# CURRENT LEGAL PERIODICALS

**The Myth of Magna Carta.** Max Radin. 60 Harvard Law Review: 1060–1091.

In 1904 Professor Edward Jenks wrote an article with the title of this paper, in which he held that the importance of the Great Charter as a symbol came only with the parliamentary struggle of the 17th century and that until that time it was "merely an ancient statute not much in people's minds". In his view the barons had no intention of announcing the rights of men, but were seeking freedom from royal control for themselves. According to this theory, Coke pulled Magna Carta "out of the dust of the record-room" and made it "the symbol of the struggle against arbitrary power" in the 17th century.

Professor Radin, disagreeing with this view, shows how the charter was regarded in England in the centuries before Coke. It was reissued several times in the century after 1215, took its final form in 1224–25 and seems first to have become known as the Great Charter about 1250. From 1297 on, statutes contained provisions that it should be maintained and one in 1368 stipulated that if any statute contrary to its provisions were passed it would be void. Collections of statutes from the early years of the 14th century were entitled *Magna Carta cum Statutis.* Certainly lawyers must have been familiar with the Charter, because it was cited also in the Year Books and the early reports and treatises. Its provisions as to the rights of the church, and the right to the protection of the law of the land, were insisted on even in the reigns of Henry VIII and Elizabeth.

Matthew Paris about 1250 gave a full account of the events leading to Runnymede and other chroniclers indicated that they understood the importance of the Charter. Chaucer did not mention it but he had no occasion to do so. Hollinshed and Stow tell about it in their histories, although Stow, writing in the reign of Elizabeth, omitted the name. Shakespeare had certainly heard of the Charter but did not mention it in King John. However, there are several probable reasons for the omission.

The Charter itself distinguishes between freemen and barons in some clauses and other nearly contemporary references indicate that the term *liber homo* did not refer only to the barons.

Magna Carta did not save England from despotism under the Tudors, but neither Henry VIII nor Elizabeth claimed that

they could lawfully disregard all their subjects' "privileges", and Professor Radin says that it is an open question whether without the "splendid symbolism" of the Charter the Tudor "despotism of fact" might not have been turned into "'one of law".

**Some Reflections on the Reading of Statutes.** Felix Frankfurter. 47 Columbia Law Review: 527–546.

All the laws passed by the Congress of the United States during its first five years are contained in one 320 page volume, while for the 993 enactments of one single session of the 70th Congress a "monstrous volume of 1014 pages" was required. The work of the Supreme Court reflects this change; now, almost every case decided there is concerned with some statute.

Problems in statutory construction arise in cases where there are contests between probable meanings. Words are not precise symbols and a statute is not the work of a single author. Also the task of drafting legislation on certain subjects, such as income tax, "without producing a flood of litigation", seems an impossible one. Doubts and ambiguities appear that necessitate judicial construction. Mr. Justice Frankfurter has examined the opinions of Holmes, Brandeis and Cardozo involving matters of construction and discusses the considerations that enter into them. His impression is that Holmes had an awareness that a statute was "expressive of purpose and policy", but that "he tended to hug the shores of the statute itself". Brandeis "would draw on the whole arsenal of aids to the construction" and also invoke rules of construction in a detailed proof or argument. Cardozo, who "preferred common law subtleties", managed to impart even to statutory construction problems "the glow and softness of his writing". All three justices remembered that laws were passed to attain certain ends and were not just abstract propositions.

In construing a statute, one must, of course, begin with its words, listening to what it says and also "to what it does not say", considering for whom it is meant and using all indications it contains as to the meanings to be given to particular words or phrases. All the parts of the statute and the relation between them must be considered. The words "intention" and "legislative intent" are objectionable because there is no way of delving into the minds of legislators or draftsmen. The court's purpose is not to give effect to what the legislature "should have" or "would have" enacted but what it "did enact, however inaptly".

The English courts say that the meaning of an act of Parliament must be collected from what it says and not from its legislative history. Mr. Justice Frankfurter says that this rule is too simple and that in the ascertainment of meaning nothing relevant should be excluded. He suggests, however, that the English judges are not "confined psychologically", because the words of a statute are placed "in the context of their minds" where there are all sorts of assumptions and impressions. In the United States, courts now look at all sorts of legislative materials, such as recitals of policy, reports of committees and recommendations of administrative agencies, and at later statutes, anything that may throw light on the purpose of an enactment. The language and the external aids must be weighed together in making "a choice between uncertainties". Canons of construction have their value as "generalizations of experience" but must not be taken as true rules of law.

Most legislation is passed in the form in which it comes from committees and without any real discussion. Thus, if committee work is sloppy, legislation will be inadequate. On the other hand, what the courts do with legislation may influence legislatures in the future. They should not be encouraged in "irresponsible or undisciplined use of language". Perfection of draftsmanship and of judicial construction are alike unattainable but "fit legislation and fair adjudication are attainable".

**Bankruptcy Reciprocity: A Study as to a Treaty with Canada.** Robert H. Busler. 33 American Bar Association Journal: 1026–1029, 1071-1073.

Mr. Busler makes a strong plea for some sort of arrangement between Canada and the United States, similar in principle to that embodied in their Convention and Protocol for the Avoidance of Double Taxation, whereby "a bankruptcy proceeding by a court that has jurisdiction under the bankruptcy act of the forum will have the same effect in the other country as it has in the country of the forum".

There would be nothing new in such an arrangement; in fact, as the author points out, the common-law countries are practically the only ones that have not yet concluded treaties of this kind with their neighbours. At the present time similar pacts are in effect between the Scandinavian countries; certain countries in Central Europe and the Balkans; France and Switzerland; France and Belgium; Netherlands and Belgium; and a number of Latin American Countries.

Negotiation of the proposed treaty and enactment of the legislation necessary to give it effect would be simplified by reason of the underlying similarity of the bankruptcy laws of Canada and the United States. In Canada, of course, bankruptcy is a matter exclusively within Dominion jurisdiction, whereas in the United States there may be concurrent legislation by Congress and the States. Seemingly, however, federal legislation would override that of the States.

The pith of such an agreement should be that each country would recognize and give the same effect, as regards assets situated within its own jurisdiction, to bankruptcy proceedings prosecuted within the reciprocating state as it does to proceedings taken in its own jurisdiction. As to the mechanics of the scheme, Mr. Busler has a number of suggestions. In particular, however, he eschews the notion of simultaneous bankruptcies, in both countries, where, by means of independent proceedings, each acting upon local assets, certain creditors are able to realize a greater percentage of their debt than other creditors of the same class in the other proceeding.

The law of the court declaring the bankruptcy should decide priority of payments to creditors, but it must be fundamental that foreign creditors enjoy equal rights and privileges with domestic creditors, including notice as to proceedings, etc. Similarly, the foreign receiver must be able to reach and acquire title to local property, real and personal, for the benefit of all creditors.

The author admits that the realization of his proposal would meet with considerable difficulty. In particular, United States jurisdictions, which at present are unfriendly to the proposition that foreign and local creditors should enjoy the same priority over domestic assets, would require considerable persuasion before they would assist the foreign trustee to obtain title to domestic assets. By the same token Canada, he considers, might have difficulty with any provision against dual bankruptcy, since this concept is established in English law. (J. E. WILSON)

**Ministerial Decisions and Natural Justice.** T. A. Blanco White. 11 The Conveyancer and Property Lawyer: 244–259.

This article is concerned with cases of "applications to the Courts to quash decisions of various Ministers of the Crown". The question to be decided is whether there is jurisdiction to make the orders.

A power to make quasi-judicial decisions must, under the common law, be exercised fairly, but this has been said to mean merely that a board "must act judicially and perform its duties conscientiously with a proper feeling of responsibility". There is no requirement that a decision must be accompanied by a disclosure of the evidence on which it has been based.

Objecting parties have a right to be heard when a minister is acting in a judicial capacity but it has been held that, up to the time of the objection, he acts administratively. An appeal was allowed in 1935 from a decision made after evidence had been accepted *ex parte*, following a public inquiry, but a minister's decision was upheld in 1936 where the scheme concerned had been discussed with the local authority before its order had been made and, therefore, before there had been any objection. It is only after a "lis" has been raised that a minister need act judicially. A minister's decision is not invalidated by the fact that he may have tentatively reached a conclusion before he entered upon his judicial duties.

Four post-war cases are discussed here. In one, the minister had sent the applicant's statement of objections to an order to the local authority for comment, but had confirmed it without hearing him. In another, the minister had confirmed the order of a local authority without hearing the objector but also without making the mistake of referring the statement of objections to the other side. The first application was granted but the second was refused. In the third case it was pleaded unsuccessfully that certain documents in the minister's files had not been disclosed at the public inquiry.

The fourth case is *Franklin* v. *Minister of Town and Country Planning* (1947), 63 T.L.R. 143. Here objections had been raised to a new town scheme and the minister had confirmed it, after a local public inquiry had been held. It was argued that witnesses should have been produced for cross-examination and that he had prejudged the issue. The evidence of bias consisted of statements in a speech made before the New Towns bill had been passed and a letter written when he confirmed the scheme. The Court of Appeal upheld the minister's decision. "An attack on the good faith of a minister is never easy to sustain".

The duties of a government department in such matters are summarized at the end of the article. The order made must be in fact within the department's jurisdiction, but the limits of this jurisdiction may be defined solely by reference to the

minister's personal opinion. When there is a dispute, "officials must act in accordance with the essentials of justice", but a department "may carry out its normal functions in its normal way". The official deciding a dispute may use his own files and may have formed an opinion already as to the issues in a case, but "he must be an honest judge though not necessarily an impartial one". Opportunities "of some sort" must be given to both sides to put their cases before the department.

**The New Public Corporations and the Law: 1. Background and General Characteristics of the Public Corporations.** W. Friedmann. 10 Modern Law Review: 233–254.

The Public Corporation, which is emerging as "the chosen legal instrument of the Labour Government for the public control of basic industries", has appeared in different countries and forms. It has been adopted in England "in eight major New Acts". It now takes a more definite form and a much greater place than formerly in the economic, industrial and social life of the country.

The general characteristics of the new public corporation are briefly summarized here. It has no shares, is responsible to the Government represented by a minister, administration is by a board appointed by a minister, capital is provided through assets taken over from private ownership where nationalized industries are being administered, it has "the legal status of a corporate body", and is subject to "some form of commercial accounting", with public control. There are two types, the commercial, such as the Coal Board and the Airways Corporations, and the social service, such as the Regional Hospital and the Central Land Boards. The latter are under "closer ministerial direction" than the former.

The boards are all appointed by the competent ministers, for definite terms, and the different acts have almost identical provisions as to conditions of employment of the corporation employees. Corporations taking over private industries are generally given limited rights to get rid of "obnoxious contracts", such as "extravagant contracts of service" with "high-ranking executives". Advisory councils are appointed by the ministers to give advice to them on behalf of the public or of groups particularly interested in the enterprises in question. The Air Transport Advisory Council is empowered to consider representations from anyone as to the operations of the airways corporations.

Powers given are wide and elastic but vary greatly with the different types of corporation. While a public corporation of the commercial type is conducted as nearly as possible as is a commercial undertaking, it is subject to the direction of the minister in the exercise of its functions and in its financial affairs. Financing is arranged by the issue of interest bearing stock guaranteed by the Treasury or charged on the Consolidated Fund, and the Airways Corporation may receive Exchequer grants.

Most public corporations must have "separate accounts properly audited". In the cases of two of the social service corporations, the accounts are submitted to the Comptroller and Auditor-General, while the accounts of the commercial corporations are audited "according to commercial standards" and are submitted directly to Parliament by the ministers. Statements as to payments out of the Consolidated Fund to public corporations must be laid before Parliament.

A second part of this article on Public Corporations is to appear in a later issue of the Modern Law Review.

**Roman Law To-day.** P. W. Duff. 22 Tulane Law Review: 2–12.

The October number of the Tulane Law Review is dedicated to the memory of the late Professor Buckland of Cambridge, who is described in this article by the present Regius Professor of Civil Law there as "the greatest master of Roman law that the English-speaking world has produced".

Roman law is taught in every university in the United Kingdom and every candidate for admission to the English Bar must pass an examination in the subject. In the United States, Roman law studies are being carried on in a number of universities, including Columbia, Harvard, Tulane, University of Washington and the Catholic University of America.

The study of Roman law is flourishing in Italy and there has been some revival of interest in it in Germany since 1945. A new *Institut de Droit romain* has been founded in France and considerable interest has recently been shown in Roman law studies in Belgium, Holland, Sweden, Denmark and Greece. In England, Roman law is "on the defensive"; at most meetings of the Society of Public Teachers of Law in Great Britain and Northern Ireland, there is some "vigorous debate" on its value in law courses. A paper by Mr. Hanbury, an authority on English equity, is quoted, in which he says that parts of English

law, "sometimes because of difficulties of pleading and sometimes owing to a heart-breaking mass of cases are unnecessarily bewildering to a beginner" and that the study of corresponding portions of Roman law would provide a "tangible preparation" for them.

Professor Duff believes that English law, as it in now, is no fit subject for young students. The Law Reports, he says, are magnificent as "a scrap-album of human nature", but "a chaos of conflicting and sometimes deplorable doctrines lies too near the surface to be kept decently buried beneath the smooth pages of a text-book", although rationalization is proceeding apace. While the Roman law system was never perfect, the Romans never "gloried in absurdity" or "decried logic" and they provided "a far more flexible machinery for legal development than the rule of precedent and the strait jacket of *stare decisis*".

The influence of the Roman codes has spread to all civilized countries except Scandinavia, England and some countries settled by the English, and Roman tradition is still strong in Scotland, South Africa, Quebec and Louisiana. This is why "lawyers from Paris and Moscow, Cairo and Capetown, Istambul and Buenos Aires" can discuss and understand "each other's legal systems while those from London or New York can not "enter into their universe of discourse". Professor Duff suggests that as statesmen who understand each other are less likely to quarrel than those who do not, there may be "a little more hope of understanding if the statesmen or their advisers have received a basic training in Roman law".

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### LAYMEN'S LEGAL AXIOMS — No. 2

One of the Seven was wont to say; "That laws were like cobwebs; where the small flies were caught, and the great brake through." (Francis Bacon: Apothegms. 1624)

After which, laws are like cobwebs, which may catch small flies, but let wasps and hornets break through. (Jonathan Swift: A Tritical Essay upon the Faculties of the Mind. *N.D.*)

Laws are generally found to be nets of such a texture, as the little creep through, the great break through, and the middle-sized are alone entangled in. (William Shenstone: Essays on Men, Manners and Things. On Politics. 1764)