

Book Reviews

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Book Reviews, 1 Cornell L. Rev. 335 (1916)

Available at: <http://scholarship.law.cornell.edu/clr/vol1/iss4/8>

This Book Review is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Book Reviews

Problems in the Law of Contracts. By Henry Winthrop Ballantine, Professor of Law in the University of Wisconsin. Lawyers' Co-Operative Publishing Co., Rochester, N. Y. 1915. pp. 1.+363.

This book contains about 650 cases, presented hypothetically, which are based upon decided cases, or are taken from examination questions given at various leading law schools. To each problem is appended a reference note which cites cases, text-books, and periodical articles and notes, where there will be found a discussion of the points involved in, or germane to, the problem. The compilation has been prepared as a stimulant to profitable colloquy in the class room; as affording case material for the preparation of briefs; and as a medium for review of the subject. The book should prove a specially valuable complement to lectures and text-books where these means of instruction are employed. It would seem, however, that where case books furnish the material for study, there might be difficulty in finding time to make systematic use of the problems and reference notes brought together in this book. The compiler, at the recent annual meeting of the Association of American Law Schools, tendered an answer to this objection by a plea for a still greater intensive training in legal reasoning than is afforded by the use of case books, and expressed the opinion that "a month of every course ought to be given to original constructive work" of the sort for which material is presented in his compilation, and thus "carry out very much more the true idea and theory of the case system and make our methods of study less mechanical and more dynamic."

The book is well adapted to the purpose intended. The problems selected are provocative of thought and discussion. The reference notes, on the whole, point to the most helpful, including the most recent information and arguments, although for some unexplained reason there are no references made to that finest example of compact and relentless reasoning on the problems of contract, Professor Langdell's "Summary of the Law of Contracts."

Edwin H. Woodruff.

Cases on the Law of Public Service. By Charles K. Burdick, Professor of Law in the Cornell University College of Law. Boston: Little, Brown & Co. 1916. pp. XIII, 544.

Undoubtedly the social philosophy behind American constitutional limitations by which we have attempted to create a sphere of liberty within which the individual shall be immune from governmental control is that the interests of society as a whole will thereby be promoted; constitutional liberty for the individual has been viewed as an important social interest. While our social philosophy seems shifting somewhat, the forces that make dominant public opinion are by no means ready to abandon the attempt and have merely come to attach greater significance to counter social interests. In short we have only come to view individual freedom as unattainable to that

degree, and undesirable in that degree that we set out to establish it. There is a shift of emphasis. In the balancing of individual liberty as a social interest against other social interests the latter are being appreciated more highly, the former is not abandoned.

The conflict ranges widely; in the field of the law governing business or economic endeavor we have only one manifestation. With us, under our system of constitutional limitations, the age-old problem of determining what businesses or callings *should* be subjected to greater regulation in the interest of society and what *should* be left relatively free becomes:—which of them *may* be more regulated and which *must* be left relatively unregulated. It is intolerable to us that the men who compose for the time being our legislatures or even our courts should determine this to suit their personal opinions. The former we restrain by some vague constitutional clauses, and the latter are under the restraint of interpreting these clauses consistently, perhaps we cannot say, in accordance with law, because in the realm of constitutional interpretation it is often difficult to predicate the existence of law prior to decision, but at least so to interpret them as to evolve a body of law, a body of rules of uniform and equal application. In this sense the doctrine of *stare decisis* is but a phase of government by law instead of by men.

Professor Burdick has collected in the first eighty-six pages of his case book all of the more valuable material bearing upon this problem. A careful study of this material by the student whether in the law school or on the bench will give a definite comprehension of the extent to which certainty has been attained by the courts in the rules of law so far evolved for determining the division of businesses between the two classes and also a definite comprehension of the degree of uncertainty which still exists. Little will be left to be learned about the present state of the law by a more exhaustive study; though the student will emerge with an eagerness to verify his opinions as to the trend of judicial thought by observing subsequent decisions as they are rendered.

While much uncertainty still exists as to what businesses may be considered in the class subject to greater regulation, the class is already numerous and there is more definiteness as to the rules to which a business within the class is subjected. The remainder of the volume is devoted to these rules, both common law and statutory. These privately owned and operated businesses subject to the greater regulation we have, for want of a better name, come to call the public services, and the rules of regulation, the law of public service. We could have distinguished better these businesses from public service proper rendered by governmental officers and institutions, and taken account of the private element in them, by styling them quasi-public businesses; and spoken of the law of quasi-public service; but perhaps it is too late.

In Chapter II material is included for adequate study of the service required to be rendered by typical quasi-public servants, whom they must serve, and excuses for failure to serve. Under the caption, "The Right of Public Service Companies to Serve Themselves"

is treated, so far as courts and legislatures have given meagre material, the question whether a quasi-public servant may also carry on a purely private additional business in connection with his public business and so operate the two that service in his public capacity rendered to himself in his private capacity will advantage him against his competitors in the latter capacity. A tendency is appearing to require the public servant to be exclusively such.

Chapter III deals with the limits within which a quasi-public servant may himself make regulations of his service or fix the conditions upon which he will render service.

Chapter IV presents the topic of rate regulation, rates fixed by the servant himself, the power of the government to fix rates, the limits on the latter power and the elements of a valid rate: herein, Operating Expenses and Maintenance, the Capital upon which a Return should be Earned and what Rate of Return should be allowed. The remaining Chapters, V, VI and VII, treat respectively of Discrimination, Duty to Furnish Adequate Facilities and Withdrawal from Public Service. In the appendix are provided the Federal Act to Regulate Commerce as amended to date and the Elkins Act.

In its 479 pages, exclusive of the appendix, this case book with its careful selection of cases, wise discrimination in eliminating less important portions of long opinions, occasional pertinent excerpts from other opinions (appended in foot-notes), is a very successful compromise between that type which puts the student to read with relative unprofitableness long opinions printed *in extenso* and that other extreme which, by its drastic pruning of opinions, explanatory captions and footnotes, leaves little for the student to think out for himself. The present case book, while achieving a fair measure of exhaustiveness of the subject by its compactness, yet preserves to an equal degree what to the reviewer is indispensable to a good case book, the feature of being a book of source material, with cases not so "edited" as to exclude all but the editor's opinion of what the cases stand for. The rule of reasonableness which pervades the law of public service has been applied by the editor in making this happy compromise.

D. O. McGowney.

The Ancient Hebrew Law of Homicide. By Mayer Sulzberger. Philadelphia: Julius H. Greenstone. 1915.

This volume contains five lectures delivered before the Dropsie College of Hebrew and Cognate Learning in 1913 by Judge Sulzberger. They belong to a series of studies in Jewish Jurisprudence and Institutes of Government. In 1910 the eminent jurist published the first of these under the title "The Am Haaretz—the Ancient Hebrew Parliament." The second, on "The Polity of the Ancient Hebrews," appeared in 1912. Like its predecessors, the present contribution is characterized by a thorough familiarity with the primary sources, a firm grasp on fundamental principles and a wide acquaintance with the general development of law, great independence of thought, and a remarkably lucid manner of presentation. The author's knowledge of Hebrew and of law renders it possible for him to

elucidate the meaning of many terms hitherto misunderstood and to remove some widely held, but erroneous, impressions concerning legal procedure and administration of justice among the ancient Hebrews.

Judge Sulzberger's conclusions in regard to the development of the law of homicide in ancient Israel and Judah are strikingly original. According to his view, the Hebrews in Egypt had an oral law which, to a considerable extent, was incorporated in the subsequently written law. When they entered Palestine, c. 1280 B. C., they brought with them the Torah, or Law. The Canaanites had cruel gods and cruel laws, despotism prevailed, slavery was the cornerstone of their institutions. The invading Hebrews, on the other hand, held that freedom was the true basis of the state, and law and justice its purpose. In their scheme despotism had no place. The chiefs of the state could not hold office without the assent of the people, nor could they rule by mere will or caprice, but only by law. In the period of the Judges the 'elders of the city' in the various cantons of the federation failed to administer the Hebrew law whose letter and spirit were hostile to the practice of wergild common among the Canaanites. Under the vendetta law the homicide had to pay a certain amount to the *goel*, or 'avenger,' of the bereaved family, failing which the avenger could put him to death. Motive and circumstances were not inquired into. A killing by accident was not differentiated from deliberate assassination. Murder was not carefully distinguished from manslaughter. There were indeed federal officers (Levites and priests) teaching the law; but the 'elders of the city,' under Canaanitish influence, were inclined to favor the wergild, and the right of asylum at the sanctuaries was recognized.

Solomon determined to abolish this system, and to enforce the Exodus statute. He therefore introduced the new remedies found chiefly in Deuteronomy. This Deuteronomic reform involved the assumption by the state of exclusive jurisdiction over all cases of homicide, the compulsory duty of the elders of the city to entrust the execution to a newly created federal officer for each canton, the *goel ha-dam*, or 'blood-avenger,' the abolition of sanctuaries for homicide, the establishment of six judicial districts, with one city in each to which the homicide must go, the substitution of internment in a separate city for wergild, and a marked change in the law of evidence by which the testimony of one witness only became incompetent to convict. The 'city of refuge,' instituted by Solomon, was really a 'city of confinement' where the manslayer was interned, according to Numbers xxxv, 28 during the life-time of the contemporary high-priest. This institution existed only about one century. For Jehoshaphat, c. 850 B. C. established a federal court in every canton, each of which had executive officers to execute the judgments. He sent princes into every corner of the land, with legal experts (Levites and priests) to reinforce their statesmanlike arguments with the statement of the principles and practices of the Hebrew law, carrying with them 'the book of the law of Yahwe.' He appointed judges in all the cities of Judah, and established a supreme court, which was solely an appellate court, in Jerusalem. This put an end to the cities of refuge and practically removed the last remnant of the *lex talionis*.

This highly ingenious hypothesis challenges attention, and is worthy of most serious consideration. If it fails to command a ready acquiescence, it is not necessarily because it runs counter to inherited opinions. Historians rightly insist upon a careful and critical examination of the sources. It is evident that Judge Sulzberger neither accepts the orthodox Jewish view that Moses wrote the Pentateuch nor the theory as to the composition and date of this work dominant among scholars to-day. The present reviewer has no fault to find in principle with this position, seeing that many years of study and reflection have led him to abandon the current system of critical analysis as well as the tradition of Mosaic authorship. But it is to be regretted that the author did not indicate more clearly such results as he may have reached in regard to the extent and probable date of the different strata in the Pentateuch. He sometimes speaks as though he held the Law to have been in existence before the Hebrew invasion of Canaan; elsewhere he intimates that certain laws found in Deuteronomy were innovations in the time of Solomon; and he strongly maintains, on the basis of a narrative in 2 Chron. xvii-xix, that the whole process which he outlines was completed in 850 B.C. There is a certain vagueness as to the character and date assigned by the author to his documents that disturbs the reader. What evidence is there that the invading Hebrews possessed any part of the Pentateuch in writing or in the form of oral tradition? How can the account in 2 Kings xxii-xxiii of the discovery of a law absolutely unknown before Josiah's time, and the history recorded in Judges, Samuel, and Kings harmonizing with this, be explained on the assumption that Solomon knew Deuteronomy? How is it possible to accept the account in Chronicles concerning Jehoshaphat's reform without considering the general trustworthiness of this work? A critical discussion of the sources by the author of these suggestive studies is certainly a desideratum.

Hammurapi's Code may legitimately be used to show what the common law of Palestine is likely to have been when the Hebrews invaded the country. The distance in time is not quite so great as the author assumes. We now know by astronomical calculations, revealing the reliability of Berosus' dates for the first Babylonian dynasty, that Hammurapi ruled from 2124 to 2081 B. C., and the code was promulgated in the latter part of his reign. In view of recent discoveries it is probable that the biblical chronology is approximately correct, and that the immigration of Hebrew tribes into Palestine took place in the 15th century, and not two hundred years later, as some scholars maintain. The Tell el Amarna and Boghazkeui tablets indicate that the Babylonian influence remained strong long after the Egyptian conquest; and the dynasty to which Hammurapi belonged was Amoritish. It is altogether natural to suppose that the nomadic invaders reacted against many customs and laws of Amorites and Canaanites as well as that they unhesitatingly adopted many others. But it may be seriously questioned whether the ethically less advanced ideas in the Mosaic codes can at once be set down as Canaanitish or Amoritish survivals, and whether particularly emphasized prohibi-

tions must of necessity be directed against foreign rather than native customs. In spite of the official correspondence between kings and governors in the 15th and 14th centuries, we know very little about the social development in Palestine at this time. It would not be strange, if conceptions and practices strongly entrenched among nomads should have possessed a firmer hold upon the recent invaders than upon those who had long ago settled down to agricultural and urban life. The higher and the lower co-exist everywhere, regardless of logical consistency. A frank acknowledgment of such possibilities and facts is quite compatible with the highest consideration for the peculiar genius of Israel.

Judge Sulzberger infers from the Code of Hammurapi that the Babylonian state had no jurisdiction over homicide cases. The absence of any section dealing distinctly with this class of crimes is indeed peculiar, and the silence is capable of such an interpretation. Yet, in view of the highly developed administrative machinery, the existence of local courts and a supreme court of appeals in Babylon, and the infliction of the death penalty or public scourging for various crimes and torts, it is difficult to imagine that the government would take no cognizance of the murder of e. g., a priest or an official, but leave this entirely to the operation of the *lex talionis*. The emphasis upon witnesses, in the plural, is so strong, that it does not seem possible that conviction on the testimony of one witness only can have been the accepted rule in the world influenced by this law. The distinction between 'avenger' and 'blood avenger,' and the interpretation of the latter as a federal sheriff are very doubtful, and a close connection between the right of asylum in a sanctuary and the cities of refuge still remains probable.

It is possible, however, that these searching investigations may permanently modify our conceptions on some important points. If vendetta law, revenge by family or clan, exhausts the meaning of the *lex talionis*, it is important to realize that there seem to be indications of the assumption by the state in Judah and Israel of jurisdiction in homicide cases, and the consequent reduction and ultimate disappearance of private blood-fcuds, even though it may be impossible to fix chronologically the beginnings of this significant change. If the term applies to the requital of injuries by like injuries, whether by private parties or the state, it should be borne in mind that, while the principle was not abandoned, the growing refinement of manners and morals made it less and less strictly followed, so that an eye was not taken for an eye, or a tooth for a tooth, even though a life continued to be taken for a life. It is not improbable that imprisonment was a punitive measure regularly resorted to, or impossible that the phrase 'he shall be punished' referred to incarceration. The etymological explanation which transforms the cities of refuge to state prisons, and does away with the familiar picture of the manslayer running a race for his life with a blood-thirsty avenger in hot pursuit of him, may be well founded. An internment of indefinite length in certain designated cities in the case of a homicide, guiltless of deliberate murder, is intrinsically probable. The limitation to the life-time of

the high-priest, whether a part of the original text or a later addition, would seem to show that the institution existed in the post-exilic period when for the first time the state was ruled, so far as the internal government was concerned, by high-priests. It is sincerely to be hoped that the author may continue these interesting and thought-provoking studies.

Nathaniel Schmidt.

Trusts, Pools and Corporations. Revised Edition. By William Z. Ripley. Boston. Ginn and Company. 1916. pp. 868.

The first edition of this book appeared in 1905. It was announced as "a deliberate attempt to apply the case system to the study of economics." In my opinion this is not an altogether accurate description of the nature and purpose of the book. It will not enable the reader to reach any clear-cut notion of the fundamental economic principles involved in the various problems grouped together under the head of the "corporation and trust problem," nor does it represent an attempt to trace the development of such principles. But it does bring together in convenient form a surprisingly large amount of pertinent material upon the subjects which it treats. While it does not point the way to conclusions, it brings the more important problems connected with the public control of corporations and of industrial combinations into clear relief, and for this reason, if for no other, it is an invaluable aid to the student.

The book includes three classes of material: First, it contains concrete descriptions of the financial operations of typical pools and trusts. Some of these accounts are by individual writers, some are taken from reports of the United States Bureau of Corporations, and some are excerpts from the record or from the briefs in important cases. In the second place, Professor Ripley reprints a number of important papers on such topics as "Trade Combinations at Common Law" (by Professor Frank J. Goodnow) and "Corporate Promotion and Finance in Germany" (by Ernest Schuster). Finally, the volume contains the text of the Sherman Act of 1890 and the amendatory statutes of 1914, together with the opinions (often abbreviated) in some of the more important cases under the Sherman Act. All this makes a volume of nearly 900 pages, including 24 chapters, and 37 different items. Some of the older material, such as the accounts of the Wire Nail Association of 1895-96, the description of the United States Steel Corporation's Bond Conversion, and the account of the Michigan Salt Association, might have been omitted with advantage. Other excerpts might have been pared down by judicious editing. I mention these points because the book as it stands is altogether too large. It does not cover the field thoroughly or systematically enough to take the place of a text-book, and my conviction, born of experience, is that there is relatively little value in asking students to read assignments in books like this unless there is time for their thorough discussion in class. But the chief disadvantage of the book is that it covers too broad a field. Its material on corporation finance and on the economic aspects of the corporation (as a general

form of business organization) is so scrappy and inadequate that it might well have been omitted. The bulk of the contents of the book relates to the problem of industrial combination. In this field Professor Ripley's selections have been carefully made, and their value to the reader is increased by the editor's generally illuminating notes.

But I must dissent from Professor Ripley's statement that the decision in the Standard Oil Company case marks "the entire conviction at last of the Supreme Court of the United States, that all was not well with business as it had come to be conducted in America, but that, nevertheless, the time had arrived to discriminate between what was evil, deserving elimination, and that which was so inherently sound and necessary as to merit the protection, nay even the encouragement, of the law." It is true that this interpretation of the meaning of the Standard Oil decision was widely popularized at the time, but more careful study of the opinion, as well as of the trend of subsequent opinions by the federal courts, has shown that instead of leaving wide scope for "judicial legislation," the Standard Oil opinion established a more clear-cut and definite criterion of the meaning and application of the Sherman Act than can be found in any prior decision.

And I cannot sympathize with Professor Ripley's defense of the Clayton Act,—a statute which in the opinion of almost all competent students of the subject is bound to do more harm than good. But these strictures relate in the main to minor points. Professor Ripley's attainments in the field covered by this volume are well known, and the book will in no way diminish his already high reputation.

Allyn A. Young.

Books Received

- A Sketch of English Legal History. By Frederic W. Maitland and Francis C. Montague. New York: G. P. Putnam's Sons.
- The Law and the Practice of Municipal Home Rule. By Howard Lee McBain. New York: Columbia University Press.
- Wood on Limitations. Fourth Edition. By Dewitt C. Moore. Albany: Mathew Bender & Company.