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THE RULE OF LAW AND THE MODERN SOCIAL WELFARE STATE*

ROSCOE POUND†

Professor Friedmann, who had already made a notable contribution to jurisprudence in his *Legal Theory,* now in its second edition, has now made a second and perhaps even more notable contribution toward understanding the role and presaging the future of the common-law system in the society of today. His purpose is a reassessment of the function of law and of legal institutions in England a half century after Dicey's *Law and Public Opinion in England during the Nineteenth Century,* comparing the economic function of law and how the common law was adapted to it in the nineteenth century with its function in the "vastly changed social pattern of contemporary England" (p. 3) in the twentieth century after half of that century has gone by. He seeks to coordinate recent developments with respect to the relation of the judicial function and judicial process to social problems, the role of legislation and the interpretation of statutes, the growth of standard contracts and collective bargaining, and the change in the structure and function of the law of property and to appraise the "interrelation of law and social change in present-day British society." (p. 3).

Dicey after the end of the nineteenth century showed us where we then stood and how we had come there. Professor Friedmann in the middle of the twentieth century essays a harder task of appraising the common law as it adapts or fails to adapt itself to far-reaching social and economic changes still in progress and considering how it may be shaped to the exigencies of those changes. The maxim of Justinian as to definitions might be made to speak a well-demonstrated truth by reading it *omnis prophetia periculosa.* But without assuming the role of a prophet Professor Friedmann appreciates the mode of legal-political thought of English-speaking peoples and has faith in the common law as equal to problems of the social service state as it was to those of the transition from a feudal relational to an individualist society.

* Being a review of Law and Social Change in Contemporary Britain. By Wolfgang Friedmann. London: Stevens & Sons, Ltd., 1951. Pp. xxiv, 310.

† University Professor Emeritus and Former Dean, Harvard Law School.

Dealing with many things that are highly controversial there is a praiseworthy attitude of moderation. There is no extreme dogmatic pushing of ideas to their limits, no striving for the sensational. Without dogmatism or skepticism for its own sake everything is subjected to scientific scrutiny and appraisal. The approach is economic functional, without any fundamental assumption that law is a product of class struggle or that it is as a whole and in detail a product of class self-interest. There is recognition also of the role of balance and adjustment as well as of the need of individualized application of legal precepts of some kinds and in many connections without advocating an extreme throwing over of technique of application or urging the impossibility of a judicial process not substantially at large. A constructive program of relative economic realism is a great step forward.

Part I, The Common Law in a Changing Society, takes up the function of the law of contracts in a society in which it is no longer chiefly the instrument of free bargaining between individual wills but has to do with standard contracts, collective agreements, statutory clauses and terms, and transactions to which a public authority is a party. It turns then to the legal conception of property in the social welfare or social service state, in which the incidents of ownership at common law, which in their aggregate made up a complete system of individual control, have come to be a residue of rights, liberties and powers left after statutory and judicially established restrictions, compulsory licenses, social insurance, statutory terms of employment and much else, have transferred much of the substance of ownership from the sphere of private to that of public law. Likewise the growth of social insurance, state assumption of responsibility for the vicissitudes of life — sickness, accidents, old age, death — has profoundly affected the law of torts, especially in America, in a tendency to shift the responsibility of the state to enterprises or persons supposed to be better able to bear it. Criminal law, too, has been affected, particularly by resort to it as an administrative sanction and in connection with what have been called public welfare offences. Next this part takes up the effects of the growth of trade unions, corporate organization in business industry and the professions, and the evolution of public opinion upon judicial treatment of freedom of trade in connection with contract and tort. Finally it re-examines Maitland's theory of the social function of trusts and shows the effects of concentration of industry and of taxation in the social service state in turning to corporate devices instead of trusts.

Chapter 2 takes for its text the recent English edition of a Continental treatise by Karl Renner on the social function of property.[1]

1. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1949).

Renner's doctrine is that ownership, while remaining in legal form an institution of private law implying a total power of doing what one likes with the thing owned, has in fact become an institution of public law, that is, one to be treated from the standpoint not of relation between individuals but from that of relation of individuals to the state, the main functions of which are exercised by complementary legal institutions derived from the law of obligations. But was it true that ownership always involved so complete a power of doing what one liked with the thing owned? Roman law forbade cruel treatment of a slave and Marcus Aurelius even gave the slave a power of obtaining relief. Also there are texts in the *Digest* which seem to limit what today we call the abusive exercise of an owner's liberty of use of what he owns. But as the law stood in the common-law world in the nineteenth century Renner's proposition was not far from the truth. What is more significant, however, as Professor Friedmann puts it, is it true, as things are today, that private ownership of the means of producing is the key to power? Account must be taken of what Burnham calls the managerial revolution. The social reformer, he tells us, "must get away from the pre-occupation of early Marxist thought . . . with technical legal ownership as the key to economic power." (p. 16). Transfer of ownership from private to public hands may no longer be the decisive or necessary means of shifting control. In the modern state there are means of legal and administrative control over economic power of the few which may suffice.

Unchecked economic power in the hands of a few has always made a task for religion, morals, law and politics. The English response to this task for the past generation, says Professor Friedmann, has been guided by two principles: (1) attempt to restore equality of bargaining between employer and employee, and (2) restriction, in the public interest, of economic utilization of private property. (p. 19). As to the first, equality is sought by requiring safeguarded collective bargaining, by social security legislation directly strengthening bargaining power by eliminating the worst fears arising from unemployment or want of capacity to work, by judicial development of relational duties of the employer, and by restricting contracting away of power to compete with the employer on termination of the employment, and by socialization of particular industries. (pp. 20-22). As to the second, Renner's analysis emphasizes the use of private property to create capitalistic enterprise. But in a time when men are not thinking primarily of liberty but are seeking to satisfy the whole scheme of human wants and expectations, use of property to afford enjoyment of the amenities of civilized life may make an even greater challenge to the social and political reformer. Hence the present century has seen continual increase of restrictions upon the right of exclusion from,

the liberties of use and enjoyment of, and the power of disposing of things owned.

In a brief survey of the way in which English law is now restricting or taking away the common-law full freedom of utilizing private property the author puts first abusive exercise of liberties of using, enjoying and destroying or making useless the thing owned. American law began to deal with these features of ownership earlier than English law. Also American legislation has gone further in imposing limitations on an owner's *jus disponendi* — but this in order to maintain the social interest in the security of domestic institutions. Next he puts legal restrictions on the abuse or non-use of patents. Here again, especially through judicial decision we have gone further in America. The old saying of the patent lawyers that the patentee was a czar within his realm has now lost all point. Third, the author puts official restrictions on the use of property due to the ideology of the welfare state and the exigencies of war. One category here is safety, sanitary, drainage and pure food regulations (in the United States regulations as to issuance of securities, as to conduct of trade and advertising and as to use of means of communication), some enforced by courts but increasingly by administrative agencies. Another is allocation of materials. Also restrictions upon ownership of agricultural land have been going beyond doing away with the owner's *jus abutendi.* The government may prescribe how it is to be used and even dispossess inefficient farmers. Taxation may be used as a means of national economic planning. Also there is public control of financial credit. Finally the most radical step is a general regime of public ownership. Except for Russia, Great Britain has gone further than any other state in transfer of industrial property from private to public ownership. It does so, however, not by direct transfer to the state but by transfer to public corporations. Basic industries and public services are made legal persons on the same legal footing as private corporations. It is significant, as the author observes, that there is a tendency toward managerial control, as in great private corporations. (p. 29). In all this, even at the furthest extent, it suggests the French doctrine of the dismemberment of property. Short of actual transfer to the state, private property is not done away with. The restraints are not total nor necessarily permanent. When restraints are lifted or expire the incidents of ownership come back.

Under the heading Private Property and the Judiciary, Professor Friedmann compares the attitude of English judges toward legislation affecting the use of private property with that of American judges and holds that English judges had an advantage in not being held down by a written constitution binding them to political and legal ideas of the past. But the framers of American constitutions and the

English judges of the end of the nineteenth century were brought up on Coke's *Second Institute* and looked at Coke's medieval terminology in terms of the then accepted doctrine of liberty. The real point is that England was industrially unified and homogeneous in population, whereas even twentieth-century America is far from wholly or uniformly industrial and at the end of the nineteenth century still had great open spaces affording opportunities and even in the same state generally showed one or more industrial enclaves in a predominantly rural agricultural society. Even at the end of the first half of the present century it can not be said that the country as a whole is entirely prepared to receive the welfare state. Social change has gone forward more slowly than in Great Britain. The ideas which American judges read into due process of law, English judges read into their doctrines of interpretation and application of statutes and of common-law limitations upon official action.

Changed judicial attitude toward legal problems of social change is taken up in connection with certain maxims, presumptions, and approaches formerly generally received. One is "a well established though ill-defined rule" that there is a presumption that a statute should not be held to interfere with private property unless it plainly says so. In the United States this was put at one time as a rule that statutes in derogation of the common law were to be strictly construed. My own view is that put in this way it was an invention of American text writers, although there is the weighty authority of C. K. Allen that it is an old rule of the courts. Nor do I think it was quite what Professor Friedmann makes it. Yet such was the effect of the rule that statutes were to be construed by the common law, which is enough for his purposes. At any rate, whatever it was, both here and in England it has for a generation ceased to affect social legislation.

Likewise the attitude of the courts toward quasi-judicial functions of administrative agencies has been changing in England and has definitely changed in America. But, as the author justly observes, there is danger of legitimating administrative absolutism (p. 307), and if courts were formerly over-strict, a relaxation rather than an abandonment of judicial scrutiny is indicated to the end that those affected by administrative orders be fully apprised of the whole and real case against them on which an administrative determination is made. Next we are told of the "increasing robustness" with which courts of law "pierce the veil of corporate personality." (p. 31). This doctrine arose in equity, the courts refusing to allow one who sought to use the separate legal personality of a corporation to get for himself an inequitable advantage at the expense of others. It was especially invoked to prevent frauds upon creditors and, as the author notes,

was carried further and employed more generally in the United States than in England. In origin it is an application of the fundamental doctrine that equity looks at the substance rather than the form. There is nothing out of the normal course of legal evolution in this. Roman law in the classical era moved out of the stage of strict law where form was decisive, and the common law in the seventeenth and eighteenth centuries took the same step.

Nevertheless what Professor Friedmann calls the "private-property approach" still prevails in many fields not yet sufficiently penetrated with consciousness of social problems. He gives as one example limitation of injunction and declaratory judgment as public-law remedies to matters where a "quasi-proprietary" interest can be ascertained. But that limitation applied originally to those remedies as private-law remedies and for more than a generation American courts have been extending them to secure interests of personality no less than interests of substance. The limitation did not grow out of an idea of securing private property but out of difficulties involved in the old procedure in chancery.[2] Also he calls attention to the legal status of the host of people who are now empowered to enter private property in the exercise of a public function — police, factory inspectors, air raid wardens and the like. These, he tells us, are still judged by the unsuitable private-law categories of invitees or licensees. (p. 32). To the Continental lawyer with his Roman public law background the doctrine that a public officer or administrative agent must justify trespass on person or property and is privileged only within the legal limits of his authority and is thought of as a licensee by operation of law, seems clearly unsuitable to the times. But the mode of thought behind it is deep-rooted in Anglo-American experience. Moreover the tendency of the type of person mentioned not to consider what the law gives them authority to do but, instead, how to do most thoroughly and expeditiously what they conceive will advance what they take to be the ultimate purpose of their authority, as appeared abundantly not long since in the enforcement of national prohibition, shows that there is more than an idea of the sanctity of private property behind the common law at this point. If we think of a social interest in the individual life as a great social interest, not to be ignored by thinking of it in terms of an individual interest of personality, and remember the course of development of the common-law doctrine, we may feel that experience developed by reason is behind the insistence of our law that the official is not above the everyday law. It should be noted, however, that the common-law categories of invitees, licensees and trespassers are not wholly satisfactory for the purely private law.[3]

2. See Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

3. See Marsh, *The History and Comparative Law of Invitees, Licencees and Trespassers*, 69 L.Q. REV. 182 (1953).

Adaptation of a system of law to social change is not something wholly exceptional — a special problem exclusively characteristic of our time. Social change goes on somewhat continuously in Western civilization. Even great major changes are fairly constant. Change from a kin-organized to a politically organized society, change from the law of a city state to a law of the world, change from the relationally organized society of the Middle Ages to a society of competing individuals, change from the state which did no more than preserve order and secure individual freedom to the social service state, in America change from a polity of colonies each a separate entity governed from Westminster to an independent federal state growing from a fringe of settlements along the Atlantic coast to a nation of continental domain, and change from the pioneer-rural-agricultural society of the formative era of our law to the urban-industrial society becoming predominant today — such changes have made it necessary continually throughout legal history to adapt experience to new situations, to apply reason to those situations and test it by further experience, and to go on in an endless succession of reason and experience, but always leaving some tried acquisition of each stage as an enduring acquisition of the law.

Chapter 3, Changing Functions of Contract and the Common Law, begins with an excellent analysis of the social function of contract in the formative era of modern industrialist capitalist society. There are found to be four elements: (1) freedom of movement, (2) insurance against calculated economic risks, (3) freedom of will, and (4) equality between the parties. (p. 34). They are closely connected and to some extent overlap, but each has a distinct meaning. The first two are said to be essentially formal in character, while the other two express besides political and social ideologies. But, he tells us, "The difficulty of bridging the gap between the formal and substantial aspects of both freedom and equality is evident in the pathetic contrast between the law of contract as it is taught in most textbooks, and modern contract as it functions in society." (p. 34). Yet in the economic realities of today is there nothing left of freedom of will in the everyday legal transactions of everyday men? There never was a time in the heyday of the classical law of contracts when everybody could be assured of being able to get every legal transaction he wished or the terms he wished. What is meant is that the area of freely willed engagements, fashioned as one wills, is now more and more restricted and in order to insure a substantial equality legal transactions are more and more, or in more and more respects, made for, rather than by, the individual man. Even so, however, one need only go over the weekly advance sheets of the National Reporter System to see that a vast amount of litigation in the courts day by day runs according to the

law of contracts in the books. But that a profound change has been taking place is true enough, and that is the author's point.

Looking in detail at what he calls the four corner stones of the classical law of contracts, the first, "freedom of movement" expresses the idea of the progress from status to contract, and it is pointed out that in the industrial economy of today we are reverting to something very like status. We are told rightly that a new kind of immobility results from the profound changes produced by the social welfare responsibilities of the state of today, by group organization and collective bargaining in industry, and the condition of industrial mobilization forced upon Western states by the international situation since the outbreak of the first World War. (p.35). But in the United States a very large proportion of workers move freely from one job to another or from one kind of work to another or from one part of the country to another. We have gone no further in America than supplementing the law of contracts. We have not wholly discarded it. The second corner stone, "insurance against calculated risks," assumes a free-enterprise society in which rewards for enterprise or speculation are restricted only within very wide limits if at all. The social interest in the security of transactions has a high valuing. The sanctions of damages and specific performance make it possible to take the calculated risks which such an economy calls for. This presupposes that the parties entering into the transaction are equal. So the sanctions are the same whether or not there is a social and economic equality. Section 406 of the Soviet Civil Code (not however enforced) suggests a judgment with reference to who can best bear the loss. Standard contracts, standard provisions and new doctrines as to frustration and judicial modification of bargains or relief from burdens undertaken are the present day response to the economic order of the time.

Consideration of the element of freedom of will leads to comparison of Professor Friedmann's book with Dicey's *Law and Public Opinion in England During the Nineteenth Century*. Dicey wrote from the standpoint of the political interpretation, characteristic of English jurists. Professor Friedmann writes from a social philosophical interpretation usual among Continental jurists of the present century. As to their relation to law, the changed public opinion of which Dicey wrote and the social change of which Professor Friedmann writes come to the same thing. In a democratic politically organized society social change is reflected in changes in public opinion and that opinion as it becomes definite controls the operation of political machinery. But in politically organized societies, not or imperfectly democratic, social change operates upon the repositories of power, perhaps more or less under pressure of public opinion, as posing them problems which must be met if they are to endure. In effect Dicey and Friedmann are both writing

of social change and the law. So, too, were the Greek writers on the philosophy of social control, the medieval jurists who sought from the Roman law, Christian texts and Aristotle universal ideas for the relationally organized society of the Middle Ages. So were the law-of-nature jurists of the seventeenth and eighteenth-century philosophy of law in the era of discovery, colonization and expanding individual opportunity in transition to a competitive individualist society. So did Kant when he sought to reconcile liberty and the authority of law in formulating the theory of justice which governed in the nineteenth century. Professor Friedmann's book, therefore, is in the right line of the books which, in wrestling with the problems to which the legal order must be directed, have shown the path of development of the law.

Dicey shows that Bentham, who urged that it was the task of law to extend the sphere and enforce the obligation of contract, assumed parties free to bargain out the conditions and terms of agreement. Physical persons possessed of free wills were to argue and reason themselves into free agreement. Hence control over the terms of contract was limited to a few categories of contravention of the policy of the law — infringement of the social interest in the general morals and the social interest in the security of social institutions. It ran counter to the nineteenth century idea of the end of law for the state to dictate or alter the terms of contracts. But more and more today the parties to contracts are not all of them physical persons. One or both may be a corporation so that the presupposition of the law of contracts in the last century fails. The idea of agreement of free-willing individual men is closely connected with the assumption of equality of bargaining power on each side of the contract, next to be considered. The first service undertaken by the nascent social service state was regulation of contracts of individuals with public service companies and incorporated public utilities where what used to be called virtual monopoly gave an unfair advantage in bargaining. However, what has developed as a function of the social service state began before the days of corporations in the case of carriers and innkeepers because of the nature of the service involved in the contract and its relation to the general security.

As to the fourth element, equality of bargaining power, the idea of equality before the law was directed to impartial award of remedy for breach or impartial enforcement of performance.

"[F]ormal equality, to vote, to make contracts, to migrate, to marry, was regarded by early utilitarianism and democratic theory as automatically conducive to social liberty and equality." (p.39). Hence the author's main purpose in the chapter under consideration is to analyze the extent to which "a mixture of legislative developments and judicial interpretations have bridged the growing gap between the early phi-

losophy of contract and the reality of contemporary society." (p.39).

At the outset it must be admitted that in no system of law has there ever been absolute freedom to enter into whatever engagements men chose with the expectation of having them enforced by public authority. Nor has the law ever kept its hands off completely in case of manifest inequality between the parties. Equity went some way to check over exertion of economic power. Also the courts came gradually to recognize group pressure as legitimate in economic and social conflicts. But the power of the courts was limited. They could not go far in creative treatment of the conditions which have arisen. Legislation has been needed and the more important changes that may have to come must come through legislation. (pp.42-43).

Four main social causes of transformation of contract are considered: (1) concentration in industry and business corresponding to increasing urbanizing and standardizing of life bringing about the "standard contract" or "contract of adhesion"; (2) increasing substitution of collective for individual bargaining leading to the collective contract between management and labor, with a varying degree of government interference; (3) expansion of the welfare and social service functions of the state leading to statutory terms of contracts substituted for or added to the terms agreed upon and increase of contracts in which government departments or other public authorities are on one side and a private party on the other, leading in the United States to abuses under the title of "renegotiation"; and (4) the effect of social, political, or economic upheavals, such as war, revolution or inflation. (pp.44-45). These have had a serious effect upon the law of contracts in the development of doctrine as to frustration and extension of legal excuses for non-performance.

Collective bargains between employer and employee are put under administrative supervision, although the courts have an ultimate task of enforcing them. It might well be said in the United States that these engagements should be regarded as in a separate department of the legal system rather than as belonging to the law of contracts.[4] The totalitarian state takes away the autonomy and freedom of workers but purports to give them security and protection in return. In Anglo-American law we have done no more than take some relatively short steps. But it is suggested that in view of the continually growing emphasis on defence and production, of the increasing assumption of government responsibility for the economic well being of the people and of the steadily increasing area of government planning, the social service state of today may prove to be a station on the road to totalitarianism. (pp.54-55).

4. See Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572, 606-08 (1931).

Professor Friedmann distinguishes four broad methods of public control over the terms of contracts. (1) Contracts may be made void by statute or judicial decision because in whole or as to certain parts they contravene principles of economic equality. Examples may be seen in the statutes against payment of wages by orders on company stores and in legislation as to warranties by the insured in life insurance policies. The author puts also invalidation of contracts between employer and employee as to exercise after leaving the employment of the employee's skill in the calling in which he has been trained. But courts of equity in laying down this doctrine were following a settled proposition of the common law as expounded by Coke, namely, a presumption against restraints upon liberty. (2) Compulsory terms may be required to be incorporated in contracts in order to conform to certain social policies. Examples may be seen in factory acts, housing laws and minimum wage laws. (3) In England the Agriculture Act and the Landlord and Tenant Act allow administrative authorities in certain cases to vary the terms of leases. (4) In England in case of nationalization of an industry, contracts made by the company taken over may be "terminated" or "disclaimed" by the public authority. (pp.55-59). If a state of the United States were to do these things as to past transactions questions would arise as to the constitutional provision against impairing the obligation of contracts.

In the common law world until recently we have not had to think particularly about incorporated public authorities as owners and managers of industries, as providers or administrators of public utilities, or as in other capacities requiring the making of contracts. The crown at common law acted through ministers or bailiffs who, having had authority conferred on them and keeping within the limits of that authority, could justify what they did, but otherwise were on the same footing as private individuals and subject to question as to their acts in ordinary proceedings in the ordinary tribunals. This has been a fundamental doctrine of the common law at least since 1338 when the Chief Justice of the King's Bench fined a sheriff for not executing a writ against an outlaw because of a private letter from the King (Edward III) telling him not to do so. The private letter from the King did not justify the sheriff in disobeying the writ. Where there are legal transactions between public authorities and private persons, the law as administered in the ordinary tribunals binds them alike. The public officer and the public authority are in no superior position *as such*. Where, on the other hand, one public authority contracts with another, as the state is acting through each, the relation is that of two agents of a common principal. Each may insist against those who act in the name of the principal that they act within the authority

given them. But when the state sets up enterprises and conducts utilities or industries either directly or through newly set up public corporations, the historical common-law doctrine has to meet situations for which it was not designed.

Continental law distinguishes a private-law contract between a public authority and a private person from transactions of an administrative public-law character. The former is in the jurisdiction of the civil courts. The latter is in the jurisdiction of the administrative courts. The test is said to be the nature of the service and activity in question. In general it is presumed that the state operates as a private-law person when it carries on an industrial or commercial service or lets property. But with the increasing multiplication of services performed by the social service state the line is harder and harder to draw.

This leads to the question whether in view of the development of public welfare services by the state there is need of departing from the traditional fundamental doctrine of Anglo-American law committing all controversies in the end to the law of the land administered in the ordinary courts. We have no ethos of administrative adjudication and it has been a slow process to make our administrative agencies in the United States conscious of the fundamentals of adjudication. The zeal of subordinates, the pressure of politics and the wide scope for discretion with no traditionally taught principles of exercising it, make it doubtful whether we could at this late stage of our legal development succeed in setting up a division of jurisdiction between the ordinary and the administrative courts.

Professor Friedmann speaks of a conflict between "public policy and private interest." But a controversy between an administrative agency and an individual is not fairly stated put in this way. There is a public policy in maintaining the interests of individuals as well as one in upholding the agencies of government. There is danger of answering questions of this sort in the way they are put. Interests should be compared on the same plane. The "relative prevalence of public policy or private interests" may mean preferring bureau convenience to constitutionally guaranteed rights of individuals. We saw under the regime of national prohibition what this may mean. Privileges of the existence and extent of which an administrative agency is the judge run counter to the whole course of development of Anglo-American law. Legislation may confide wide discretionary powers to administrative agencies with which the courts cannot interfere. But in the United States such grants of power are subject to constitutional limitation applied in the ordinary courts. To have a different set of courts applying them to a not clearly defined category of administrative determinations would lead to conflicts such as arise in some of

the states of the United States where criminal cases are reviewed in a court of criminal appeals of final jurisdiction while civil causes are reviewed finally in a supreme court. Unhappily the two courts do not always agree on points of law which are involved in each type of case.

Economic upheavals have occurred from time to time in legal history with no little regularity. Experience of how to promote good faith as a presupposition of the economic order has developed what has become, substantially, a universal law of obligations governing the relations of the parties to everyday transactions of economic life. Even the radical overturning of the economic order in Soviet Russia has not wholly eliminated the civil law of obligations. That the two recent world wars should in their aftermath produce some juristic doctrines to meet the exigencies of the twentieth-century upheaval is to be expected. Development of the doctrine of frustration is not a unique phenomenon. It is not out of line with the general course of evolution of law. Indeed that and kindred doctrines have been worked out by the normal procedure of experience developed by reason and reason tested by experience. The persistent problem of balance of stability and change has had new illustrations of how it recurs and how the law meets it.

Among the conclusions with which the chapter ends, one is of particular interest: public law increasingly controls the quasi-legislative function of contract. (pp.70-71). This refers to article 1134 of the French Civil Code: "Agreements legally formed take the form of law for those who have made them," a proposition of Roman law, repeated by Domat in the seventeenth century and by metaphysical jurists in the nineteenth century. As things are going today individuals no longer make law for themselves by free contract. The law as it is coming to be more and more controls the power of individuals to make law for themselves by legal transactions.

Chapter 4, Social Insurance and the Principles of Tort Liability, propounds two theses: that at first there was in England a reasoned development by legislation of what had been worked out by experience in judicial decision, but that later, "after a period of leadership and initiative in the adaptation of the law of tort to the new principles of public policy, the English judiciary is now reverting to a more cautious and conservative attitude as an ever-swelling number of statutes give articulate expression to new social policies." (p. 74). Apart from and before the advent of the social service state the courts in the common-law world have been developing a tort liability without regard to fault based upon control over things owned or agencies employed in order to stimulate the fullest diligence to maintain the general security. With the coming of the service state this theory is

reinforced and carried further under a general humanitarian idea of providing for every one a full social and economic life in civilized society. In the law of torts in England the author sees this as leading to two new types of liability: (1) duties of one in control of property to the public, and (2) duties of employers to employees. Under the first head he takes up cases of liability of a manufacturer for negligence to an ultimate purchaser. Here American courts seem to be going further than British courts. At least there is some recent suggestion in the American state courts that the idea of inquiring for negligence of the manufacturer and establishing it by the doctrine of *res ipsa loquitur* is to be given up and an absolute liability of the manufacturer is to take its place. Next he considers extension of the liability of a principal for the torts of an independent contractor. Here the principal has no control so that the judicial development on the basis of control and correlative responsibility for the general security does not apply. Also he adds widening of liability under the doctrine of *Rylands v. Fletcher*,[5] and extension of the liability of owners of premises. In much of this there is no systematic idea of liability but there is suggested a theory of what I have called the involuntary good Samaritan. As to duties of employers to employees the law has gone far both in Great Britain and in America both through judicial decision and especially through legislation going far beyond requirements of maintaining the general security.

It is pointed out that the older social legislation sought to mitigate social insecurity of the underdog. Later it has aimed at an over-all insurance and a question of setting off of social insurance as against tort liability is suggested in which British legislation made a rough compromise. (pp. 87-90). As the idea of the involuntary good Samaritan has developed in legislation there has been return to judicial conservatism. (pp. 93-96). In the balance of stability and change, movement back and forth between new developments and recurrence or obstinate adherence to older rules and doctrines out of line with the new developments is a familiar phenomenon in legal history. One need only recall Lord Mansfield and his immediate successors.

Professor Friedmann holds that the main function of the law of torts is the reasonable adjustment of economic risks in society. Historically both the law of torts and the criminal law grew up to the idea of the social interest in the general security. With this he contrasts what he calls the social insurance principle, that is, insuring the individual social and economic life, or ultimately the individual life as a whole. The two have not merged in this ultimate. But, as he says, the difference between tort liability dependent on negligence as it has come to be and strict social insurance liability is relatively

5. L.R. 3 H.L. 330 (1868).

small and there is temptation to give up the culpability idea wholly. (p.99). He tells us, however, that there are three answers. One is that the law of torts even today affects large numbers of people who are neither employers nor manufacturers but are ordinary individuals not covered by insurance. The difference between liability for negligence and strict liability is still important. Second, coupling of tort liability with standards of conduct is practically significant for maintaining the general security. Interest in the observance of these standards often passes from the enterprise to its insurer which, where the liability is not absolute, has a definite pecuniary interest in careful conduct by the insured. It is even in the interest of workmen operating machines to have liability dependent upon maintenance of certain standards of conduct, since this adds to the civil and penal sanctions against the manufacturer or employer the pecuniary interest of the insurance company in the maintenance of standards. Third, even if the compensatory functions of the law of torts were taken over entirely by state insurance, the state which paid the loss to the insured victim of fault might well claim against the one whose fault caused the injury.

In chapter 5, Public Welfare Offences, the author discusses a novel case in Australia — Cain v. Doyle[6] — in which the manager of a Commonwealth munitions factory was prosecuted for terminating the employment of the complainant without reasonable cause. The statute provided for imprisonment or a money penalty. The only basis of conviction could be a section of the Crimes Act that "any person who procures or by any act of commission in any way directly or indirectly knowingly concerned in or a party to any offence against any law of the Commonwealth, shall be deemed to have committed that offence."[7] The manager had not discharged the complainant, but he had in effect knowingly advised it. Hence it was argued that he was an accessory of the Commonwealth and should be held under the statute as a principal. The court, one judge dissenting, held that the Commonwealth could not be guilty of the principal offence and affirmed dismissal of the complaint. Four opinions were written and there was much difference as to the grounds of decision. Three judges held that the evidence did not sufficiently establish that the manager procured the dismissal or was a party to it. One held the prosecution not maintainable for four reasons: one, that the fundamental idea of a prosecution was one of an offence against the King's peace; second, in case of any serious offence the Commonwealth itself would have to be the prosecutor; third, in the case before the court the Commonwealth would have to pay a fine to itself; and fourth, where imprisonment is

6. 72 C.L.R. 409 (Austr. 1946).
7. Commonwealth Crimes Act, 1914-1932, § 5.

an alternative penalty, the Commonwealth could not be included since it could not be imprisoned. Two judges considered that criminal liability of the Commonwealth was not a theoretical impossibility but that there was a strong objection against so interpreting the statute because it was opposed to received legal conceptions, constitutional, analytical and historical. There ought to be a clear expression of intent to enact anything so seriously contravening well settled ideas. Any fine would accrue to the federal treasury which would pay the fine to itself. The Commonwealth, which was to be fined could remit the fine. Also, they said, if the statute was interpreted to allow the Commonwealth to be held for a crime two or more ministers could be held for conspiracy. The Chief Justice said that without recourse to prosecution violation of the duty imposed by the statute might give the complainant a remedy by injunction or mandamus. The state courts in the United States are agreed in denying the injunction in such cases, but mandamus to require reinstatement is generally allowed. Two judges did not consider the difficulties in enforcement insuperable and considered that effectiveness of the statute would be seriously impaired if it was not construed to allow the manager to be held as accessory. Professor Friedmann agrees to this. (pp. 106-07). But if we are talking about realities, why think of principal and accessory? Why not prosecute directly as offenders against the statute the manager, superintendent or director who exerted his power wrongfully? That would be the common law solution. Proceed against those who justify under the crown's authority what the crown could not do rightfully.[8] But if we look at the matter from a public-law standpoint, as the social service state has two aspects, one as ruler and the other as operator of public service or industrial enterprises, why can't the state in its ruler aspect prosecute itself in its public service aspect and inflict penalties on those who represent and control that aspect?

In chapter 6, Freedom of Trade, Public Policy and the Courts, the author tells us that "the courts have conspicuously failed to develop the notion of 'public interest' to any real significance." (p. 131). But does he develop a meaning? The real point, I submit, is to identify it with the end of law and see that it is nothing less than giving effect to the most we can of human desires and expectations with the least sacrifice. Writers too often take the public interest for something given in each particular situation. The author tells us that the problem of the legal order does not lie in recognizing the "elementary truth" that the aim of law is securing the maximum freedom for every individual which is compatible with an equal measure of freedom for every one else, but in finding the way to realize it. I submit that it is

8. Cf. the sheriff in Reginald de Nerford's case, Y.B. Hil. T. 14 Edw. III, pl. 54 (1339-1340).

not merely to secure a maximum of freedom but to keep freedom in balance with other fundamental human demands or expectations so as to give effect to the whole scheme of them with the least sacrifice.

The chapter ends with an interesting discussion of the policy of English law which seeks to maintain neutrality in the struggle of social and economic interests. One might query as to the real common-law approach. American cases as to unfair competition between individuals are part of the common-law picture. They seem to go on a proposition that one who intentionally does anything which on its face is injurious to another is liable to repair resulting damage unless he can establish a liberty or privilege by identifying his claim to act as he did with some recognized public or social interest. The question is, then, what will justify *prima facie* aggression on personality or substance. Fair competition in business or industry has been relatively easy to work out. The secondary boycott and advancement of the labor movement have made difficulties. In all cases pressure short of duress exerted in the promotion of a legally recognized interest is held justification. But when and why are interests legally recognized? When experience has shown it can be done with a minimum unsettling of the general adjustment of competing social interests or reason has shown it can be made to adjust with the other interests pressing on the legal order to be recognized and secured.

As the preceding chapters had gone forward from Dicey, chapter 7, Trusts, Corporate Bodies and the Welfare State, goes forward from Maitland. Maitland's main theme is the contrast between the personalized concept of a trust and the impersonal "collectivized" German concepts of an association (*Verein*), an incorporated public institution (*Anstalt*) or a private charity (*Stiftung*). (pp.133-134). We are told that today the contrast as to unincorporated associations and endowments has much narrowed; that unincorporated associations have acquired so many of the attributes of legal personality that while the difference between incorporated and unincorporated bodies is still important it is longer fundamental; that there is a steady gain in the advantages of incorporation, and that in the United States and Canada the tendency is to incorporate charities. (p.134). Now, it is said the purposes of a charitable trust are achieved through incorporation "in the depersonalised manner which distinguishes the modern large-scale corporation from the old-fashioned trustee." (p.142). Partly this is due to exigencies created by the tax laws. Partly, perhaps, it is an incident of the "managerial revolution."

But while incorporation of trustees is changing the picture drawn by Maitland, the author points out a new and serious problem presented to the law of today by the unincorporated association. Through

their power of expulsion and of refusing admission, professional organizations, churches, labor unions and societies for the protection of trades exercise in effect a compulsory control over a great part of the population without being subject to the checks and control which obtain in the case of incorporated organizations. The courts have consistently stressed the social and club features of associations of this kind and so minimized the scope of enforceable rights of an injured member. (pp.145-46). "The corporate and collective organisation of industry, both on the employers' and on the workers' side, has now proceeded to a point where in the more highly industrialised democratic countries it stops little short of *de facto* compulsion. The lone dissenter, or a rebel who criticises the management, will not only be expelled but he will normally be unable to find work in his trade. . . . Freedom to organise is rapidly becoming compulsion to organise." (p.147). This is acutely controversial at the moment in connection with the Taft-Hartley Act. Professor Friedmann calls for statutory appeals in case of professional bodies exercising disciplinary jurisdiction and a different policy as to private associations which interfere with fundamental principles of individual freedom.

Next he takes up public-law problems in recent English decisions. Under Dicey's influence "systematic and theoretical study of public law was neglected until the flood of new social services, ministerial powers, administrative tribunals, and public corporations injected public law problems into English law far in advance of its theoretical study." (p.153). For historical reasons, resulting from the contest of the common-law courts with the Stuarts, English law referred what we now think of as public law to the private law of persons. At the other extreme there are those in England and in America who would turn over the whole field of the legal order to public law. Thinking primarily of the classical English recognition of private law only he argues that democratic societies need "the dichotomy of public and private law." (p.155). "They have a rapidly increasing number of public bodies, law-making authorities, and social services, of all kinds, which cannot be treated on a par with contract or property relations between private parties yet must be brought within ascertainable legal rules." (p.155). That is, a true public law does not mean relegation of conduct of officials of the social service state to the domain of justice without law. The question is how a kind of administrative justice can be developed within the Anglo-American legal system. (p.157).

Next follows a survey of public law problems in recent English decisions. He finds three: (1) conflict of public interest and private rights, (2) the border-lines between administrative discretion and legal duties, and (3) sovereignty and equality in the legal relations between the state and other public authorities on the one side and the individual citizen on the other.

As to the first he points out a distinction between the United States and Great Britian in that the main protection of personal liberty in British law is in the strength of public opinion and the determination of an independent judiciary to protect basic liberties unless they are directly and clearly restricted by Parliament. Yet the courts are sometimes prepared to sacrifice the protection of personal liberty for reasons of state. Speaking of the dissenting opinion of Lord Atkin in *Liversidge v. Anderson,*[9] the author says: "Logically, it is submitted, Lord Atkin's argument is unassailable. The difference between him and the majority was not a matter of logic but of policy. The majority were prepared to ignore ordinary rules of interpretation, because they regard the public interest of national safety in times of war as superior to the normal safeguards for the liberty of the individual." (p. 158). Of this Professor Friedmann says rightly that present-day social and international devolpments may make the distinction between war and peace, between emergencies and normal situations, very precarious. (p. 159). In more than one of the United States constitutional provisions for emergency legislation have made the "emergency clause" a joke. In time of economic depression we have seen interpretation go to great lengths under the excuse of emergency. The Roman emperor began as first citizen given the widest powers for life in an emergency. Here again we come to the problem of balance. The central task of administrative law is to keep in balance the exigencies of efficient administration and security of the individual life. The absolute state and the believers in administrative absolutism know of no limitations but by the grace of the sovereign in the one case and the discretion of the administrative agency in the other. Blackstone's doctrine that "the public good is in nothing more essentially interested than in the preservation of every individual's private rights" and Dicey's doctrine of the rule of law are at one pole; the doctrine of the totalitarian state is at the other. But the balance required (wrongly stated, I submit), as one between the social welfare and individual freedom, must determine the problem as to the limits of administrative discretion. It is said to be the very heart of the Continental doctrine of administration. (pp. 163-64).

A closely connected problem grows out of the difficulty of exact definition of the three departments of government according to the doctrine of separation of powers. In modern administration not only do administrative and judicial powers run into each other but legislative and administrative functions are not easily set off. Between a general rule, applicable to an indefinite number of persons and a particular order directed to or affecting a particular individual or group or corporation, the difference may be one of degree. (p. 168).

9. [1942] A.C. 206, 225-47 (1941).

But is not the latter a judgment rather than a legislative act? Administrative rules are quasi-legislative. They should be made on the plan of legislation: upon information as to all sides of the matter dealt with and opportunity of interested persons to be heard as statutes are. Likewise administrative orders should be made as judgments are: upon a full and fair hearing of all sides. But we are told that as the distinction between legislative and administrative action cannot be drawn absolutely, the classification of a particular official act will depend on "a careful weighing of the needs of public administration against legitimate interests of the individual." (pp. 168-69). Who is going to do this weighing? If administrative agencies themselves do it or it is done by administrative courts as part of the administrative hierarchy, it is clear enough that supposed needs of public administration will always prevail. So far as the weighing has put the results in the form of constitutional provisions or statutory definitions or precepts in the Anglo-American polity the ultimate determination is one for the courts.

Under the heading Statutory Immunities and Legal Duties, the author puts a typical case. During the war the Defence of the Realm Act relieved local authorities from their duty of lighting streets and gave them power to build air shelters. There were many accidents to pedestrians, cyclists and motorists who in the blackout ran into surface shelters, fell into bomb craters or slipped on the steps of underground shelters. It would seem that at common law, while the local authority was relieved from liability for failure to light, its duty of exercising due care in carrying out its power of building air shelters and its control of unlighted streets was not affected. But in a number of cases the courts held for some time that where the local authority built a shelter in the street there was no duty of putting in warnings for those who had to use the street at night. The sound rule was finally laid down by Lord Greene, M.R., in 1945 that the duty of reasonable care not to subject users of the street to an unreasonable risk of injury was not superseded by suspending street lighting.[10] But that there were three English cases to the contrary between 1940 and 1941 shows the growth of the administrative idea in England in war time. Professor Friedmann suggests a distinction between authority to build an air raid shelter, to maintain the general security, and authority to conduct a bus service as a social service, putting the distinction on the ground of a prevalent policy of organizing bus service inside, not outside, the common law. In 1941 Lord Simon emphasized the public law aspect of such questions.[11] But Lord Atkin's dissent is notable. He argued that the board which had contracted to build

10. Fisher v. Ruislip-Northwood Urban Dist. Council, [1945] K.B. 584.
11. East Suffolk Rivers Catchment Board v. Kent. [1941] A.C. 74 (1940).

flood banks was in the same position as a private contractor and liable in damages for failure to carry out the work with the skill reasonably to be expected. Lord Simon's proposition that liability would hamper the board in the exercise of its public duties seems to be in the prevailing direction. The author's summary is: "[A] public authority . . . should clearly be liable, in so far as its legal position can fairly be compared to that of a private contractor." (p.177). As a matter of common law I should agree. But how far can such lines be drawn in the social service state?

"English law," says the author, "has no theory of the State." (p.177). Historically this is true. To Blackstone it was only a matter of persons acting under authority of the Crown, liable for action beyond what they were authorized to do, and justified so far as the authority the Crown could give them extended. It is not easy to fit the exigencies of the social service state into the traditional Anglo-American legal system. But the need of distinguishing between different aspects and functions of the state is quite as urgent as it has proved to be in the rest of the world. In Continental Europe whether the civil or the administrative courts have jurisdiction depends on whether the state or public authority has acted in its public or in a private function. Questions of conflict of jurisdiction are settled by a special Conflict Tribunal. With us the question would arise whether this was to be an executive or administrative, or legislative, or a judicial tribunal. It would have to be a strong and independent tribunal in order to uphold the guarantees of our American bills of rights. Professor Friedmann holds that it gets down to "the cardinal problem of the relation of administrative discretion and legal duty." (p.179). Are we prepared to relegate American bills of rights to administrative discretion? Perhaps it will be said that the bills of rights create duties and so cut their province out from discretion. In England, legislation has taken a great domain of transactions to which public authorities are parties out of the sphere of public law and made the public corporation operating nationalized industries and many social services liable in contract and tort the same as private individuals.

"[T]he cardinal problem of public law [is said to be]: How to preserve the legal security of the individual, in a society in which more and more legal relations pass from the private to the public sphere, without hampering the needs of administration in the social welfare State." (p.183). It is a serious question how far this can be done. Must the social service state run to absolutism? As to this the author comes to two conclusions with some sub-headings. (1) He feels that not only the legislature but the courts are gradually abandoning the presumption, laid down in the text books on statutory construction, in favor of the integrity of private rights. This, I think, is equally true

of the United States, and we need to be measuring the tendency with the guarantees of our bills of rights. But he thinks that "the predominant judicial attitude is now one of balancing the interests concerned without any predisposition in favour of either public interest or private rights." (pp. 183-84). But can this be done without in the very way of putting it overweighting the scales on the side of what is put as public interest? Was Blackstone wholly wrong in insisting on security of individual private rights as a public interest? Isn't it really a balance of the social interest in social or political institutions and the social interest in the individual life? Otherwise we may answer the question in the very way we state it.

(2) He puts two tentative principles limiting administrative discretion, as to which I should address a preliminary question whether in the United States in practice this would mean administrative discretion as to applying the bills of rights: (a) "where the imposition of legal liability (in tort or contract, through the imposition of statutory duties, or through the construction of ministerial actions as quasi-judicial) would interfere with the execution of public duties, such legal liabilities will not be imposed on a public authority. . . . Where the urgency of the public interest demands it, but not otherwise, it should be construed as overriding private rights." (p.184). Much American judicial decision in the last twenty years suggests this. But how far does it call for giving up our constitutional polity? (b) "Subject to these reservations, however, public authorities are now increasingly subjected to the same legal duties as everybody else." (pp.184-85). (i) "[S]tatutory immunities or powers do not convey a general immunity from duties of care towards the public." (p.185). (ii) "In the field of contract, there is an increasing tendency to treat promises given by public authorities, including the Crown, as contractual, rather than administrative." (p.185). How about estoppel? There was a serious abuse in the United States under the OPA and under some state administrative authorities, where individuals in all good faith followed the advice of local offices or even acted on letters from what purported to be the head office and then found the advice given them repudiated and thereby incurred serious penalties. Here individuals or private corporations would have been estopped. The author thinks it possible that the common-law system will eventually develop a hierarchy of administrative courts and thus systematize administrative law. But his conclusion of the chapter is more in the spirit of English-speaking peoples. He feels there is enough to "show that the adaptability of the common law, which is the pride of English lawyers, can meet this new challenge as it has met many others." (p.186). It is the jurist's duty to assist both legislature and judges in this task of adaptation.

Chapter 9, The Legal Status and Organisation of the Public Corporation, taking up the dual character of such corporations, considers a case where the question was whether the British Transport Commission, which took over the property of the Great Western Railway Company when the railways in Great Britain were nationalized, was subject to the Rent Restriction Acts. It was held that the Commission was bound, on the ground that its powers were not the province of government.[12] On the other hand, Blackburn, J., in *The Mersey Docks and Harbour Board Trustees v. Gibbs*,[13] and Sutherland, J., in *Ohio v. Helvering*,[14] had drawn the line according to whether the public corporation was a substitution for individual enterprise or, in other words, on a distinction between the state as government and the state as trader. This criterion, annonnced both in Great Britain and in America, has been making much trouble for the courts in Australia. Frankfurter, J., put the matter well in *New York v. United States:*[15] "In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity."[16] He suggests setting off "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations."[17] This is with respect to our American federal polity. Something depends upon the legislation creating the public corporation. But the test usually applied is ill-adapted to the dual character of such corporations; further as to these corporations the courts have failed to develop a clear and simple principle of legal policy. (p.214). The author holds that the public corporation is an institution designed to integrate public enterprise with the existing common-law system and should be treated by the law accordingly. (p.216).

Chapter 10, Declaratory Judgment and Injunction as Public Law Remedies, has less interest for the reader in the United States. Perhaps it is enough to refer to what Chief Justice Vanderbilt has called "judicial deference" — a disinclination to entertain suits to enjoin unconstitutional encroachments.[18]

Chapter 11, Statute Law and its Interpretation in the Modern State, takes up the growing importance of statute law. In 1908 in a paper on "Common Law and Legislation,"[19] when there was a conflict between the courts and the legislatures over social legislation, I said that the

12. Tamlin v. Hannaford, [1950] 1 K.B. 18 (1949).
13. L.R. 1 H.L. 93 (1866).
14. 292 U.S. 360, 366, 54 Sup. Ct. 725, 78 L. Ed. 1307 (1934).
15. 326 U.S. 572, 581-84, 66 Sup. Ct. 310, 90 L. Ed. 326 (1946).
16. *Id.* at 581.
17. *Id.* at 582.
18. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 138-40 (1953).
19. Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383 (1908).

courts impeded or thwarted social legislation by an illiberal attitude toward statutes conceded to be constitutional, regarding them as an alien element in the law, to be held down to the strictest limits and not to be applied beyond the requirements of their express language. I suggested that there were four ways our legal system might deal with a legislative innovation: (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, holding it, as a later expression of the general will, of superior authority to judge-made rules on the same general subject, and so reasoning from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or coordinate authority in this respect with judge-made rules upon the same subject. (3) They might refuse to receive it fully into the body of the law and might give it effect directly only; refusing to reason from it by analogy but giving it nevertheless a liberal interpretation to cover the whole field it was meant to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give it a strict and narrow interpretation, holding it down rigidly to those cases which it covered expressly. I added that the fourth hypothesis represents the orthodox common-law attitude toward legislative innovations, but that the third represented more nearly the attitude toward which we were tending. The second and first hypotheses appealed to the American lawyer of that day as absurd. He could conceive that a rule of statutory origin might be treated as a permanent part of the general body of law to the extent of establishing rules, but not principles. I argued, however, that the course of legal development upon which we had already entered must lead us to adopt the method of the second and eventually that of the first hypothesis.[20] Two years later the leading analytical jurist of the day shook his head. He compared, as "differing views as to the comparative efficacy of Legislation and Adjudication, as instruments for bringing law into harmony with social progress,"[21] my paper and the pronouncement[22] of Chief Justice Baldwin of Connecticut that statutes have no roots, spring from some temporary emergency, and are hastily and inconsiderately adopted, and pronounced a judgment on the comparison: "[T]he preference will hardly be granted to Legislation."[23] But it cannot be questioned that today statutes have taken over whole domains of the law and have introduced new principles of pervading force.

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20. *Id.* at 385-86.
21. HOLLAND, ELEMENTS OF JURISPRUDENCE 76 n.2 (13th ed. 1924).
22. Baldwin, *Constitutional Law* in TWO CENTURIES' GROWTH OF AMERICAN LAW 6-7 (1901).
23. HOLLAND, *op. cit. supra* note 21, at 76 n.2.

Professor Friedmann distinguishes three approaches to interpretation of modern statutes: (1) the pseudo-logical or text-book approach, (2) the social-policy approach, (3) the free intuition approach. The first governs in the current text books both in England and in America. He puts as the main pillars of traditional interpretation of statutes the "literal rule, the golden rule, and the mischief rule." (p.239). The literal rule, the plain meaning of plain words, to be applied regardless of the result, has been pronounced by Mr. Justice Frankfurter "a pernicious over-simplification." The "golden rule" says that where the ordinary sense of the words used would lead to inconsistency or absurdity the literal meaning must be modified. The "mischief rule," the classical one since its formulation in the reign of Elizabeth (1584) as reported by Coke in 1604, prescribes interpretation according to the old law, the mischief it involved, the remedy and the reason of the remedy — in modern phrase the social purpose must be found from the previous law, the specific defect in it for which the statute was provided, the specific remedy devised and the reasoned principle of that remedy. (p.240). The author tells us that the three main rules cancel each other out. In a sense this is so. But the first, properly used, means that there is to be no interpretation unless interpretation is called for. If the meaning is plain, there is no ambiguity or inconsistency or patent absurdity in the text, the plain meaning of the text is to be applied. Modern social legislation, however, must be distinguished from the simple prescribing of a rule of property or commercial law or inheritance or criminal law for a particular fact or simple state of facts in a simple economic order. The text book rules go back to Blackstone's ten rules in the eighteenth century and to the seventeenth-century texts on logic. They are made for a different type of statute from those which give the courts trouble today.

Rightly the author objects to the rule of British courts against use of "legislative history." But while in order to ascertain the mischief and the remedy resort to the legislative history of a statute may be not merely legitimate but necessary, it has been greatly abused in the United States to justify interpretation where none was called for and even to find meanings contrary to an unambiguous and consistent text. His general criticism of the traditional canons of statutory interpretation as applied to social legislation is, however, well taken. These canons are a set of learned formulas giving a deceptive appearance of logic serving to conceal choice between opposing results of equal validity and of inarticulate ideological premises depending on personal preferences and changing currents of social policy. (pp.243-46).

In the social policy approach the idea is to interpret so as to give effect to the social objective. (p.247). But is that always something given, or may it not leave itself to be found through interpretation?

It is a useful corrective of the traditional canons but can only give a partial answer to the problems raised by the legislation of today.

A third group of thinkers, in despair of any assured objective canons advocate "free and creative" interpretation by the judge overlooking that the final interpretation must be the work of a bench of judges, not of a single judge. Its extreme exponents go further than cases of palpable absurdity or result too unjust to be reasonably attributable to the legislature. They discard legal principle — *i.e.*, authoritative starting point for reasoning and logical deduction altogether — and see the solution of the problems of interpretation in free creative handling of concrete situations. As to this the author reminds us that under the Nazi regime the free intuition approach became a convenient way to dispense with laws. Judges subject to severe political pressure could distort existing statutes in the name of "healthy instincts of the people." (p.250).

After all, as Professor Friedmann rightly warns us, legal logic and canons of interpretation are not without value. There is long experience behind them. They are useful in the great majority of routine cases. It is the marginal case and the novel situation in which uncertainty makes judicial choice with little assured guidance the best that is available. (pp.250-51). Even here the uncertainty is exaggerated. The received ideal of the end of law is usually decisive.

With this preliminary discussion he takes up comparative evaluation of the approaches. He points out that literal and grammatical construction, reading of a clause in the context of the whole act, the *ejusdem generis* maxim, *expressio unius est exclusio alterius,* etc., break down where a clause neutral on its face requires a choice between values or where a statutory term is so broad as to allow of divergent meanings. As Gray showed long ago the difficulty in such cases is usually that the possibility of choice between divergent meanings did not occur to those who drafted the statute because the situation of fact calling for interpretation did not occur to them. Hence the interpretation has to be in a measure legislative. As to the social policy interpretation, all social legislation is not dictated by an easily definable social purpose. Here again a choice of the social purpose may have to be determined from the outside. We are told, and there is truth in it, that there is room for free creative choice on this account, and are cited to the Swiss Civil Code which requires the judge who finds a gap in a statute to decide as if he were a legislator. But that is something very different from the give-it-up doctrine that there is no possibility of a rational solution so that judges may and will do what they like from unascertainable motives. Extreme skeptical realism leaves the judicial process to political pressure of the worst type. The weakness of most of the theories of interpretation is that they assume all statutes are of one and the same type.

Accordingly the author takes up next the need of differentiation (pp.252-65). From Marshall to the present Supreme Court of the United States, American judges have insisted that interpretation of the Constitution is not the same thing as interpretation of an everyday statute. The Judicial Committee of the Privy Council has also announced that doctrine and it has been recognized by the High Court of Australia. But it has not always been seen that this means that general terms in a constitution must be understood in the light of changing social and political developments. (p.256). There are, then, seven types of legislation to be considered: (1) constitutions, (2) social purpose legislation, (3) specific reform acts, (4) acts implementing international conventions, (5) penal statutes, (6) taxation acts and (7) predominantly technical statutes. For the second he insists that the presumption in favor of protecting private rights should be done away with entirely. The avowed and unavoidable purpose is to do away with certain private rights. But this cannot be laid down so emphatically for the United States where some private rights are secured by the bills of rights. As to the third, a proposition that statutes in derogation of the common law were to be strictly construed, operated mischievously at one time in the United States, but has been abrogated generally by legislation. As to the fifth, more and more penal legislation today is administrative in character and so has social-service ends. Hence a distinction must be made in applying the maxim as to strict construction of penal statutes. As to the sixth, tax statutes have come to be a special type of social service acts. Hence the rule of construing them in favor of the taxpayer is no longer applicable. (p.262).

Four general conclusions summarize an excellent chapter: (1) Increasing predominance of statute law is not sufficiently appreciated in adjudication nor in legal education. There is need of more systematic study of its principles. (2) The traditional rules of interpretation disguise a wide margin of judicial discretion in non-logical choice between many rules. (3) None of the usual approaches to interpretation is self-sufficient. The analytical approach provides useful guides for routine cases but fails as to marginal problems. The social policy approach gives clear guidance only where statutes have a clear, definite social objective. The free intuition approach opens the way to prejudice and arbitrary decision. (4) Much may be achieved by differentiating types of statutes. In a large proportion of predominantly technical statutes judges must be guided by the same principles as in the creative development of precedent. To my mind this is the crux of the matter. The received ideal of the end or purpose of the legal order is the ultimate guide.

Chapter 12, Statute Law and the Privileges of the Crown, is an excellent discussion of a matter of increasing importance in the social service state. Three conclusions are reached: (1) The "lingering fic-

tion" of a legally indivisible state must be given up and a theory of legal liability substituted. Where the state either directly or through incorporated public authorities carries on activities of a commercial, industrial or managerial character the proper test is not an impracticable distinction between governmental and non-governmental functions but the nature and form of the particular activity. (2) The rule that the Crown is not bound by statute unless specifically mentioned or by necessary implication is socially and politically objectionable and is not required by legal principle. It is an exception to the rule laid down by Coke in 1601, as to statutes made "for the public good, the advancement of religion and justice, the prevention of fraud, or the suppression of injury or wrong," not the rule itself. As Coke puts it the rule should be developed by the courts. What has passed for a rule should be an exception limited to cases where an overwhelming public interest demands that the Crown (state) should be exempt. (3) There is need of "a more articulate theory of the state in modern British law." (pp.273-74). One might say the same, although the need is not yet so great, of American law.

From this the author passes to what is the most urgent problem of democratic societies today: "Whether it is possible to preserve in a planned State the essential principles of law of a free democratic society." (p.277). This is considered in chapter 13 under five heads: (1) The Welfare State and the Role of the Lawyer; (2) Three Meanings of the "Rule of Law"; (3) Dicey and the Rule of Law; (4) The Road to Serfdom and the Rule of Law; (5) Five Legal Aspects of the Social Welfare State.

On the first the author begins with the proposition that the planned social welfare state is now accepted to a greater or less extent in every western democracy and has become a basic reality of western life. He finds three chief causes of this. One is the urbanizing and industrializing of western society. Physical and technical conditions of life have increased the need for control. Second, these conditions have led to development of social philosophy, which recognizes responsibility of government for housing, unemployment, and social insurance. Third, there is a chronic condition of mobilization or semi-mobilization, military and industrial, in preparation for or in fear of war. This involves control over national assets and resources. The total effect is to transform the free economic society in which the state simply keeps the peace into a centralized society in which the state takes an active part in the economic and social life of the citizen.

Dicey's phrase, "The Rule of Law," which came into general use in political science, is said to require redefinition. One sense given it today is the existence of public order. Jennings so defines it. Under a constitutional democracy — with a written constitution — where

courts have the decisive function of finding the meaning of rules of the constitution, it means, the author tells us, ultimate judicial control. Third, it may mean purely political control, as in Great Britain, where the rule of law is what a Parliament as the supreme lawgiver makes it and the courts have only the limited function of interpreting statutes. (pp.283-84). This leads to consideration of Dicey's theory. At common law the idea of equality before the law and of universal subjection of all persons and all classes of persons to one law administered in the ordinary courts of justice was carried to its furthest extent. Everywhere in the common-law world acts of executive officials and administrative boards and tribunals are subject to scrutiny in ordinary legal proceedings as to whether they are within the legal powers of such officials. I have called this the doctrine of the supremacy of the law. Dicey's doctrine had three aspects: (1) No man is punishable except for "a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land" and hence the rule of law is not consistent with arbitrary "or even wide discretionary authority on the part of the government." (2) The rule of law means equal subjection of all classes to the ordinary law of the land as administered by the ordinary law courts and therefore a rejection of so-called administrative justice administered by special tribunals on the Continental model. (3) In English law private individual rights derive from judgments of the courts rather than from constitutional codes. But I should think the first and the second are the essential points.

Because he made a distinction between law and administration the author considers that Dicey misunderstood the nature of administrative justice. He contrasted administration with law. Any wide measure of discretion not guided by principles was thought incompatible with the rule of law. But, it is said, the evolution of modern government has made it increasingly clear that this antithesis between law and administration is false. (pp.285-86).

This depends much on what is meant by law. Here the term "law" is used in what I have called its third meaning — the judicial process in distinction from the administrative process. This distinction was not peculiar to Dicey. It was laid down by Sheldon Amos,[24] by Gray,[25] Pollock and Maitland[26] and Salmond.[27] The first English recognition of the administrative process on a par with the judicial seems to have been by E. C. Clark.[28] Both the judicial process and the administrative

24. AMOS, SCIENCE OF LAW 396-97 (1875).
25. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 24 (1892).
26. 1 POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW xxv (1st ed. 1895).
27. SALMOND, JURISPRUDENCE § 5 (1st ed. 1902).
28. 1 E. C. CLARK, ROMAN PRIVATE LAW: JURISPRUDENCE 75 (1914).

process are instruments of the legal order. Also there is an element of discretion in the judicial process and a function of adjudication in the administrative process. But the two processes are characteristically distinct. The one deals with each case as one of a type and seeks to determine it by a rule for cases of that type. The other tends to treat cases as unique and make *ad hoc* determinations. In the United States administrative determination has not developed an ethos such as the judicial process has in the common-law world.

Professor Friedmann says: "Legislative and administrative aspects in a given action by a public authority are often inextricably mixed. This makes Dicey's antithesis of law and administration as being one between fixed rules and discretion highly unreal." (p.286). But the sound kernel in Dicey's doctrine is a distinction between judicial justice according to law and administrative justice as we have seen it in the United States in the past forty years. This stands out in the cases in which it has been possible to review administrative adjudication. Four features of administrative justice are continually in evidence. One is a tendency to decide in advance of hearing and without hearing both sides, using the hearing when required by statute, as little more than a technical formal requirement. Second, there is a tendency to consult one side or hear statements or arguments from one side with no opportunity to refute afforded to the other. Third, action is taken upon grounds of which the party adversely affected has had no notice and no opportunity to explain or refute. A striking example of this may be seen in the *Greene*[29] case in England. At the administrative hearing before the advisory committee, Greene was wrongly informed as to the basis of his detention. The Court of Appeal had held that Greene was not prejudiced by the mistake.[30] But those who have had some experience of arguing in the dark before administrative tribunals may doubt this. What would have been possible by way of remedy if prejudice had resulted was left in doubt.[31]

Fourth, a serious feature of administrative justice is entrapment of individuals by advice and information given by officers, subordinates and local officials of the administrative agency and repudiated after allowing it to be acted on in good faith. The judicial process goes on upon public records showing what has been done, upon what facts and why. It is too often impossible to give an assured answer to this in case of administrative adjudication. I, myself, had an experience of three successive hearings in an administrative deportation proceeding in which the real basis of the proceeding was not revealed until it

29. Greene v. Secretary of State for Home Affairs, [1942] A.C. 284, 309 (1941).
30. *Ex parte* Greene, [1942] 1 K.B. 87 (1941).
31. Greene v. Secretary of State for Home Affairs, [1942] A.C. 284, 306 (1941).

accidentally appeared that a witness upon whose information the proceeding was based had mistakenly identified the person to be deported with another alien who had left the country. Fortunately this could be brought to the attention of the Attorney General before final action. If the real basis had been disclosed the proceeding would have stopped at once. After forty years study of the decisions year by year I see little advance toward a technique of administrative adjudication in America such as I submit our constitutional polity calls for. There are no such checks upon administrative determination as have been developed as to judicial determination in the history of the common law.

We are told rightly that two principles are essential to democratic society: (1) the safeguarding of protected individual rights by impartial judicial authority (It is added that this need not necessarily be the ordinary courts of law, but if not the administrative tribunals must develop a technique of adjudication involving adequate checks and an ethos of adjudication not yet manifest in the United States.); (2) the principle of equality before the law of those who engage in comparable legal transactions and enterprises. The sound kernel of Dicey's doctrine is that the common law judicial process goes far to secure these where the administrative process as to adjudication does not in the United States.

The next section of chapter 13 is devoted to Hayek's version of Dicey. But this is as extreme on one side as the doctrine of American adherents of administrative absolutism is on the other. Hayek goes on Bentham's idea of law as an aggregate of laws — that is, of rules attaching definite detailed legal consequences to definite detailed states of fact. Law in the second sense is by no means wholly a body of rules. Even the body of authoritative materials of decision is not wholly made up of rules. There is an authoritative technique and there are received authoritative ideals. Even the body of precepts includes rules, principles and standards. But the authoritative technique and the received ideals afford a guarantee of how rule, principle and standards will be found and applied. What is sound in Dicey lies here and all that can be said for Hayek is that until like checks upon the administrative process in action develop the lack of such checks leads to administrative absolutism which leads toward the totalitarian state.

Next the author takes up the legal aspects of the social welfare state. It is said that five different functions call for analysis. They result from the activities of the state as (1) protector, (2) dispenser of social services, (3) industrial manager, (4) economic controller and (5) arbitrator. (p.298). The whole seems to come to little less than the totalitarian state. But this is not the place to argue where, or whether at all, the line may be drawn. The first activity requires no

comment. The second requires a multitude of ordering and managing functions by government departments and independent public authorities and so calls for development of public-law principles. (p.301). Is there not, then, need of fitting these principles into our common-law system? I doubt whether administrative courts can do this so well as our ordinary courts could with real guidance from juristic working out of principles adapted to our common-law polity. With respect to the function of the state as industrial manager, we are told that subjection to ordinary legal liabilities need not prevent the fulfilment of economic, social and other planning functions. (p.301). Then is not this precisely what the ordinary courts which have a developed ethos and technique can do best? Professor Friedmann puts a question of public enterprises operating side by side with private enterprises. Should the government act impartially between the two? Or may the government encourage one at the expense of the other, holding the former a form of enterprise which it regards as preferable? We are told that "a wise government will act with moderation" (p.303) and that the question is one of "policy not of law." (*Ibid*). But ought there not to be legal limitations if only to insure the moderation which should be exercised by a wise government? Can we expect wisdom under the conditions of practical politics otherwise?

Under the fourth activity allocation of essential materials involves great powers in the government for the time being. It can thwart certain industries and encourage others. Where the state is both governor and engaged in industrial and commercial enterprises there is danger in the bureaucratic allocation of resources unless there are constitutional legal restrictions. Also the author points out that the power of the government of the day to throttle criticism of its policy by allocating paper or to curtail freedom of personal movement by direction of labor, raises one of the most serious problems of the modern democratic planned society. (p.305). We may well pause before making over our American legal constitutional polity to what seems to lead directly to making the omnicompetent planned state a totalitarian state.

As to the function of the state as arbitrator between different groups in society, the author points out that a social service state need not be collectivist. It can be a parental or dictatorial state "dispensing social welfare among the citizens while forbidding them to engage in any autonomous collectivist association" (p.305) as in Nazi Germany or Fascist Italy or under Franco in Spain. Or the state may become responsible for all group action in its domain, regarding their "quasi-autonomous" organization as required from the point of view of management. This is the arrangement in Soviet Russia, where there is a function of arbitrator between state operated industries and trade

unions. But, the author reminds us, the trade unions are not genuinely autonomous organizations. They exist within a well defined national plan and are subject to an overriding state policy. On the other hand, in the modern democratic state groups and associations are allowed on principle to develop freely and to adjust their relations by agreement and so in the sphere of private law. (p.306). In England there is full and equal recognition of trade and manufacturers' associations, employer's associations and trade unions "each entitled to foster and protect its interests by group action." (p.306). I am not sure we can quite say that for the United States.

But, says the author, "This purely passive function of the State is proving increasingly insufficient." (p.306). Almost everywhere there has come to be a chronic economic crisis. No state can afford a long standstill of production or a rise of prices, wages and production operating to paralyze the economic order. It becomes necessary for the state to intervene. When it intervenes it cannot maintain a system of referring both sides to free contract. Freedom of association involves also freedom not to associate and gives rise to serious controversy as may be seen in the United States today in connection with the Taft-Hartley Act. As he says: "It is almost impossible to reconcile a compulsory national wages policy with the recognition of full freedom of organised groups and the consequent right of unimpeded collective bargaining." (p.306). But the state in a democratic society may have not only to be arbitrator between organized employers and organized employees but also between contending organized groups in production and unorganized consumers. It may have to do this while upholding freedom of association and while safeguarding the interests of the state. In the endeavor to find a way through these manifold and difficult tasks it is not hard to see why peoples give up and, as the easiest way out, turn to absolutism.

The book concludes with a summary of ways in which reconciliation of planning with democratic principles of justice might be achieved. First, the privileges and immunities of the state in legal transactions affecting individuals must be abolished and prerogatives which have sometimes been unduly extended by the courts in time of war must be limited. I have called attention to this in a note, "Administrative Discretion and Civil Liberties in England."[32] Second, there must be proper control of administrative discretion. As to this the author tells us there are three essential safeguards. There must be general legislative directives laying down principles of administrative action. These principles must be enforceable by independent tribunals. Whether there should be a hierarchy of special administrative courts or a combination of administrative tribunals with appeal to the highest civil

32. Pound, Note, 56 HARV. L. REV. 806 (1943).

court he regards as relatively less important. But if making this control effective is left to administrative tribunals not part of the general organization of judicial justice, can we expect these tribunals to develop the ethos of courts as known to the Anglo-American polity or will they fall into a rut of administrative absolutism? Third, the state as well as separate public authorities must be subjected to the principles of the common law. Public authorities simply as such are not to be put in a legally privileged condition beyond the general principles governing all privileges. There is to be no presumption that the state or public authority is not bound by a statute. (pp.308-09).

A problem of the line between administrative discretion and legal responsibility, the author tells us, is inherent in the nature of public administration. (pp.309-10). We can't ignore that at least an accepted minimum of planning calls for reconsideration of legal principles. We must not expect too much of the law. But American constitutional history shows that constitutional legal safeguards maintained by independent common-law judges can achieve a great deal. The real foe of absolutism is law: "[F]rom their own experience and their deep reading in history," said Mr. Justice Frankfurter, "the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. 'Civilization involves subjection of force to reason, and the agency of this subjection is law.' "[33] A balance of planned service and freedom is the problem confronting the jurist of today. The Anglo-American lawyer has a great opportunity of working out the paths of development of the common law to meet this problem.

33. United States v. United Mine Workers of America, 330 U.S. 258, 308, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947).