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Book Reviews

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BOOK REVIEWS

CURRENT LEGAL PROBLEMS 1956. Edited by G. W. Keeton and G. Schwarzenberger. London: Stevens & Sons, 1956. Pp. vii, 275. $5.55.

Some little time has passed since Alfred Noyes, in *The Barrel Organ,* first called his readers to: "Come down to Kew in lilac-time (It isn't far from London)."

London will be the setting for the next meeting of the American Bar Association, and though one may doubt whether lilacs will be in bloom, members and their families no doubt will rejoice in the chance to heed the poet's summons.

Fine legal minds also bloom in the ancient capital of the United Kingdom, in any season. Contact with them likewise will be cause for rejoicing. To prepare for such amiable concourse, we American lawyers may profitably turn to a book just received from the publishing firm of Stevens & Sons, Limited, of London.

On behalf of the Faculty of Laws, University College, London, the book, under the title *Current Legal Problems 1956,* presents the public lectures delivered during the Michaelmas and spring terms of the College Session of 1955-1956 by members of its Faculty of Laws, and also an address to The Bentham Club by its President, Sir Patrick Devlin.

Bentham, of course, is *the* Jeremy Bentham. He assisted in founding the University College, and after he died, by direction of his will, his bones were assembled and made the frame of a clothed likeness set up in a glass cabinet somewhat like the corpse of Stalin in Moscow, but sitting up. As fascinating as is the lore of the Bentham name, it is quite beyond the scope of this review.

What first impresses the American reader of the lectures is the similarity of the problems considered important to the London University Faculty in relation to our current legal problems here. Thus the recession of the influence of the common law which is the subject-matter of Sir Patrick Devlin's discourse "The Common Law, Public Policy and the Executive" is reminiscent of our own experience here with the ever expanding jurisdiction of administrative agencies. This trend needs close watching by all lawyers, and in fact by all citizens, if the ideal of independence and the separation of powers is to be maintained unimpaired. What part did Bentham's ideas play in this? One pauses to wonder at the irony.

So too, more and more of our law schools here are emphasizing the study of comparative law. What then could be more appropriate than a review of Professor Raphael Powell's lecture on "Good Faith

in Contracts" in which he traces that subject from the Roman notion of bona fides through the canon law to the English law which he then compares with the Scot's law and the French and German Law.

Likewise, the question of "How High is Up" is one which has been occupying the attention of our aeronautical experts, who should find B. Cheng's observations in "Recent Developments in Air Law" of more than passing interest. Professor Cheng, in suggesting that the peregrinations of future Buck Rogerses may encounter not a few legal complications, cites many American authorities.

American authorities are reviewed, too, in "Obscenity and the Law," by D. Lloyd, M.A., LL.B., Quain Professor of Jurisprudence in the University, and in "The Control of Monopolies and Restrictive Trade Practices" by Mrs. Valentine Lathan Korah, LL.M.

A parallel with the Hawaiian question now vexing our Congress is suggested in the essay, "The Constitutional Future of Malta" by Professor R. C. Fitzgerald, LL.B., F.R.S.A., Professor of English Law and Dean of the Faculty of Laws. Of course, Hawaii is not mentioned in this paper but the situation of Hawaii vis-a-vis the mainland of the United States somewhat resembles that of Malta with respect to the British Isles, and there is a similarity of aspiration

Of the other lectures, the student of law in particular may receive considerable enlightenment on what is meant by the phrase "public policy" by reading "The Intention of the Legislature in the Interpretation of Statutes," the sixth lecture of the series, on page 96, by D. J. Payne, LL.B. Citing frequently the work originally prepared by P. B. Maxwell on "The Interpretation of Statutes," (10th ed. 1953), Mr. Payne indicates how judges must "make law" in applying statutes to cases unforeseen by the legislature, and advances the idea that a delegation of such power by legislatures to the courts be frankly recognized. It is an interesting theory.

All the lectures carry the quality of the limpid, fluid, British style of expression. Excepting possibly the last lecture "The Province of the Doctrine of International Law," by G. Schwarzenberger, Ph.D., Dr.Jur., they are all easy to read. It seems that abstruseness is too intrinsic in the subject of international law to be overcome by any style of writing. The gist of this lecture, however, so far as I am able to perceive, is that it is time in international law to call a spade a spade, diplomatically of course,—to recognize the element of military force in international affairs for what it is, and to deal with it accordingly. One observation pertinent to many branches of law appears on page 242 relating to "Balancing of Interests":

> The process of balancing conflicting rules, which itself has an inevitable element of subjectivity, however strongly controlled, would be transformed

> into a still less verifiable juggling game with maxims on a level of subjectivity unlimited.

Here, the phrase "subjectivity unlimited" somehow strikes a familiar responsive chord.

If space allowed, food for comment could be found in all of the lectures not mentioned:

> "Gifts in Favour of Sport and Recreation" by O. R. Marshall, M.A., Ph.D.
> "Mens Rea and Vicarious Responsibility" by Glanfille Williams, M.A., LL.D., Fellow of Jesus College, Cambridge. (This discusses criminal liability of owners of motor vehicles, amongst other matters).
> "Revision of the Sale of Goods Act" by E.R.H. Ivamy, Ph.D. (To be noted for its discussion of international sales).
> "Security of Tenure Under the Landlord and Tenant Act, 1954" by E. H. Scamell, LL.M.
> "Freedom of the Press in the Commonwealth" by D. C. Holland, M.A.

The last mentioned lecture offers some ground for supposing that the press in some parts of the Empire is not as free as it might be—shades of Milton's *Areopagitica!*

All in all, these lectures are addressed to the philosophers at the bar and are not intended for the everyday busy practitioner.

DAVID F. MAXWELL*

SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION. By Edmund Morris Morgan. New York: Columbia University Press, 1956. Pp. xii, 195. $3.50.

Columbia has earned the gratitude of lawyers interested in trials and the process of proof by inviting Edmund M. Morgan to deliver these lectures and by publishing them in this little book.

Morgan, always a bonny fighter, here gives again his reasons for the faith that is in him on some of the issues on which he has entered the lists aforetime. Thus, he doughtily defends the thesis—a most sensible one, I think—that when a judge (after notice to the adversary when appropriate) has finally determined to take judicial notice of a fact, the fact is settled for that trial and the adversary may not contest it with contrary evidence. Again, he challenges once more, as applied to the hearsay rule, the thesis of Thayer and Wigmore that the law of evidence is the child of the jury system. He assembles the expressions of the judges and textwriters in the period when the hearsay rule was a-borning, to show that they gave, not distrust of the jury, but the

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probative weakness of hearsay, due to the lack of oath and cross-examination, as their reason for rejecting it. This is persuasive but not conclusive. Sometimes reasons may be strong which are not spoken. May we not say that the weakness of hearsay would inevitably be appraised by common law judges in the setting of the untrained body who were to hear it? Finally, he recalls the position formerly espoused by Wigmore that the admission of a party out of court could be received only as a kind of impeachment of his present position and not as substantive evidence of the facts admitted. Morgan demonstrates the unsoundness of this and makes clear that extra-judicial admissions are accepted by the courts for the truth of the statements contained in them and come then within the definition of hearsay, and thus are received under an exception to the hearsay rule.

But he does much more than re-fight these battles. In his first lecture he tells the fascinating story of the struggle of English and American courts to shape a system of pleading which will define the area of dispute, so that the trial will be confined within manageable compass, and which will reliably guide the lawyer in assembling his proofs and preparing for trial. At one stage, about the time of Henry II and during the Year Books era the effective part of the pleading stage consisted of an oral interchange between court and counsel, not unlike the modern pre-trial conference. This vivid description bears quotation: ". . . the proceedings by which the parties, their pleaders or counsel, and the court evolved the precise issue for trial and the phrasing in which it was to be enrolled were informal in the extreme. Thus: The pleader makes his statement of claim or defense. The opponent thinking it insufficient interposes, 'Judgment of that.' The court may turn to the pleader and demand, 'Say something else,' or reply to the objector, 'Say something.' Or there may be a debate between counsel or between counsel and court. Biting remarks by the court, sometimes punctuated by profanity, are not uncommon. Counsel, before accepting the court's intimation that his pleading is insufficient or that he must respond to the opponent, may ask time to consult and advise his client. Occasionally in complying he may remark that had the client followed his advice, he would have stood upon his original position. When the substance of the opposing statements has been agreed upon, the language in which they shall be enrolled has to be determined." (pp. 9-10).

Next, apparently, came an era when the court-counsel-conference method of settling the pleadings lapsed—a backward step—and the parties had the responsibility for drafting written pleadings so circumscribed that the issues were few and simple. At this stage, "preparation for trial remained a comparatively simple matter and the task of the jury relatively easy to perform." (p. 22).

Then came an era, beginning about 1700, of piecemeal liberalizations of pleading. Among these changes: permitting the plaintiff to join as many causes of action as he liked, if remediable in the same form of action, and this permission was expanded by permitting him to state a single cause of action in as many "counts" or different versions as he thought might be needed to meet the possible alternative facts that the proofs might disclose; a similar extension of the defendant's rights, given by the Statute of Ann of 1705, permitting the defendant to interpose as many pleas to the merits as he might have; the widening of proveable defences under the general issue; and finally the invention of general assumpsit as a wholesale remedy for money due. But to liberalize is not always to reform. As the author says: ". . . on the whole the system of common-law pleading which the judges and lawyers developed defeated the very purpose which it should have served. It had become an art requiring infinite care as to form and encouraging subtlety of scholastic reasoning, but affording neither court nor parties notice as to the issues of fact which would be the subject of proof at the trial. . . . Adequate preparation for trial required the investigation of all materials relevant to any state of facts which a lively legal imagination could conceive as possibly relevant under each of a series of issues. To call such pleading issue pleading was to ignore actualities. It was a far cry indeed from the simplicity of issue and disclosure in advance of trial of the real area of dispute which prevailed in the days of oral pleading." (p. 24).

Then in the middle 1800's came the Hilary Rules, the half-hearted and self-defeating effort of the English judges to reform the system of pleading. "Before [the Rules] went into effect one case in six turned on the pleadings without regard to the merits, under their influence, one in four." (pp. 24-25).

This failure of the judges prompted the American reformers to turn to the legislature and thus was born the Field Code, with its abolition of forms of action and its requirement that only facts shall be pleaded. It has likewise been a failure. "The original Field Code contained 391 sections; by 1919 it had grown to more than 3,400 sections. It used to be said that the average lawyer learned it at $10.00 a section—the cost of permission to amend. Charles Boston at one time estimated that one third of the time of the New York courts was consumed in deciding mere matters of procedure. . . . But my fundamental objection to the typical code is that a party can comply with its terms and keep hidden his real ground of attack or defense. In this way he can put his opponent to needless expense involved in preparation to meet issues that will not actually be litigated. . . . Had the lawyers and judges received the code with a determination to make it produce the result that the codifiers had intended, it would doubtless have given us a simplified

procedure by which controversies could be adjusted with reasonable speed and without undue expense. But they were unwilling or unable to do so." (pp. 26-27).

Against this background of failure the author sketches the system established by the Federal Rules. Here the effort to force the party to show his hand in his pleadings is abandoned. General statements are permitted and the opportunity for attack on the pleadings is restricted. Information as to the adversary's contentions and the evidence which the party will have to meet is to be secured not mainly from the pleadings, but chiefly through the use of the liberalized provisions for discovery and pre-trial hearings. "The first step toward making a lawsuit a rational proceeding for discovering the factual basis of a controversy is acceptance of these provisions of the Federal Rules. The next is a complete renovation of the rules of evidence." (p. 35).

The lecture on Functions of Judge and Jury discusses and brings light to two distinct but related topics. First comes a clear exposition of the allocation and operation of the two burdens collectively known as the burden of proof, namely the burden of producing evidence of a fact and the burden of persuasion, together with a description of the effect of presumptions upon each of these burdens. In addition, it treats of the responsibility of the judge to decide preliminary questions of fact upon which the admissibility of challenged evidence depends, the inroads which have been made upon that responsibility, and the consequent dangers to the policy upon which the particular rule of exclusion is based. He gives as an extreme example of such danger the practice which prevails in New York and some other states of admitting before the jury a confession, where there is conflicting evidence as to its voluntariness, with instructions to disregard if they find it involuntary.[1] In closing the chapter, he says: "The conclusion of this whole matter is that in the administration of trial by jury we deprive jurors of the effective assistance of the judge in the very situations where it is most needed. It is time that we ceased our inconsistent attitudes towards them—treating them at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects." (p. 105).

The last three lectures deal with the hearsay rule, its history, theory and practice and its operation in conjunction with other exclusionary rules. The author demonstrates that the requirements of the established exceptions do not provide adequate equivalents in trustworthiness for the oath and cross-examination. He devises elaborate supposed cases showing that the hearsay rule, its exceptions, and its sister rules of exclusion may often operate to let in the least reliable and exclude the most trustworthy types of hearsay. He makes this trenchant com-

1. See Stein v. New York, 346 U.S. 156, 172 (1953).

ment: "I realize that the Bar, and perhaps the Bench, are not prepared for radical reform which would make admissible all hearsay that a court considers as having appreciable value. Experience with the Model Code of the American Law Institute is conclusive on that. The Uniform Rules of Evidence, lately approved by the Institute and by the American Bar Association are much less radical. Their adoption would make the rules governing hearsay reflect in general the reasons which appear to govern the current attitude of the more liberal courts. They call for serious consideration by the profession, if we really want to make a trial a rational proceeding for the discovery of the facts affecting the rights and duties of the litigants. Will the usual inertia of the Bar make them only another neglected proposal of so-called dreamers?" (p. 168).

I do not apologize for my lavish use of quotations in this review. Many thousands of students at many schools and many thousands of lawyers and law teachers at professional meetings have listened with admiration and delight to Morgan's exposition of what the rules of evidence and procedure are and what they ought to be. Any of them who read these quoted passages will see again the tough wiry figure, the heart-warming smile, hear again the cadences of that reedy, resonant voice, denouncing false idols. And they will say again, "there is a man."

CHARLES T. MCCORMICK*

EFFECTIVE DRAFTING OF LEASES WITH CHECK LIST AND FORMS. By Milton N. Lieberman. Newark: Gann Law Books, 1956. Pp. viii, 974.

This book is a comprehensive check list with comments, suggested forms, and index. Its primary purpose is "to provide the lawyer with that peace of mind which comes when he feels confident that he has completely covered all those matters which he might otherwise have overlooked, in drafting or examining" a regular commercial lease of land upon which a substantial building has been erected or will be erected.

The check list consists of 472 items. Each item includes a question and comment. Many items also include one or more suggested forms which often contain possible solutions to problems raised in the comment. The questions and comments have been very carefully written and for this reason they should be very useful.

Of the 472 items, 14 relate to agreements to lease or options to lease, 17 to income tax considerations, and 15 to certain special purpose leases. Of the 15 items on special purpose leases, seven relate to spe-

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cial purpose leases which are similar to regular commercial leases—for example, theatre leases, factory or mill leases, shopping-center leases. Six of these 15 items relate to special purpose leases which are not similar to regular commercial leases—for example, oil and gas leases, farm leases, billboard and signboard leases.

Mr. Lieberman in his comments on billboard and signboard leases neglects to warn lawyers that "leases" of this type may be grants of easements and therefore the usual principles of landlord and tenant law would not be applicable. In general the comments to each of the questions which relate to special purpose leases consist of statements of the more important matters which a lawyer should consider and a warning that the book is not intended to be a comprehensive check list for the drafting of these and other special purpose leases. Consequently, the lawyer who is drafting a farm lease will wish that more material on farm leases had been included in the book; the lawyer who is drafting shopping-center leases will wish that more material on his specific problems had been included. As between these two lawyers, the one who is drafting a modern farm lease is in a slightly better position, because Mr. Lieberman had made an exception to his general practice of not citing cases, texts, articles, or pamphlets in his comments and has cited the pamphlet *Better Farm Leases* with the suggestion that it be examined for special points

Mr. Lieberman's decision not to cite cases nor to discuss directly the law of landlord and tenant is understandable and proper. But, in view of the fact that many of his comments to the questions of the check list are necessarily suggestions as to points which should be considered, many lawyers would probably appreciate citations to specific texts, articles, and pamphlets where these specific points are discussed more fully. The citations should include materials prepared for realtors as well as materials prepared for lawyers, because many of the provisions which are included or are intentionally omitted from a lease involve the so-called practical aspects of leasing and not legal principles.

The appendix of the book consists of about 150 pages. It contains four sample leases, guaranty, tenant's assignment, acceptance by assignee, landlord's consent to assignment, landlord's assignment, and various forms of acknowledgments; a list of the 472 questions for quick reference; suggestions as to preparation for closing; and a short "Bibliography of Forms" which includes texts as well as form books.

There is a general index of 82 pages and an index to suggested forms of 55 pages. Both of these indexes have been carefully prepared to enable the lawyer to find quickly a specific point. Through the index to the suggested forms, a lawyer may find one or more suggested forms which are pertinent to his specific problem. Unfortunately,

some of the suggested forms which were copied from form books or leases, are poorly drafted. Also, the suggested forms have not been edited and therefore vary as to style, quality, and the meaning of some of the words used in them.

Time limitations often determine the quality of portions of many very useful law books. It would have required a great deal of time for Mr. Lieberman or any other qualified person to edit all the suggested forms so that they would meet the standards of modern legal drafting and be uniform in style so that a lawyer could easily fit them together into a modern lease. As a simple illustration, some of the suggested forms use the terms "lessor" and "lessee"; others use "landlord" and "tenant." In a book on the effective drafting of leases the desirability of the terms "landlord" and "tenant" should be recognized because they are more easily understood by landlords and tenants who must carry out the terms of their leases. Also, when typing the terms "lessor" and "lessee," typists at times have mistakenly typed "lessee" for "lessor" and vice versa.

The following simple illustration of Mr. Lieberman's failure to give proper attention to the suggested forms in his book appears at page 3:

> II-1. Are the full names of all the parties inserted and correctly spelled?
>
> COMMENT
>
> To avoid any future question as to the identification of the parties . . . the full names of all the parties should be inserted. . . .
>
> SUGGESTED FORM
>
> This lease made the 10th day of January, 1956, between John J. Doe, unmarried, son of John A. Doe and Mary Doe, of 215 A Street, in the City of . . . .

In addition to the failure to use the landlord's full name, the address is so placed as to create an ambiguity. Is it the address of the landlord or of his parents?

If all lawyers would consistently use the full names of parties to legal documents, particularly documents which are recorded or are necessary to determine rights with respect to property, the time required for searching records would be substantially reduced. If full names and an electronic device were used the time required for a title search would be reduced from days, weeks, and months to minutes.

On page six of the book in two different suggested forms the name of the landlord is given as "John Doe" in one form and as "John Jones" in another form. Is a lawyer who uses this book more likely to follow the principle of using full names which is set forth in the comment of Item II-1 or the suggested forms which do not follow this principle?

Effective Drafting of Leases with Check List and Forms is a very

worthwhile book, but it will not be the last material which a lawyer will buy to assist him in the drafting of leases.

ROBERT N. COOK*

THE LAW AND ONE MAN AMONG MANY. By Arthur E. Sutherland. Madison: University of Wisconsin Press, 1956. Pp. ix, 101. $2.50.

The central problem with which *The Law and One Man Among Many* is concerned is the relation of individual man to collective man in our highly organized twentieth century society. This calls for a re-examination of the fundamentals of human freedom under law in our own time. Particular attention is devoted to the complex interplay of competing and conflicting freedoms and restraints which are fixed by a wide variety of controlling pressures upon the individual. Professor Sutherland concludes that man's freedom is the mathematical sum of all the multiple helps and hindrances supplied or imposed by his natural, his private, and his civic surroundings. The extent to which our courts take cognizance of these respective helps and hindrances in the settlement of controversies between individuals, or between individual man and the group, and the perception of justice in the treatment thus afforded, is the subject of detailed inquiry.

This slender volume of one hundred pages derives from Professor Sutherland's preparation and delivery of the Rundell Lectures at the University of Wisconsin Law School. As the author so readily concedes, on this subject there has been no end of the making of many books by many philosophers. But any lack of novelty which may attach to the subject matter is outgained by the insights he brings to bear upon the problem, which is of such persistent interest to all students of the administration of justice. The author combines clarity of style with an interesting array of legal and non-legal source materials, and avoids the ponderousness and pomposity which mark so many inquiries in this complex and difficult field.

In format, the book falls into the three-part pattern which a series of three separate but related lectures would naturally impose. Despite this forced episodic quality, the author achieves continuity and a high degree of integration through the medium of periodic restatements of position and purpose, and the use of a brief epilogue.

Under the sub-title "Fashions in Individualism," the first part of the book is given over to consideration of the meaning of freedom as applied to the individual in his relation to the many. The several political, economic and cultural connotations of "individualism" are developed by liberal quotation from a sampling of savants and special

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pleaders, past and present. Periodically changing styles which affect the use of words like individualism and collectivism in describing opposite social philosophies are graphically illustrated. The alternate triumph or rejection of these terms in the legal order, when freedom of the individual is at stake, calls for something more precise in the way of helpful definition. Accordingly, Professor Sutherland chooses to define "individualism" as a belief in the desirability of man's being left to do as he pleases, so long as he does not too shockingly interfere with somebody else's doing the same. This definition subsumes that the most desirable objective for a society to achieve is the greatest possible average individual freedom for the members of that society. It follows, then, that the great problem of our society is to decide what limits collective man will put on the individual's acting to please himself.

Under the sub-title "Freedom Added and Subtracted" the second part of the book is devoted to examination of a variety of decided cases wherein our courts have appeared to add and subtract the elements of freedom to which individuals have laid competing claim, either against the crowd, or against other individuals with inconsistent freedoms of their own to maintain. The difficulty of the judge, who must find merit in the conflicting desires of individuals or of groups, is readily apparent in cases involving competing evangelical factions, racial groups, occupiers of land, and government security risks.

Under the sub-title "Perception of Justice," the final section of the book deals with man's aspiration for justice, of his past and current attempts to find standards of guidance for the administration of justice in an increasingly complex and crowded world. Many of our familiar conceptions of justice are tested, and rejected as furnishing any singly acceptable criteria. The majority will is hard to ascertain and productive of error. Justice as defined in the ancient word is entitled to respect, but often confronts us with an orthodoxy outworn, while divine law presents its own peculiar problems of discernment. Justice as that which brings happiness to the greatest number is of small aid in the generality of cases, where the problem is not to decide which of several benefits people ought to want, but to allocate between rival aspirants the very thing they do want. Natural law with its claimed universality of application, unchanging and everlasting, has its own difficulties of definition but, as the author notes has had something of a revival in our times. In fact, he performs the rather improbable feat of lining up Blackstone the religionist and Holmes the skeptic under the aegis of the law of nature. This is possible, of course, only by the most expanded definition of the doctrine.

In summary, the author concludes that governing indeed represents a series of choices, and that all men are not governed alike. In this

exercise of discriminatory choice we are able to perceive something of the nature of Justice. But as to what justice is, we are forced to join with Plato in his ancient confession of failure: "for I know not what Justice is." However, the business of governing goes on, as it must if we are to survive, and the choices made will be found to rest upon application of multiple criteria, a blend of motives, and a mixture of political theory.

It seems to me that the difficulties which beset the reviewer of a book are often in inverse ratio to the size of the book, itself. Particularly, where the book is concerned with a theme which has confounded thoughtful men of all the Ages. Professor Sutherland does not appear in the least hampered by the page limitation of *The Law and One Man Among Many*. From the outset, he manages the impression that he has something important to say, and proceeds to say it with a refreshing display of modesty and sincerity. With so much in the book to appreciate and applaud, it is difficult to come to grips with evaluation of its central theme, and the extent to which the author has accomplished what he set out to do. It is obviously unfair to criticize a writer because he wrote the book he did, in place of one he did not. But at least a partial objection along these lines seems valid. After its impressive statement of position, and brilliant exposition of man's unswerving attempts to find standards which will parallel his aspirations for justice, the conclusions finally drawn are indeed anti-climactic. Perhaps it is just a case of the author's having raised our hopes too high, but it comes as neither news nor comfort that "we know not what Justice is," and that the choices which affect man's freedom always rest upon multiple criteria, each having some value, and a blend of motives, and a mixture of political theory.

Some readers may be less troubled by the relative inconclusiveness of the author's summation, than by certain of his primary assumptions upon which the entire structure depends. His definition of freedom as the mathematical sum of all the multiple helps and hindrances supplied or imposed by man's natural, private, and civic surroundings seems to be no more than a restatement of pluralism, broadened perhaps to include environmental "sovereignties," along with those of private or occupational groups in the modern community, intermediate between the individual and the state. The validity or invalidity of the doctrine of pluralism is unaffected by its being recast into the form of an algebraic equation. A more pertinent objection to the definition of freedom herein is that it contemplates freedom as a goal, rather than a method. As a method, freedom may be related to the value of human life in much the same sense that the army is related to national security, or commerce to wealth, or due process to the decided case. When viewed as a datum which may be extracted by simple arithmetic, free-

dom loses its deeper meaning and is effectively split off from its function.

Professor Sutherland also defines "individualism" as a *belief* in the desirability of a man's being left to do as he pleases, so long as he does not too shockingly interfere with somebody else's doing the same. This definition he ties in with the stated assumption that the most desirable objective of society to achieve is the greatest possible average of individual freedom for the members of that society. It is not clear, nor perhaps important to this discussion, whether these are statements of preferred position, or whether the author is merely reading the minutes of the last meeting and noting current acceptance of these points of view.

The troubling effect of these definitions is not limited to such obvious unanswered questions, as what do you mean by "as he pleases"? Is the action or inaction thus enabled that which *does* please him, or that which he *believes* pleasing, or will it be limited to that which would and should please him, if he were reasonably average in his desires and capacity for appreciation? The difficulty runs deeper. If taken at face value, this elevation of the individual conscience to the role of court of last resort (limited only by the competition of the conscience or desire mechanism of other men or groups) sounds like a jurisprudential accommodation worked out between Austin and Thoreau. It must be conceded that modern man is the inheritor of an orthodoxy which consists in holding that the universe only exists and is governed for the sake of mankind, or, as it is sometimes more palatably put, for the spirit of man. But from this persuasion, it would seem a fateful, though beguiling, step to cast man in a new juristic image: a man without moral commitment to others, or to life; to each, himself.

Summing up: a tremendously provocative book which merits careful reading by all those who claim an interest in the law.

KENNETH B. HUGHES*

PROXY CONTESTS FOR CORPORATE CONTROL. By Edward Ross Aranow and Herbert A. Einhorn. New York: Columbia University Press, 1957. Pp. xxiii, 577. $15.00

Anyone engaged in or contemplating participation in a proxy contest should have this volume under his arm, not on his desk. It is a practical handbook describing the step by step battle of a contest for corporate control. It is documented by illustrations from well known proxy contests of recent years and a full citation of authorities.

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The informal procedure of the Securities and Exchange Commission's staff in processing proxy statements and material is explained commencing at page 121. This reviewer does not know the authors personally but it is obvious that they, like he, learned this heretofore unpublished information in the school of hard experience. The authors know whereof they write. If the book had been published earlier it would have saved this reviewer many hours of labor and research.

Parts I to V give the problems—and most of the answers—from the time the idea of a contest begins to take form down through the solicitation of proxies, conduct of stockholders meeting, judicial remedies, and the expenses involved. Each topic is discussed from the management and then from the insurgent viewpoint. This is true whether the question be that of starting a contest or of management's right to use corporate funds in the contest and insurgent's reimbursement from such funds.

The statutes of the principal states and the leading cases under them are analyzed. The well publicized contests are subjected to an interesting analysis for purpose of illustration and to indicate their effect in developing the law pertaining to what constitutes proxy soliciting material, to "staggered" boards, to cumulative voting and other topics. Peculiarities of the corporation statutes in various states which may cause a result different from the leading cases on the same point in another jurisdiction are noted.

A lawyer who reads this book may feel that in some respects treatment has been too elementary. He may skip the pages in Chapter 3 dealing with the difference between a record date and a closing of stock transfer books. He may not care that the going rate charged by stock exchange members for obtaining a customer's instruction on how to mark a proxy for his "Street Name" stock is 30¢ (p. 226) or the reminder on page 335 that "Paper clips, rubber bands, writing pads, pencils and similar items are always needed" when you count the proxies.

But then, the authors aim their book at corporate executives, proxy solicitors, security analysts, accountants and public relations experts as well as lawyers. The story of a proxy contest is all here.

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GIBSON'S SUITS IN CHANCERY. By Arthur Crownover, Jr. Charlottesville: The Michie Company, 1955-1956. Vol. I, Pp. xxiii, 909; Vol. II, Pp. xv, 949. $45.00.

Although Chancery originated with the King's conscience, in many instances it has become the lawyer's headache. Particularly is this true in states like our own where the original distinction between courts of law and equity is preserved, and the early formalities and jurisdictional distinctions peculiar to chancery procedure are to a large extent maintained. To this condition a useful antidote since 1891 has been *Gibson's Suits in Chancery,* a new edition of which has just been published.

I have had occasion to note before that we in Tennessee are particularly fortunate in the availability of outstanding texts dealing with all phases of our local practice. *Caruther's History of a Lawsuit* and *Pritchard on Wills* do for law and probate practice what Chancellor Gibson's treatise does for equity. Now with this new edition, the first in eighteen years, we can add to our blessings that all three of these useful aids to Tennessee lawyers have been revised within the past half dozen years, and thus we have not only the best but the most modern tools with which to practice our profession.

The present editor is by no means a newcomer to the field, for he collaborated with Judge Higgins on the edition just prior to this one. The editorial work has been immense, and it is no surprise to learn from the preface that it required more than eight years. Much new material has been added, and the chapters on Jurisdiction, Parties, Process, Pleadings, Evidence, Hearings, Specific Remedies, and Appellate Procedure have either been completely rewritten or greatly amended. The numerous equity cases decided by Courts of Appeals in this state since the last edition have been collected and collated, and citations to them as well as to the earlier decisions have been provided references to the Tennessee Reports by volume number rather than by the name of the reporter. References to decisions citing earlier editions of this work have also been provided under the appropriate section numbers. Code sections given are those of the new 1956 Code as well as the earlier one of 1932. Virtually all of the footnotes have been rewritten or supplemented, and many new ones provided. Although preserving all of the virtues and even much of the flavor (the Latin maxims have been retained, but English translations are also given) of Chancellor Gibson's text, this is in many respects an entirely new work.

The format has also been considerably improved. In addition to the usual general index and index of forms, a key to the Latin maxims has been provided, as well as a parallel reference table to the fourth edition. And by no means the least significant contribution which

the publishers have made to the usability of this edition is the breaking down of the text into two volumes, thus permitting the employment of a type considerably larger and more readable than that which placed users of earlier editions in constant danger of myopia.

Chancellor Gibson's thesis, maintained by his present editor, is that "The evolution of the law in England and in America has been on lines marked out by Equity." In the disappearance in many states and in the Federal system of the ancient distinction between courts of equity and law he sees not an abandonment of equitable principles but an absorption by them of the more rigid rules of law; and even in modern pleading he sees a wider application of equity procedures. His statement on this point, which remains unchanged from earlier editions, sounds almost petulant:

> There is an opinion, somewhat prevalent, that there is no Equity jurisprudence in those States of the Union which have abolished Chancery Courts. This is a gross misconception. The doctrines, principles and remedies of the Chancery Court are in full force in every State; and while, in many of the States, there are no separate Chancery Courts, in all of them the jurisprudence of Equity is, nevertheless, recognized and administered as fully as though special courts of Equity were in existence. In those states that have adopted the 'code practice' or 'reformed procedure,' as it is variously termed, instead of the principles, pleadings, practice and remedies of the Chancery Court being abolished, in fact the common law practice, pleadings and remedies have been abolished, or greatly conformed to those of Chancery.

Even in the most recent and sweeping procedural reform in courts familiar to all of us, the Federal Rules of Civil Procedure, the present editor sees a capitulation to equitable principles; for to Chancellor Gibson's original statement he has found it necessary to add only a single clause:

> And in the Federal Courts the principles, pleading and practice of Equity remain wholly unimpaired, procedure under the Rules now being a complete conquest of the common law by Equity.

The philosophy implicit in this approach raises interesting possibilities. Since 1870, the preservation of the separate courts and systems in this state has been guaranteed by its constitution,[1] and shortly thereafter our Supreme Court said, ". . . it may be conceded that the two systems are therein recognized, and it may be further conceded that the Legislature has no power to abolish either system."[2] Yet, in the same year, while reiterating that "the courts are to be preserved intact," the same tribunal added, "but what shall be the

1. TENN. CONST. art. VI, § 1.
2. Halsey v. Gaines, 70 Tenn. 316, 319-20 (1879).

matter over which they shall exercise their powers subject to certain limitations involved in other clauses of the Constitution, is left to legislative discretion."[3] We can, therefore, short of a constitutional amendment, never have the twin streams of justice flowing from a single fountain head which exist in many states; but if the course of historical development which has prevailed in the past continues in the future, we may see the Chancery Courts become dominant in our judicial system to the point where the Circuit Courts become mere adjuncts dealing only with such matters as come within their concurrent jurisdiction or over which they are given specific statutory authority. This may well be the ultimate effect of the Act of 1877 enlarging the jurisdiction of the Chancery Courts to "include all civil causes of action triable in the Circuit Courts, except for injuries to person, property or character, involving unliquidated damages."[4] Of this Act Chancellor Gibson wrote "the far reaching effect of this statute is hardly yet fully comprehended," and his editor has seen fit to permit this statement to stand even after eighteen years.

But if we are to have a *de facto* consolidation of our courts over a substantial area (even though *de jure* it is prohibited by the Constitution), then it would appear that procedural reforms are in order. For the same considerations which have brought to the Chancery side many substantive innovations have confirmed it in procedures which by modern standards are in many instances archaic and outmoded. Trial "according to the forms of chancery" is a complex and sometimes burdensome process, beset by many pitfalls for the unwary. "Equity pleading" as our author says, "is a controversial science." Technical requirements persist which have long since lost their meaning. For example, how many sworn answers are called for today? Yet the useless gesture of waiver is demanded for each case. Again, how many cases are tried on depositions in modern Chancery practice? Yet, to quote again in a different context, "it seems that by oversight or neglect it is still quite possible to have such a hearing in Chancery that will be considered irregular by the appellate courts." This would appear to be out of step with the modern trend of procedural reform, which is to protect the unwary. While this approach may tend to encourage slovenly practice, at least it prevents the client from being penalized for his lawyer's mistakes.

In this connection it is interesting to note that the rules governing the practice in our Chancery Courts[5] have remained virtually unchanged over the past quarter of a century; and even they do little more than embody the traditional procedures which antedated them

3. Jackson v. Nimmo, 71 Tenn. 597, 609 (1880). See also TENN. CONST. art. VI, § 8.
4. TENN. CODE ANN. § 16-602 (1956).
5. *Id.* § 21-401.

by many years. The present editor has found that on matters of pleading, for example, the authorities cited by Chancellor Gibson in 1891 are as much in point as ever, and has therefore repeated the citations although the books themselves are long out of print. (Vol. I, p. 179 n. 13). "The pleadings in Equity were probably borrowed," he writes, "from the Civil law (Roman Law) or from the Canon law (the Civil law as adapted to its own use by the Roman Church after the fall of Rome), or from both. The early Chancellors were, for the most part, if not altogether, ecclesiastics, and many of them were masters of the jurisprudence of the Civil and Canon law; and it was natural for them, in the administration of their judicial functions in the Court of Chancery, to transfer into that court the modes of proceeding with which they were trained and most familiar." Historically, this is very interesting; but unfortunately we do not in the hustle and bustle of modern life have the leisure to muse over it as did our predecessors. If the business of the courts is to be handled with dispatch, tradition must give way to expedition.

And so the lawyer who seeks equity frequently finds himself in a procedural morass from which he can extricate himself only with the greatest difficulty and the aid of a treatise such as this. Reform will come, no doubt; for to quote one of the maxims of which Chancellor Gibson was so fond, "Apices juris non sunt jura," legal niceties are not the law, but frequently an impediment to it. Meanwhile in evaluating this new edition of *Gibson's Suits in Chancery,* there is no reason to alter the judgment passed upon it almost half a century ago by an anonymous reviewer:

> The volume was promptly accepted according to its real worth as an authority, has continued to hold its rank, and has become, more than a mere convenience, an absolute necessity to every Tennessee lawyer.

WALTER P. ARMSTRONG, JR.*

LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901. By Sidney Fine. Ann Arbor: University of Michigan Press, 1956. Pp. x, 468. $7.50.

Doubtless only members of Justice Holmes' own generation ever could quite recapture the devastation and delight of his quip: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics.*"[1] That was indeed a judicial milestone, yet just how much has

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1. Lochner v. New York, 198 U.S. 45, 75 (1905) (dissenting).

today become obscure. The quoted title, *Social Statics,* is suggestive. The pilloried decisions—which at that date were still largely in the state courts, and were typified by *In re Jacobs,*[2] invalidating a statute that had outlawed cigar making in tenement houses—are clear enough. But even a student who recently has reread Spencer can hardly conceive the hold which that preposterous philosopher's ideas had on the post-Civil War generation. For this reason and others, Professor Fine's admirable study is timely, welcome aid.

From the very beginning, Fine shows, laissez faire, an individualist doctrine—the philosophy of the negative state, of "the less government the better"—held a powerful, innate appeal in a land of virgin resources and opportunity. Yet early practice tempered theory: during the formative periods, Federalist-Whigs and Democrats alike made affirmative use of government. In the federal field, there was the American system, with its tariff, National Road, canal and telegraph projects; in the states, a host of state-built or state-subsidized canals and railroads, sanctioned by both parties. The Civil War vastly extended the promotive force and hand of government, bringing increased tariffs, national banks, the nationally subsidized Pacific railroad and telegraph, and the like.

On to this dynamic national stage, about 1865—a nation fast being urbanized, industrialized, and bereft of free lands—moved Mr. Herbert Spencer with his *Social Statics, Man Versus the State,* and *Synthetic Philosophy.* Certainly it was one of the fateful, one of the untimeliest entrances of history. Spencer viewed government as sheer, unmitigated evil. History, happily for him—until disillusionment in old age—was a progression from *more* government to *less!* Evolution was the key, and evolution was inexorable, mechanical, ruthless, yet overall, benign. Society moved wholly by laws—"natural" laws that is—the two most vital of which were "the law of equal freedom," and the "law of conduct and consequence." The former proclaimed simply the platitude that "every man has freedom to do all that he wills, provided he infringes not on the equal freedom of any other man." The latter held that conduct and consequence always were inseparably linked; that *human* evolution also must proceed according to the "survival of the fittest." All in all—and it all was elaborated at great length—here was one of the fantasies and paradoxes of history: synthetic, deductive philosophy masquerading as inductive; pure dogma and speculation decked out as science, and making its appeal as science. Darwinism in social and civil dress! Yet this creed, preposterous today, possessed an almost irresistible appeal—a kind of intellectualized, 19th Century "rock and roll" that literally swept the land. Novelty and will-to-believe overcame doubt, hypnotized thought, sterilized, neutralized

2. 98 N.Y. 98 (1885).

and emasculated government—government to which there was no human alternative, and which presently was to be needed as never before.

Hence Spencerism was the windfall of all time. Fortuitously, and almost at the moment of its birth, a rampant, capitalist order, in good part created by affirmative action and expansion of government, fell heir to this shield and buckler—an entire suit of doctrinal armor—as incongruous as Lochinvar's, to be sure, yet not less valued nor serviceable. Progress, Spencer and his followers contended, was automatic, certain, irresistible. Government, legislation—"state interference," the latter was called—not only were bad; they constituted a dangerous, unwarranted meddling with the cosmic order. "Hands off," "laissez faire," "let alone" were commands of nature, the highest wisdom. "Oh, those grand, immutable, all-wise laws of natural forces," the ironmaster Andrew Carnegie exulted, "how perfectly they work if human legislators would let them alone! But no, they must be tinkering." (p. 103) "The universal law of supply and demand," another leader declared, "is superior to any law which can be enacted by Congress or by any other power on earth." (p. 103).

Professor Fine elaborately documents the conquests of this amazing creed. Anachronistic it might be—myth masquerading as fact, belief as thought—yet for a time Spencer's theory literally swept the board. Economists, businessmen, clergymen, editors, judges—the literate and knowledgeable professions—all were seduced, all lent their voices to popularizing a theory which, in its ruthless determinism, dogmatism, and postulate of a preordained economic and social order, actually was a kind of inverted Marxism—equally crass, blind and deductive. William Graham Sumner was the American high priest. Youmans and his *Popular Science Monthly,* was its chief propagandist and popularizer, while the *Nation,* America's leading journal of opinion, and John W. Burgess, the most influential political scientist, were among its representative communicants and sponsors.

Inevitably, law became infected. In a forty-page chapter, "Laissez Faire Becomes the Law of the Land," Fine covers the familiar high spots of constitutional history, 1870-1900, stressing the importance of the Cooley, Dillon and Tiedman commentaries; the substantive revolution in due process; the significance of Bradley's and Field's dissents; the growing voice and influence of the corporate bar. This perhaps is Fine's least successful chapter. Lawyers and judges will cavil at the tyrannies of a binary code which reduces every constitutional question to simple affirmation or negation of power or right; and violence is done to economics, if not to semantics, by failing to emphasize differences between the judicial veto of subsidy measures or tax exemptions on the one hand, and regulatory measures on the other. Yet

this chapter is a succinct summary, for general readers, not only of the leading cases, but of the research and conclusions of Professors Corwin and Haines as well as the more recent monographs of Twiss, Jacobs and others.

An added merit of Professor Fine's work is his demonstration that not all Americans knelt at this altar, and even those who did, including several of the most devout, like Andrew Carnegie and the future Justice Sutherland, occasionally, even flagrantly, sinned against their creed. For laissez faire, as Sumner himself admitted, was a "maxim of policy . . . not a rule of science." (p. 88). Most conveniently, it could be turned on or off, and it was. There was scarcely a reputable economist in the land, but who believed tariffs to be uneconomic, pernicious and doomed. Yet these "iniquities" not only survived but flourished, and much as they deplored "tinkering," ironmasters of Pittsburgh saw nothing incongruous nor unbeneficial. Carnegie, moreover, eventually devoted 40 millions of his fortune to founding public libraries on a matched fund basis—in the end immensely *expanding* municipal functions.[3] And much as he deplored "tinkering," he still could advocate government construction of a ship canal which promised to lower ton-mile rates from the lakes to his works in Pittsburgh. Equally doctrinaire Spencerians clamored for city water works and sewage systems, and for better state universities for their children. To quote one of Professor Fine's summaries:

> The National Association of Manufacturers, organized in 1895, criticized the manufacture and free distribution to farmers by the Department of Agriculture of vaccine designed to combat blackleg but importuned the federal government to promote foreign trade by chartering an international American bank, subsidizing the merchant marine, enacting a protective tariff, and reforming the consular service so as to make it more solicitous of the export needs of American manufacturers. Railway officials who attacked rate-making as an improper exercise of legislative authority saw nothing amiss in legislation to prevent strikes. . . . (p. 112).

(One here is reminded of, and perhaps there is ironists' symbolism in, Paschal's vignette of the young Utah Congressman, George Sutherland, defending his beet-growing constituents, and their sugar bounties, against a proposed Cuban reciprocity clause. The *Cuban* growers' troubles, Sutherland declared, in opposing the 20% tariff reduction, sprang from the fact that *they* were submarginal, inefficient producers! "It did not occur to him that the same might be said of American producers."[4]).

3. See CARNEGIE CORPORATION OF NEW YORK, CARNEGIE GRANTS FOR LIBRARY BUILDINGS, 1890-1917, at 3 (1943). "Mr. Carnegie never gave libraries. He gave money for erection of free public library buildings. The recipient community, before receiving the gift, was required to pass an ordinance guaranteeing from tax sources an amount of support equal to one-tenth of the Carnegie gift."

4. PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 43 (1951).

Yet the most significant exposure of this growing breach between theory and practice probably was Frederic J. Stimson's analysis of a nine percent sample of the 13,000 laws of all types enacted by the states and territories in 1889 and 1890—the very years that marked the rise of broadened judicial restraint via the due process clause. Only 17 of the nearly 1200 acts embodied notions of individualism. By Stimson's view, 29% were "socialistic" in that they "limited personal and civic freedom in some essential, and he placed the remainder in the category of 'allowable socialism' because they recognized the right of private property although they regulated its use." (p. 353).[5] Five years earlier Albert Shaw had declared, " 'the one striking and common characteristic' of the five thousand general laws or amendments . . . enacted by state legislatures in 1885 was their 'utter disregard of the *laissez faire* principle.' " (p. 353). During the period 1881-1896, New York state expenditures increased four times as much as the increase in the state's population.

Thus the paradox of these times was the growing gulf between theory and practice with respect to the responsibilities and functions of the state. All civilized governments were steadily increasing the scope of their activities. Yet the dominant social theory—laissez faire—ignored the trend and the necessity, and condemned the result. Theory and fact were irreconcilably at odds and moving toward head-on collision.

In the second half of his study Professor Fine develops this reverse side of the picture. To a degree, of course, Spencer became his own corrective. Clergymen in the American social gospel movement excoriated his "gospel of force and muscle." A new school of political economy, more realistic in its premises, and led by Ely, Henry Carter Adams, Seligman, Commons, Patten, John Bates Clark and others, stressed the necessity and uses of government to combat such problems of an industrial age as monopoly and unemployment, and to promote the general welfare by social planning, conservation, and the like. A new school of sociologists led by Lester Ward, Ross, Small and Giddings; political scientists like Woodrow Wilson and Westel Willoughby; pragmatists in philosophy like James and Dewey—all in varying degrees attacked, exposed, and eroded the premises and precepts of social Darwinism. Meanwhile, reform and reformers—men like Henry George, Edward Bellamy, and Henry D. Lloyd; movements like the Grangers and Greenbackers, Free Silverites, Knights of Labor, Socialists, anti-monopolists—all advanced programs and panaceas based on the positive uses of government, a theory and program squarely at odds with Spencerism.

Fine stresses the current and future significance of this shift by

5. The author here cites SIMPSON, POPULAR LAW MAKING 127 (1910).

analyzing the change in public attitude toward unemployment, as cherished theories simply dissolved in the face of stubborn facts. His concluding chapters are models of persuasion. One, "The Legislative Record," surveys the rise of social and economic legislation, both welfare and regulatory, spelling out the statistical analysis already cited. This is followed by a brief "Conclusion: The Years Since 1901," which draws threads together, nudges the impatient Progressives and New Dealers on stage; then, with artistic restraint, steps aside, allowing readers to interpolate the trends from their own experience.

Professor Fine thus re-covers, much more intensively and systematically, the field pioneered by Professor Hofstadter's interpretive essay, *Social Darwinism in American Thought.*[6] The two works necessarily overlap; yet Fine's is far more than elaboration of the Hofstadter theme. Documentation throughout is meticulous, supported by a forty-page classed bibliography, outstanding in itself, and of almost equal value to students of intellectual, economic and constitutional history.

As an historian of economic and sociological thought, Fine's summaries are strongest in these fields. With his gift for incisive statement and analysis, one regrets merely that one of the most unfortunate aspects of Sumner's thought is ignored: the manner in which an exaggeration or apotheosis of the role of social mores or "folkways," with corresponding disparagement of legislation as a creative and positive element in social control, made for paralysis and regression in such fields as race relations and the constitutional rights of minorities. The role of due process (and "higher law" with an economic content), in constitutionally and judicially shielding business, has been stressed again and again. Yet the role of Sumner's pseudo-science of the mores, in ruthlessly abandoning the freedmen, and as an alibi for inertia and indifference in the face of discriminations, is one phase of Social Darwinism in its relation to law which deserves greater emphasis—especially now that the deadlock is being broken. Yet even this is implicit in Fine's study.

In summary, this is a persuasive and enlightening book.

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6. (Rev. ed. 1955).