and in the common law can be traced to the fact that trade marks were of little value so long as the producer and the consumer were in close contact. But in spite of this warning as to the economic unimportance of the trade mark one is still unprepared to find that in 1742, Lord Hardwick in *Blanchard* v. *Hill,* 2 Atkyns 484, refused the first recorded request for injunctive relief against trade mark piracy. The author explains the decision as an expression of the prevailing antagonism to monopolies, but even so, the decision seems to be not a connecting link, but a break in the chain. While the case was later repudiated, it remains in the memory to disturb the progrees by which the trade mark came from its lowly origin in the gilds to the place where in 1838 its protection in law and equity was deemed too clear a duty to require the citation of any precedents.

In his closing chapter, Dr. Schechter considers in the light of his historical researches the main problems in the modern law of trade marks. Is a trade mark property or a symbol indicating origin or ownership or a symbol of good will? Does the court protect it because it is property or in order to prevent fraud? The author makes the ingenuous suggestion that although the trade mark does not indicate that the article in question comes from any particular source, the characteristics of which are favorably known to the purchaser, it does guarantee that the goods emanate from the same source as certain other goods that have given the consumer satisfaction and have borne the same trade mark. He affirms that in the light of historical research it is correct to classify trade marks as property, but he further concludes that even if a trade mark were not technically property, equity should interfere against the piratical use of such a mark by others in order to prevent the destruction or impairment of the probable expectancy of trade or custom of which the trade mark is both a symbol and a creative factor.

This conception will facilitate an adequate judicial protection of trade marks, whereas a rigid insistence on the element of fraud or deception would permit piracy of a trade mark in one line by a maker of a non-competing article. A court should be unwilling to permit a defendant "to get the benefit of complainant's reputation, or of its advertisement." A broad recognition of the trade mark as a symbol of existent and potential good will and as property "will prove the most effective means of combating trade mark pirates who lurk ever watchful on the fringes of the fields of trade."

A rare book. Through the mists of dim centuries, it drives home to a just recognition in our day, one of the great instruments of modern business. No lawyer should fail to have in mind this picture of the trade mark as the product of economic changes and as the symbolic expression of vast business rights.

CHARLES J. TURCK.

INTERNATIONAL RELATIONS. By Raymond Leslie Buell. New York: Henry Holt and Company, 1925, pp. XV, 768.

The latest number of the popular American Political Science series is International Relations. The author has dealt with his almost limitless subject under three heads: Problems of Nationalism, Problems of Imperialism, and The Settlement of International Disputes.

Under the first of these topics he has pointed out that the nation is a link between the individual and humanity. "This quality of national self-consciousness has, entirely apart from its chauvinistic aspects, been of considerable importance in international relations. Nations resent insult more quickly than individuals, and they are less capable of self-control." The author believes in the small nations—and agrees with Zimmern that "a good international world means a world of nations living at their best."

While he approves in the main of the doctrine of self-determination he calls the reader's attention to the fact that a difficulty arises as to just where to draw the line. "Literally interpreted," he observes, "he doctrine of self-determination would sanction the resistance of any minority to the will of a majority.

Extended still further, it would authorize any individual to resist the law."

The pan-nationalistic movements he feels are totally unsatisfactory criteria of nationality. They are likely to be abused for imperialistic ends. "Back of the Pan-Slavic movement lurked Russia; back of the Pan-German movement lurked Germany; back of the Pan-Asiatic movement lurked Japan. When these movements have won the support of gevernments, it has been not for the purpose of fostering the cultural life of peoples, but of disguising illicit gains by euphemistic terms."

After considering the causes of imperialism Professor Buell concludes: "Imperialism is not necessarily condemned because of the mere *existence* of such control in areas where native governments are demonstrably unable to maintain a certain standard of order and decency fixed by the civilized world. But imperialism does stand condemned when it follows certain methods and policies which ignore the interests of the natives and of the world at large for the benefit of a chosen few." The exploitation of natives in the French, the Belgian and the German colonies of Africa, he finds, stands as a fearful indictment of the white race.

Under the subject of the settlement of international disputes, the author disposes of Senator Borah's proposal in the following words: "Commendable as was the underlying purpose of the American plan, it was somewhat naive to expect nations to punish their own 'War breeders' for a war which the parliament of such a nation had declared."

The League of Nations, the author feels, is today the only organization which stands for a better understanding among nations and for solving problems of international relations.

The author has gathered a mass of material on his subject. He really covers the history of the world for the past fifty years. He has not always arranged his facts to the best advantage and sometimes repeats. His style is somewhat journalistic. The result is a valuable treatise on problems that today confront our statesmen.

W. LEWIS ROBERTS.

INTERNATIONAL SOCIETY, ITS NATURE AND INTERESTS. By Philip Marshall Brown. New York: The Macmillan Company, 1923, pp. XVI, 173.

It is interesting as well as instructive to follow Professor Buell's book on International Relations by a study of Dr. Brown's brief treatise on International Society.

Dr. Brown's broad training in international affairs has enabled him to speak with authority. For ten years he was in the diplomatic service in Turkey and Central America; he was an observer on the peace commission in Hungary after the World War; he is an associate member of the Institute of International Law with headquarters in Belgium; and he is professor of International Law at Princeton University and associate editor of the American Journal of International Law.

In regard to the new stage of development of the nationalistic idea, self-determination, Dr. Brown says, "The dangerous tendencies of nationalism cannot be too strongly deplored. This desire for self-determination and self-expression among nations unquestionably stands in the way of world peace and organization. But nationalism, like the institution of matrimony, should never be descried because of its occasional unhappy results. It must be accepted as the basic fact of international society."

The author calls the reader's attention to the fact that while in the every-day affairs of life we rely more and more on the services of the expert, "in the field of international relations, curiously enough, we find that the doctor, the lawyer, the milliner, and the 'man in the street' all reveal an equal competence. All are ready with a definite explanation of the ills of international society, and are prepared to suggest how this universe should be run." . . . . "We should, in an honest spirit of inquiry, shun with horror the emotional and sentimental method of considering this problem and should concentrate our investigations open-mindedly—and not unsympathetically—on the definite problem of the very nature of international society."

As a result of his studies he concludes: "The supreme problem of international society is to find unity out of the divergences and differences of nations; to discover a greater common denominator that will enable men to interpret their varying interests and aims, that will enable them to come together on a

plane of genuine brotherhood. This would not appear possible either by ignoring fundamental distinctions or by assuming that all men are essentially the same. Men truly begin to understand each other when they generously recognize and allow for the profound differences and inequalities that separate peoples. This is the beginning of wisdom among nations."

W. L. R.

THE SUPREME COURT AND MINIMUM WAGE LEGISLATION, compiled by the National Consumers' League. New York: New Republic, Inc., 1925, pp. XXVIII, 287.

The decision of the Supreme Court of the United States in the case of *Adkins* v. *Children's Hospital* (261 U. S. 525), popularly known as the Minimum Wage case, decided on April 9th, 1923, called forth an unusual number of comments and criticisms which appeared in the leading law reviews. These articles have been collected by the National Consumers' League and published in a single volume together with an excellent introduction by Dean Pound of the Harvard Law School.

That the decision should have raised such a lively discussion is due to the fact that it dealt with a question of economics and was rendered by a divided court—the Chief Justice and Justice Holmes and Sanford dissenting.

Of the seventeen articles reprinted in this book the greater number, thirteen to be exact, criticise adversely the majority opinion of the court.

Among the more interesting of these papers one might mention the following: The Judiciality of Minimum Wage Legislation by Thomas Reed Powell, Law School of Harvard University, published in the Harvard Law Review; Economic Wage and Legal Wage by George Gorham Groat, Department of Economics, University of Vermont, published in the Yale Law Journal; The Minimum-Wage Decision by George W. Goble, College of Law, University of Illinois, published in the Kentucky Law Journal; Constitutional Law; Due Process of Law—Minimum-Wage Act by A. A. Bruce, Northwestern University Law School, published in the Illinois Law Review; The Supreme Court and the Minimum Wage by E. M. Borchard, Law School of Yale Uni-

versity, published in the Yale Law Journal; and the Minimum Wage Decision by Francis Bowes Sayre, Law School of Harvard University, published in The Survey.

The names of these critics of the decision should commend this book to the attention of all who are interested in social welfare and progressive legislation. W. L. R.

STUDENTS' MANUAL OF BANKRUPTCY LAW AND PRACTICE. By Lee E. Joslyn, Albany, N. Y. Matthew Bender and Company, Incorporated, 1925, pp. 335.

The most recent addition to Matthew Bender and Company's law student publications is a manual on the law of bankruptcy by a member of the Detroit Bar, who has been a referee in bankruptcy for more than fifteen years and a lecturer on the subject in the Detroit College of Law.

The book is an attempt to explain the law on this subject as clearly and as briefly as possible. Constant reference in the text is made to the various sections of the Bankruptcy Act and its amendments which are set out in full in the index. Citations of decisions where sections of the act have been construed add greatly to the value of the work. A very complete index contains references to the sections of the Bankruptcy Act as well as to pages in the text. General orders in bankruptcy adopted by the Supreme Court of the United States and official forms as prescribed by the same court are given as published in Collier on Bankruptcy.

In justifying the publication of this students' edition the author says: "The aim and effort in this work has been to cover the questions of actual practice as fully and completely as possible, in a book as condensed as this has been made. Substantially all questions that usually arise in the ordinary case in Bankruptcy have been discussed and covered. Questions arising in other branches of the practice of law, and which are so often determined in the Bankruptcy Court, have not been so fully discussed, for the reason that to cover them completely would require what is furnished in such an exhaustive work as Collier on Bankruptcy."

LYCURGUS OR THE FUTURE OF LAW. By E. S. P. Haynes. New York: E. P. Sutton and Company, 1925, pp. 82.

Under the classic title of Lycurgus the Dutton company has just published another of its "The Today and Tomorrow Series." This number deals with the law. Others of the series have considered the future of the doctor, the future of morals, the future of war, the future of art, *et cetera*. The purpose of this series is to provoke thought.

At the start the author makes his position clear. "Lawyers," he says, "are supposed to be more interested in the past than in the future and to resent lay criticism. . . . If the laity were really interested in legal reform the world would be a happier place. . . . . I mention all this because my motive in writing the following remarks is to stimulate the interest of the laity in the law."

Problems considered by the author are legislation, criminal law, the land laws, costs and fusion, private international law, and individual liberty. In each case the author gives his views of what he thinks the law ought to be rather than what it probably will be. In speaking of individual liberty, especially dear to his English concept of law, he complains that "the increasing Armericanization of Great Britain may well breed despair in anyone who wishes to see the ideals of the aristrocrat, the humanist, and the peasant preserved by law. It may be that the refuge of liberty will be found in the Catholic Church, which was the only religious body with sufficient courage to resist Prohibition in the United States, and that the Common Law of England, inspired throughout by traditions of freedom, will be gradually extinguished by a multitude of pettifogging Statutes, each destroying piecemeal some little vestige of a period when a man could call his soul his own."

There is little in this book that will appeal to the thoughtful reader. It is even possible that it fails in its purpose to provoke thought. W. L. R.

THE UNITED STATES SENATE AND THE INTERNATIONAL COURT. By Frances Kellar and Antonia Hatvany, New York; Thomas Seltzer, 1925, pp. XIX, 353.

One of the very best works on the World Court has recently come from the press of Thomas Seltzer. It is the one of the many new treatises on the subject that will appeal especially to members of the legal profession. It is clear, concise, and accurate. Headlines in heavy type give in brief the contents of paragraphs somewhat after the plan followed in the well-known Hornbook series of law books.

While the title might lead one to expect a review of the long struggle in the United States Senate for the admission of the United States into the World Court, nothing of the kind is found. Wherever it has been proposed by the Senate to make changes or reservations, these changes or reservations have been noted together with a word as to the probable effect if such changes were made. The authors in all cases have been impartial in their comments. In fact one cannot tell just what position they take in regard to our entrance to the court until he comes to the concluding chapter. Their arguments there that the United States should not enter seem weak.

A complete summary of the opinions and judgments of the court, the statute creating the court, the rules of the court, various proposals from this country and a summary of the jurisdiction of the court are set out in annexes to the book. These annexes add to its value as a reference work. This book is of more than passing value and should find a place on the lawyer's shelves. W. L. R.

BOOKS RECEIVED.

SPECIFIC PERFORMANCE OF CONTRACTS. Third edition. By John Norton Pomeroy, Jr., and John C. Mann. Albany: Banks and Company. 1926. pp. XL, 1045.

CASES ON FEDERAL TAXATION. By Joseph Henry Beale and Roswell Magill. New York: Prentice-Hall, Inc. 1926. pp. XV, 719.

TAX DIARY AND MANUAL FOR 1926. New York: Prentice-Hall, Inc., 1925.

NEW ASPECTS OF POLITICS. By Charles E. Merriam. Chicago: The University of Chicago Press. 1925. pp. XVII, 253.

THE DOCTRINE OF CONTINUOUS VOYAGE. By Herbert Whittaker Briggs. Baltimore: The Johns Hopkins Press. 1926. pp. X, 226.

SUMPTUARY LEGISLATION AND PERSONAL REGULATION IN ENGLAND. By Frances Elizabeth Baldwin. Baltimore: The Johns Hopkins Press. 1926. pp. XII, 282.

CASES ON MORTGAGES OF REAL PROPERTY. By Morton C. Campbell. Cambridge: Published by the Editor. 1926. pp. XIII, 640.