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Book Reviews

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The court in the instant case refused to engage in judicial legislation by declaring that an injury caused by the idle curiosity of an employee is an injury arising out of and in the course of his employment. This court has distinguished the cases where "compensable curiosity" has been recognized. Actions which can be directly related to the ordinary work pattern or routine of the employee might justify the application of the "curiosity doctrine."

The court here rejected recovery on the basis of there being no casual connection between the nature of the claimant's work and her injuries. The court's reasoning seems to be sound in view of the express wording of the statute and the restricted remedial nature of Workmen's Compensation acts in general.

George N. Tompkins, Jr.

BOOK REVIEWS

ENGLISH LAW AND THE MORAL LAW. By Arthur L. Goodhart.[1] London: Stevens and Sons, Ltd., 1953. Pp. x, 151. 12s.6d. — This small, but important, volume consists of four lectures delivered by Dr. Goodhart, at the University of Manchester, England, in November, 1953, under the terms of the Hamlyn Trust.[2] These lectures constituted the fourth annual series presented under this Trust,[3] since 1949. In the first lecture, Dr. Goodhart discusses "The Nature of Law and of Morals," in the second, "Constitutional Law, Administrative Law and International Law," in the third, "Criminal Law, Torts, and Contract," and in the fourth, "The Other Branches of the Civil Law," including Property, Commercial Law, Company Law, Equity, Quasi-Contract, Family Law, Practice and Procedure, Evidence, and Conflict of Laws. In this fourth

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1 Professor Goodhart is Editor of the *Law Quarterly Review,* and Master of University College, Oxford, England. He was formerly Professor of Jurisprudence at Oxford University.

2 The Chancery Division of the High Court, in England, approved a program for the administration of the Hamlyn Trust on November 29, 1948, so "that the Common People of the United Kingdom may realize the privileges which in law and custom they enjoy in comparison with other European Peoples and realizing and appreciating such privileges may recognize responsibilities and obligations attaching to them." Text at vii. The funds for this Trust were left by Miss Emma Warburton Hamlyn of Torquay, who died in 1941.

3 The first series, entitled "Freedom Under the Law," was given in 1949 by Sir Alfred Denning; the second, in 1950, under the title "The Inheritance of the Common Law," by Richard O'Sullivan, Q.C.; the third in 1951, by F. H. Lawson, on "The Rational Strength of English Law"; the fifth in 1953, entitled "The Queen's Peace," by Sir Carleton Kemp Allen, Q.C.

lecture, he also considers the relation of the doctrine concerning "Abuse of Rights" to the Common Law, and describes the influence of law on morals.

The thesis of these lectures is that the moral law, conceived as an external body of principles of right and wrong, and derived from reason, morality, religion, and national traditions, has caused a sense of obligation on the part of the people to obey the law, apart from fear or the sanction of force. This sense of obligation, springing from the "moral convictions of the English people," [4] has considerably affected the genesis and development of every branch of English Law. But this fact has not hitherto been sufficiently recognized.

Dr. Goodhart refutes the force theory of law, whether based on command, as advocated by such jurists as Hobbes, Austin, Holland, and Markby, or grounded on sanction, as taught by Kelsen. He shows that this theory of law is unable "to explain constitutional law, international law, religious law, or moral law," [5] however much it may adequately describe statutory law, or case law based on precedent. Kelsen's theory that the fundamental political norm must be "presupposed to be binding" [6] begs the whole question why the members of politically organized society are obliged to abide by this norm.

After rejecting the force theory, the author argues for the obligation concept of law. According to this concept, "duty cannot be explained in terms of a sanction," [7] *i.e.*, a threatened evil, which can never be an essential element of law. This is true although force and fear are necessary for that part of the population which "can be controlled only by the imposition of a sanction." [8] Hence law is "any rule of human conduct which is recognized as being obligatory." [9]

It is indeed encouraging that a jurist of the stature and reputation of Professor Goodhart should acknowledge the debt of the Anglo-American legal system to what a scholastic jurist would designate as the objective natural law.[10] He has lucidly and brilliantly demonstrated how that law, or an equivalent morality, has been responsible for Anglo-American constitutional law, with its restraints upon the political sovereign; for the formula of the "reasonable man" in torts, for Quasi-Contract, and for juridical concepts of private property, to mention but a few of the many specific legal institutions considered in these lectures.

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4 Preface at x.
5 *Id.* at ix.
6 Text at 18.
7 Preface at x.
8 *Id.* at ix.
9 Text at 19.
10 See Brown, *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System*, 4 CATH. U. OF AM. L. REV. 81 (1954).

Not only has Dr. Goodhart demonstrated the impact of moral law upon English law, but he also makes positive recommendations for bringing the two laws even closer together. Thus he would change the doctrine of consideration so that "a promise should be held legally binding, even in the absence of consideration, if there was sufficient evidence in writing, and if it was made with the intention that the promisee should act in reliance on it." [11] Again, he favors procedural reform in the field of English Administration law to remedy a situation which French law has corrected by means of an appellate system.[12] He is convinced "that part of the price we pay for the death penalty is inevitable confusion in the law relating to the legal responsibility of those who have a disease of the mind." [13]

Professor Goodhart has advanced the cause of transcendental idealism in the sphere of Jurisprudence by these lectures, although, as measured by the standards of the Scholastic School, there are deviations from the natural law concept, especially in regard to the juridicity of positive law. His interpretation of the classical definition of law by St. Thomas Aquinas, namely, that law is "an ordinance of reason made for the common good by the public personage who has charge of the community," is hardly that accorded to it by scholastic jurists. Dr. Goodhart believes that St. Thomas was "speaking of an ideal law." [14] St. Thomas meant that any command, even though it had the form and appearance of positive law, was not law if it contravened a basic dictate of the natural law. This is not to take sides in the debate whether or not St. Thomas believed in purely penal law, *i.e.,* law not binding in conscience to the thing prescribed.[15] The view of St. Thomas would seem, therefore, to be contrary to that of Dr. Goodhart, who writes that "Law is merely a piece of machinery and can be used either for or against liberty," [16] particularly if by "liberty," is meant "justice." For the scholastic, the basic question is not whether "law is identical with freedom or justice," [17] but whether a rule may be designated law if grossly unjust, or unreasonable.

It was the scholastically conceived idea of natural law which has most influenced the path of the Common Law. That law was not essentially based on *relative* moral ideals. Its changing content has resulted rather from modifications of the minor premise of the syllogism, as it were, *i.e.,* the varying social and economic conditions, rather than from changes in the major premise, *i.e.,* objective natural law. Professor Goodhart does

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11 Text at 104.

12 *Id.* at 65.

13 *Id.* at 89.

14 *Id.* at 5. Dr. Goodhart has not mentioned the need of promulgation of law which St. Thomas brings into his definition.

15 See DAVITT, *The Nature of Law* 140-147 (1951).

16 Text at 5.

17 *Ibid.*

not clearly accept this position, stating that "It is a pragmatic natural law and not one based on general principles expressed in authoritative sources." [18] According to Scholastic Jurisprudence, there can be no law of any kind without a law-maker, and no natural law without a Law-Giver, ascertainable by human reason, apart from revelation. If there is no law-maker, there can be no basis for the recognition of the obligation to obey the law. The reason for such recognition is ultimately as important as the fact of recognition, if not more so.

Professor Goodhart has endeavored to minimize the deviation of English political theory from objective morality, but the fact remains that the doctrine of force has been more widely accepted in England than in the United States. It may be "unthinkable," or "inconceivable," that an Act of Parliament would violate the law of nature; nevertheless, the Courts in England cannot "refuse to recognize a statute enacted by the Queen-in-Parliament on the ground that it is in conflict with 'common right and reason.' " [19] This is in contrast with the doctrine of judicial supremacy in the United States, and with English political theory from *Magna Charta* to the sixteenth century.

Great commendation is due Dr. Goodhart for the splendid and original contribution which he has made, in these lectures, to applied natural law. They are evidence of his continued efforts to preserve and enlarge, if possible, the best and most vital aspect of the Anglo-American Common Law, *i.e.*, its conformity, generally speaking, with right reason and the morality of the free-world. His writings in this connection have been reinforced by his work, as a member of the Law Revision Committee, and by his effective particpation in molding enlightened legislative policy on both sides of the Atlantic. May he long continue to make further contributions to this all-important field.

*Brendan F. Brown**

RADIO AND TELEVISION RIGHTS. By Harry P. Warner.[1] Albany: Matthew Bender & Company, Incorporated, 1953. Pp. xi, 1254. $35.00. — This is a companion volume to *Radio and Television Law* by the same author published in 1948. Together they comprise the most complete up-to-date treatise on important legal questions in the radio and television field. The 1948 volume with supplements deals primarily with the regulation of the industry by the Federal Government. On the other hand this volume is concerned with the law of copyright, trade-marks and unfair competition as applied to the broadcasting industry.

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[18] Text at 37.

[19] *Id.* at 54-55.

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A little less than half the book is on statutory copyright. It really amounts to a neat treatise on statutory copyright law of the U. S. The historical background and earlier statutes are discussed. Then there is detailed analysis of the present law: enumeration and explanation of the categories of subject matter of copyright, formal requisites for statutory copyright protection, analysis of the various rights secured, a discussion of the remedies for infringement, etc. Much of this material is hornbook law and requires little elaboration by Warner. In addition, however, there are a number of problem areas, areas where the law is uncertain or where the law has recently been changed.

For example, the always troublesome concept of "publication" furnished a couple of fairly recent unorthodox decisions, the *Miracle Record*[2] case and *Blanc v. Lantz*.[3] Warner points out that in the *Miracle* case, a federal district court announced, contrary to the custom of the trade,[4] that the distribution of phonograph records to the public constituted a publication. If this view is to prevail, Warner urges amendment of the copyright Code to permit registrations of records. In *Blanc v. Lantz* the court stated that public performance of a film could constitute publication. The author considers the latter case erroneous.[5] These and other areas of uncertainty in the Copyright Law are analyzed.

In his chapter, the Right of Transformation,[6] Warner discusses the right to complete, execute and finish a model or design for a work of art. Among other things there is considered the copyright protection, as works of fine art, afforded objects primarily designed for a utilitarian purpose, but also ornamental, such as clocks, curtains, rugs and furniture. Warner indicates that although the Copyright Office has followed the practice of accepting these for registration, the courts have not been as "liberal" as the Copyright Office here and have been "reluctant" to extend copyright to such ornamental objects which are primarily designed for a utilitarian purpose. Since the publication of this book the Supreme Court of the U. S. decided the case of *Mazer v. Stein*.[7] This case upholds the validity of a copyright for an ornamental object otherwise qualified for copyright even though primarily designed for a utilitarian purpose.

Recent changes in the Copyright Code as well as areas of uncertainty in the copyright law are given extended treatment. For example, there is discussion of that part of the 1952 Amendment to the Copyright Code which creates the right to publicly deliver, read or present for profit nondramatic literary works such as novels, poems and articles.[8] This changes

2 Shapiro Bernstein & Co., Inc. v. Miracle Record, Inc., 91 F. Supp. 473 (N.D. Ill. 1950).

3 83 U.S.P.Q. (Cal. Super. 1949).

4 Text at 177.

5 *Id.* at 175.

6 CH XI.

7 ....U.S....., 74 Sup. Ct. 460 (1954).

8 Text at 309-312.

the law of *Kreymborg v. Durante*[9] which had, in effect, allowed a certain amount of broadcasting of novels, poems and articles without the permission of the copyright holder.

Warner indicates that this new right may result in what he considers a hardship on broadcasters. The new law grants protection to a vast amount of "non-dramatic literary works", including advertisements, items in the newspaper columns, jokes in a cartoon strip, etc., making it highly possible that the use of such material without permission might lead to infringement suits.

Another recent development receiving extensive analysis and discussion is the *Golding*[10] case in which the California Supreme Court held that the plaintiff's "central dramatic situation" had been infringed by the defendant. Warner indicates that the significance of this case is the fact that it comes close to protecting ideas alone rather than their expression. At least, he says, courts must now "distinguish between an order or a combination of ideas which reflect at least a sequence of events . . . and an abstract idea. The former is protectible; the latter is not." [11]

The Copyright Code is a vital consideration to those concerned with radio and television programs. But it is not the only consideration. Warner indicates the place of common law copyright, principles of the law of unfair competition, the right of privacy and other legal concepts in the protection of program content, service marks and program ideas. For me these were the most interesting parts of the book. These are the areas of greatest uncertainty in radio and television law. Warner indicates the problem areas, points out trends in the law and suggests how traditional legal concepts — common law copyright, unfair competition and the right of privacy — may bear on the problems.

Chapter XXI, Unfair Competition and the Protection of the Content of Radio and Television Programs, deserves special mention. It is an excellent, thoughtful chapter. The general principles of the law of unfair competition are analyzed including a discussion of the somewhat unorthodox *I.N.S.*[12] case. Then the radio, television and entertainment cases which have employed unfair competition concepts are considered. Warner abstracts the following rational or "basic thesis" from what appears at first glance to be a rather disorganized legal field: The law of unfair competition has not and should not be used as a substitute for common law or statutory copyright. Where practical or legal reasons preclude such protection, and protection should exist, then unfair competition remedies are appropriate. Warner recognizes that the "design

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9 21 U.S.P.Q. 557 (D.C.N.Y. 1934).

10 Golding v. RKO Pictures, 193 P.2d 153 (Cal. App. 1948), *aff'd*, 208 P.2d 1 (Cal. 1949), rehearing *denied*, 35 Cal. 2d 690, 221 P.2d 95 (1950).

11 Text at 556.

12 International News Service v. Associated Press, 248 U.S. 215 (1918).

piracy" cases are contrary to this thesis. He thinks that such designs should receive protection, that neither copyright or patent laws afford a practical protection and that the *Cheney*[13] case which denied rather than afforded unfair competition protection is contrary to his thesis. But this, he says, can be explained on the grounds that "the courts are loath to resolve substantial and conflicting interests whose differences can and should be solved by the formulation of a comprehension policy by the legislature." [14] Also contrary to his thesis are the *Miracle Record*[15] and *Blanc v. Lantz*[16] cases. These cases he says are simply erroneous.

Some other chapters worthy of special note are those dealing with the Lanham Act and the as yet indefinite protection it affords radio and television service marks,[17] the excellent one on international copyright in which Warner voices support of the Universal Copyright Conventions[18] the one describing ASCAP,[19] and the one on the American Federation of Musicians.[20]

Like *Radio and Television Law,* this book has heavy, expansible binding which allows for the addition or replacement of pages in the future.

As the Preface states,[21] a few of the chapters were originally published as law review articles.

This book and its companion volume are the best legal treatises in the radio and television field. This book is a vital reference manual for anyone interested in this subject and most parts of it would be interesting, informative reading for all lawyers.

*Thomas Broden, Jr.**

TAXATION IN THE UNITED STATES. By Randolph E. Paul.[1] Boston: Little, Brown and Company, 1954. Pp. vii, 830. $15.00. — Good wine needs no bush, and a new book by Randolph E. Paul on taxation needs no puffing for it to be eagerly taken up and appreciated by tax men. This

13 Cheney Brothers v. Doris Silk Corporation, 35 F.2d 279 (2nd Cir. 1929), *cert. denied,* 281 U.S. 728 (1930).

14 Text at 984.

15 Shapiro, Bernstein & Co., Inc. v. Miracle Record, Inc., 91 F. Supp. 473 (N.D. Ill. 1950).

16 83 U.S.P.Q. 137 (Cal. Super. 1949).

17 CH XXIV.

18 CH XIX.

19 CH XIII.

20 CH XIV. According to a footnote, this chapter is almost wholly a reprint of an article by Prof. Vern Countryman, *The Organized Musicians,* 16 U. OF CHI. L. REV. 56, 239 (1948-49).

21 Text at vii.

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new work, however, is not designed for specialists. It is addressed to and deserves a wide audience. All lawyers with a deep sense of their professional obligations would profit by the knowledge and wisdom to be found in the pages of this massive volume concerning the development of our national tax system. Mr. Paul has provided good reading out of materials that are generally considered to be most forbidding. In the course of an absorbing narrative of the events which shaped our tax system he has shown the importance to every intelligent citizen of better knowledge of our tax history. While the greater portion of the text is devoted to a rather detailed account of the course of revenue measures through Congress, legislative action is illuminated by frequent references to related events in the world at large: wars, political campaigns, booms and depressions, inflation, court decisions, and many other happenings which must be taken into account for an understanding of the amazing growth of our tax laws. Influential men are not overlooked. Nor does the author hesitate to point out the moral of his tale. His purpose in writing the book is stated in the last chapter, which will be discussed below, but again and again throughout the text the teaching of experience is emphasized. Mr. Paul shows what the lessons of the best of teachers are. Have we learned them?

Our tax annals from the earliest times are recounted. Even the colonial period is not neglected. Taxation was important even in that remote era as every schoolchild knows, but it is not until our own century, the age of World Wars, that federal taxation becomes gigantic. Accordingly, the narrative is concerned largely with the events of the last fifty years, particularly those since 1913, the year of inauguration of the modern income tax. The record shows not only great increases in the federal revenues over the years but also what is less generally appreciated, namely, great improvements in the distribution of the burden of taxes, at least at the federal level. Federal receipts increased from about $4 million in the period between 1789 and 1791 to $53 million in 1862, $236 million in 1866, over $5 billion in 1920, $44 billion in 1945, and $65 billion in the fiscal year 1952. There was a long beginning period during which customs were of primary importance and persons with low incomes bore the chief burden of taxation. Similarly when excises were developed the chief burden fell on persons with low incomes. The increasing emphasis on income taxes in more recent years has brought about a shift of the burden, to a marked extent, from low incomes to high incomes. State and local taxes, however, consist largely of sales and property levies, and for the most part are regressive in effect to this day.

There can be little serious dispute about the necessity under existing circumstances and for the foreseeable future of providing revenues for the federal government in amounts of the order of magnitude provided for under existing law. The serious question is with regard to the sources of revenue. The graduated income tax has been tried and found effective.

This is one of the great lessons of our tax history. The graduated income tax is not only a great revenue producer, but it is, on the whole, more just than any other form of taxation. This view is supported not merely by theorizing but by our own experience as a nation. Such is the tenor of a goodly portion of Mr. Paul's history. In connection with this theme he pays his respects to certain recent writings in which the principle of progressive taxation is attacked or damned with faint-hearted praise.[2]

Another great theme of the author is the use of taxation for the purpose of promoting the economic welfare of the country. The simple notions of Secretary Mellon, which appeared pre-eminently sound to many worthy men in his day, are set down in the record together with the "trickle-down" theory of economic benefits then so popular and now in our own time revived in high quarters. The aftermath of the application of that "philosophy" is recounted. Then comes the lively story of the New Deal and taxation. Mr. Paul points out that the great fiscal mistake of the New Deal was the too strenuous attempt at budget-balancing in a depression, that is to say, there should have been greater deficit financing.[3] Then come the years of the Second World War and the use of taxes to control inflation as well as to provide extraordinary revenues. The measures taken are explained at length, and Mr. Paul tells of his own participation in tax policy-making. The failure to utilize the tax system more effectively than was done in the recent inflationary period is recorded, and the narrative ends in anticipation of the revision of the Internal Revenue Code that, at present writing, is under consideration by Congress. A very excellent and comprehensive index completes the book.

It is Mr. Paul's conviction, as expressed in the last chapter of the book, that a full understanding of the basic issues involved in tax and fiscal policy must be acquired by an effective majority of the American people if we are to survive the plots and attacks directed against us from the Kremlin.[4] We must be prepared to make great sacrifices, and we cannot do so intelligently and effectively unless we are properly informed. The book, then, was written to supply vital information to the American people in the literal sense of those terms. It would appear that Mr. Paul does not exaggerate the importance, the momentousness of his history, when one considers how much misinformation concerning tax is spewed forth daily in our press and on our platforms. It is to be hoped that Mr. Paul's book will have many thoughtful readers who will convey its salutary teaching to others.

*Roger Paul Peters**

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2 See chapter "The Story of Progressive Taxation", text at 714 *et seq.*, 729.

3 Text at 243.

4 Text at 765 *et. seq.*

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BOOKS RECEIVED

AMERICAN PRESIDENT, THE. By Sidney Hyman. New York: Harper & Brothers, 1954. Pp. 341. $4.00.

BAR ASSOCIATION ORGANIZATION AND ACTIVITIES. By Glenn R. Winters. Boston: Survey of the Legal Profession, 1954. Pp. xx, 243. $.....

CONTRACTS, CASES ON. By George L. Crak. Indianapolis: The Bobbs-Merrill Company, Inc., 1954. Pp. xiv, 192. $9.00.

*ENGLISH LAW AND THE MORAL LAW. By A. L. Goodhart. London: Stevens & Sons Limited, 1953. Pp. x, 151. $2.50.

FORMS OF AGREEMENTS. By Oscar LeRoy Warren. Albany: The Matthew Bender & Company, Inc., 1954. Pp. vii, 1460. $20.00.

HOW TO WIN LAWSUITS BEFORE JURIES. By Lewis W. Lake. New York: Prentice-Hall, Inc., 1954. Pp. xii, 303. $5.65.

INCOME TAX, ROOT OF ALL EVIL, THE. By Frank Chodorow. New York: The Devin-Adair Company, 1954. Pp. xi, 116. $2.00.

MILITARY LAW. By Daniel Walker. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1954. Pp. xiv, 748. $9.75.

*RADIO AND TELEVISION RIGHTS. By Harry P. Warner. Albany: Matthew Bender & Company, Inc., 1953. Pp. xi, 1245. $35.00.

SCIENTIFIC EMPLOYEE BENEFIT PLANNING. By Howe P. Cochran. Boston: Little, Brown and Company, 1954. Pp. xx, 354. $10.00.

*TAXATION IN THE UNITED STATES. By Randolph E. Paul. Boston: Little, Brown and Company, 1954. Pp. vii, 830. $15.00.

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