Current Legal Periodicals

The Drift Toward a Consumer Credit Code. By F. B. HUBACHEK. 16 University of Chicago Law Review: 609-634.

This paper discusses the desirability of a rational, factual, systematic approach to a code of regulatory laws dealing with the modern socio-economic problem of consumer instalment credit. To date, legislation has been miscellaneous, casual and unsystematic, and looking merely to improve the condition of the small borrower. But small loans are only part of a larger problem, because there has been a tremendous demand for consumer credit and new types of creditors have gone into the field, particularly sales finance companies.

The vast increase in consumer instalment credit, reflecting a wage system where debts are payable in instalments as wages are received, points to the need for a consumer instalment credit code for regulation of financing in order to protect the debtor from deception and oppression. The most important respects in which unfairness to the debtor can occur are, first, in the representations and disclosures made to consumers contemplating going into debt; then, in the charge exacted for the credit extended; and, finally, in the remedies available to the creditor for collection. Of these three, the rate of charge is the crux.

The history of regulation in the field, culminating in the Uniform Small Loan Law of 1916, is briefly presented, and its subsequent re-drafts, as presented by the Russell Sage Foundation, which did the research in the field. The U.S.L.L. was drawn with the purpose of fostering a legitimate source of consumer credit and of obtaining enforceable regulation of the creditor and his practices, in the public interest. Since 1916 many states enacted statutes based on the U.S.L.L. and adapted to local conditions. The enactments barred and punished the "loan shark" and fostered and regulated the licensed lender. The subsequent development of new and unregulated consumer credit agencies and the entry into the consumer credit business of established

but unregulated commercial lenders have created the need for a new and broader code.

The most prevalent recent devices to increase the ostensible rates of charge on consumer instalment credit are discussed, these being the use of discounts and fees without refunding unearned portions, and the sale of insurance to debtors. The problem of regulating or preventing such devices poses many problems, but a survey of legislation in the years 1945-1948 reveals that twenty-one states have enacted regulatory laws applicable to some part of consumer instalment credit. These fall under three general headings: acts enlarging the area of the small loan law; acts regulating other types of creditors in a manner similar to small loan laws; other evidences of a trend toward symmetrical treatment of the various credit agencies and methods.

The intermingling and overlapping of consumer credit agencies, particularly in the fields of small loans and sales financing, emphasize the need for symmetrical treatment of the various agencies. The rate of charge itself presents a basic problem, since the rate has to be commensurate with the risk involved, depending upon the type and amount of consumer credit extended. The rate of charge varies inversely with the amount, as does the need for protection of the debtor. The smaller the loan, the greater the charge required to carry it, and the smaller the loan the greater the need for protection of the debtor who is in the group of borrowers closest to the subsistence level and most easily imposed upon. The community has more than an ordinary interest in their protection.

The difficulties of harmonizing, let alone unifying the diverse institutions, methods and practices of consumer instalment creditors are obvious, and to date have only been attacked piecemeal. Progress has been fumbling and erratic. The problem is of national importance and the need is increasing, as evidenced by the request of the Federal Reserve Board on February 14th, 1949, to be given the power to regulate consumer credit.

What is required is the imposition by legislative process of a systematic plan of regulation covering all consumer instalment credit agencies in a manner which holds them to uniform standards of conduct consistent with the public interest. (B. KUSHNER)

Field Theory and Judicial Logic. By FELIX S. COHEN. 59 Yale Law Journal: 238-272.

St. Peter's threat to bring suit against Satan for the latter's non-

repair of the party wall between Heaven and Hell called forth the crushing remark from Satan, "Where do you think you will find a lawyer?" This fabricated hearsay is used by the author to indicate popular opinion of lawyers who are called upon to support apparently inconsistent propositions.

A proposition from the standpoint of rigorous logic is either true or false. There is no middle ground. Life, unfortunately, is not so simple. Truth on earth is a matter of degree, for every actual humanly constructed sentence has different shades of meaning for different readers. The ancient wisdom of our common law recognizes that men are bound to differ in their views of fact and law, not because some are honest and others dishonest but because each of us operates in a value-charged field which gives shape and colour to whatever we see.

The "field" is a new concept in physics. Einstein has shown that "it is not the charges nor the particles but the field in the space between the charges and the particles which is essential for the description of physical phenomena". He has made it possible for us to say that what is reported as a straight line in one system will be reported in another system as a curve of a defined form. Observation of the "world-line" of a body, that is "of the series of all its locations in space-time", provides varying estimates of that body as it is viewed in the different fields through which it passes.

The field theory of physics applied to law would establish a body of knowledge from which we would be able to predict that what looks like a straight story from one standpoint will look like a crooked story from another. Or, that the line of motion of any precedent, traditionally considered to be in a straight line imparting its direction to every case that gets in its way, would actually be subjected to a special pull whenever it passes near a point of high value tension. The old idea of straight lines of precedent filling absolute legal space should be rejected.

The use of a precedent always implies a value judgment, a judgment that similarities between the precedent and the following decision are important and that dissimilarities are relatively unimportant. The application of precedent thus always involves a process of selection or discrimination. But one man's pattern of selectivity is not the same as another man's.

The physical analogy of a field of force becomes helpful in dealing with the problem of how judgments of causality vary. Such an analogy may indicate that just as precedents shift in direction when they enter a neighbourhood of high value tension

so judgments of causality will undergo a similar shift in direction. For example, increasing sympathy for the victims of industrial accidents will bring about a broadening of the field within which causation for such accidents is found in some act of an employer who is able to provide some measure of compensation.

When two people in a law court blame each other for an accident they are simply behaving like human beings. The function of a law court is not to eliminate all the personal value-terms that lead individuals to draw causal lines one way or another but rather to apply a more comprehensive view of the facts as a guide for social action.

The field theory may be usefully applied in considering the controversial area of "public policy", the last resort of the lawyer who finds the cases and statutes against him and of the judge who has not been enlightened by the advice of counsel. In reality the issue between law and public policy is chiefly rhetorical. Every rule of law, every interpretation of a statute, every standard of what a "reasonable man" would do or say or believe or approve, every line of precedents, every view of what any decided case "stands for", always presupposes one view or another as to "public policy". Judgments of public policy create rules and precedents in place of fathomless, systemless collections of individual cases.

Those who seek to achieve a critical and comprehensive view of the law in action must ferret out the judicial value patterns that underlie decisions. These value elements can be identified and analyzed only if we adopt an operational view of valuation based on the analogy of the field theory of modern physics. So we can expect to find the value patterns of a judge, as of any other human being, in the choices he makes between competing interpretations of fact, in the selection of value-charged words to describe given facts and in the articulate and inarticulate premises of his arguments.

In the suppressed moral premises of judicial opinions, in the choices between words of different value tones, in the selection, classification and interpretation of facts and precedents, and in the tracing of lines of causation we find prime indicators of the value patterns of a judge, a judiciary or a society. The sum of such indicators defines a value field.

An immediate application of the field concept would appear to be possible in the realm of jurisprudence. For the field concept, which recognizes the limited and relative validity of many apparently conflicting views in the practical struggles of the law

court and the market-place, points to the possibility that many conflicting schools of jurisprudence may all be true and valid in differing and limited perspectives or regions.

If we view philosophy, including jurisprudence, not as a set of propositions but as a way of understanding, we may say that one philosophy is superior to another if it achieves a greater degree of generality so that it can include other philosophies as special cases within a larger framework of convergent perspectives. Legal philosophy is not a bad play in which each actor clears the stage by killing off his predecessors. It is, rather, a great co-operative exploration of possible perspectives. The history of legal philosophy is not a sad history of successive errors, each thesis producing in Hegelian-Marxian fashion its own antithesis and destruction.

More tolerance may give us more truth. Each line of exploration is likely to disclose landmarks which will prove of value to other explorers moving in different directions and starting from different approaches. Appreciation of the different perspectives from which legal philosophers have approached the problem of the nature of law should place one who attempts to systematize their insights in a better position to form a more comprehensive synoptic vision of the legal order than any past generation has enjoyed.

One difficulty in the way towards this objective is to be found in the inarticulate value judgments of legal philosophers who, ordinarily, do not make explicit their purposes or the value patterns out of which their purposes emerge. For example, Hobbes, oppressed by the evil of civil war and of anarchy, produced an analysis of law differing from that of Spinoza and Locke, who were more concerned with the evils of tyranny, and from Kant whose concern was with the problem of how men pursuing radically different social goals and capable of destroying each other with the weapons of modern science can possibly evolve a pattern of living together in mutual respect.

Another difficulty in obtaining a comprehensive view of the legal order is the naive opinion that definitions are propositions which are either true or false, whereas they are rather resolutions to use language in a certain way. Viewed as such, a definition of law, clearly defined within a given context, may be fairly translated into other people's universes of discourse.

The true significance of Einstein's general theory of relativity is not that it calls attention to the long-recognized diversity of physical perspectives but that it makes possible a translation

from any perspective into any other perspective. If this sort of translation among the different tongues of jurisprudence could be developed, mutual understanding might readily be achieved. In the meantime it is well to remember that no two philosophers and no two jurists can ever contradict each other unless they are talking about the same thing and that there is no reason to believe that those who use the same words necessarily mean the same things. (G. M. CHURCHILL)

The Use of Extrinsic Aids to Statutory Construction in Oregon. By QUINTON JOHNSTONE. 29 Oregon Law Review: 1-19.

The author points out that extrinsic aids to statutory interpretation are now used more extensively than ever before. The trend is a result of the increase in the amount of extrinsic materials, indicating legislative intent, available and because the courts are placing increased reliance upon such materials.

Although the Oregon courts do accept a number of extrinsic aids to interpretation, there are a number of important and increasingly significant types that have not received general acceptance. Some examples are given and it is pointed out that a more extensive application of these materials would result if pre-enactment reports of interim committees and other historical material were made available in a permanent form.

The Supreme Court of Oregon has accepted, as an aid to interpretation, the history of the times during which an act was passed. The author advocates the increased use of briefs, setting forth the historical facts of the contemporary setting at the time of enactment, as an inducement to the courts to make greater use of such aid.

The plain-meaning rule offers an apparent obstacle to an unrestricted use of extrinsic materials. The purpose of the rule is allegedly to apply the legislative intent. But if extrinsic aid discloses a meaning obviously contrary to the literal meaning of the statute, this objective is defeated.

The Oregon Supreme Court has shown a fairly uniform adherence to the plain-meaning rule but admits of an exception where the result would be absurd and unjust. This exception, together with the court's ruling on whether or not statutes are unambigous and subject to the rule, gives a court the discretion of deciding cases on its own views of right or wrong, despite a comparatively unambiguous enactment. The effectiveness of the plain-meaning rule is in consequence considerably restricted, and an increased use of extrinsic aids to interpretation results.

Whether or not there can be any real "discovery of legislative intent", the courts, in justifying the use of extrinsic aids, have argued that they are applying the legislative intent. But to the degree that "intent" cannot be determined, the courts are not bound and may determine statutory meaning by their own standards of justice. In such cases a theory of limited judicial independence, in applying statutes to factual situations, has been advocated. A vast new field of extrinsic aids then opens up and the opportunity should be given to present arguments on the desirability or otherwise of any of the possible constructions of the statute and to submit all relevant extrinsic factual aids in support of the arguments.

In conclusion the author suggests that the courts should first consider the language of the statute together with all relevant extrinsic aids available. If there is then any doubt of the proper construction of the statute in the particular case, the discretion of the court should be exercised. Such a practice would supply the courts with real reasons for decisions without leaving them to rely on the elusive "intent of the legislature" explanation. (F. M. MANWARING)

Changing Political Fashions?

La liberté politique dans un citoyen est cette tranquillité d'esprit qui provient de l'opinion que chacun a de sa sûreté; et pour qu'on ait cette liberté, il faut que le gouvernement soit tel qu'un citoyen ne puisse pas craindre un autre citoyen.

Lorsque dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement.

Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens seroit arbitraire: car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pouroit avoir la force d'un oppresseur.

Tout seroit perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçoient ces trois pouvoirs: celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers. (Montesquieu: De l'Esprit des Lois. 1748)