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Social Meaning of Legal Concepts No. 4, Sale of Consumers Goods

Karl N. Llewellyn

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find out. There is a passing reference to Burnham, and the emergence (in Britain presumably) "of the new élite, small groups of highly trained and masterful politicians, industrialists, engineers, scientists and soldiers." This, however, is purely theoretical and does nothing to tell us why Britain elected to alter her political and economic institutions in the specific way that she did. And if it be protested that she did not elect to make these changes but was forced to, then we must discover the conditions which issued these imperatives. With regard to the concentration of business there are references to the research of Berle and Means. But their findings dealt with American corporations, not British. Professor Friedmann makes no effort to estimate analogous developments in the country about which he is writing. And to use Thurman Arnold's books for information on monopoly is to commit the same error.

This leads to a final comment. Professor Friedmann is, we surmise, a student of comparative legal systems. His knowledge of British, Australian, Canadian, American and Continental experiences is vast. Yet, in a record of the contemporary British legal and social scene, the space he spends on comparisons with other countries (especially Australia) would appear to be unnecessarily great. This is all the more so because the rate and character of "social change" in these other countries have not kept pace with nor been in the same direction as that of Britain. We would certainly demand—if only as a beginning—statistics on trade union membership in Britain, Australia and the U. S. before we began to compare their respective courts' attitudes toward organized labor. This would be all the more necessary in a book which professes to speak of the relation between law and social developments. Much of "comparative jurisprudence" will be discarded as a parlor game when lawyers begin to draw on the data of the social sciences in their attempts to "socialize" the law.

ANDREW HACKER*

LOUIS M. HACKER**

Oxford, England.

SOCIAL MEANING OF LEGAL CONCEPTS. NO. 4. SALES OF CONSUMER GOODS. Edited by Edmond N. Cahn.¹ New York: New York University School of Law. 1952. Pp. iv, 291-403. \$1.50.

I find the results of this fourth annual conference extremely disappointing, and have been puzzling over the why. What one has is a pamphlet which in part is very well done, and which even in its other parts has dramatic value. Stein's paper on the general organization of

* Member of The Queen's College, Oxford University.

** Dean, School of General Studies, Columbia University.

¹ Professor of Law, New York University School of Law.

distribution to consumers is excellent introduction; Edwards' paper then cross-lights the same area in terms of various distributing types of organization and "function", in their combined cooperation and war for the consumer's dollar. Edwards' is one of the most stimulating papers I have seen, and is written with an amazing balance of both substance and tone. But it is out of balance with the whole pamphlet because Edwards presupposes a fair amount of knowledge in the field; he bypasses the more concrete. In contrast, Stein writes patiently and with good humor for the college sophomore, while Cumming takes the high school freshman (female) gently by the hand to show her how utterly her consumer-welfare depends on the nice men who manage trademarks. Campbell, meanwhile, contributes the kind of fuzziness to the picture which annoys people who think (not without some reason) that "the consumer-movement" in these United States is weak in effectiveness on the housewifery side largely because the movement fails to provide a combination of effective seeing and saying with effective ways and means. Campbell, when then stung by a perverse misinterpretation by Petro, produces a really powerful "reply" which shows what some leaders of consumers can do under pressure. We need more of the pressure and much less of the fuzz—particularly in a field in which, as this symposium shows, there are many consumer "leaders" who are eager to lead consumers rather more as fish for catching than otherwise, and who study the problems of fishing with a care sustained and in itself laudable.

The symposium benefits from having the comments on the papers spread around among what is substantially a single panel; and there is value in the selection of personnel, since there is a touch of emphasis-weighting, in the papers, toward what one might call the "receiving" side of the market, while there is a touch of emphasis among the commenters toward what one may call the "providing" side.

My problem of dissatisfaction goes, now, to the bearing *on the series* of any body of material even remotely similar to what I have attempted to describe.

"Social Meaning of Legal Concepts" is a vital, exploratory, illuminating and corrective line of work. It has been often opened, and almost as often dropped or twisted or cold-storaged. Scrutton's magnificent *Land in Fetters* fruited (by the grace of God, before Scrutton died). Ely's *Property and Contract* seems to me to have done curiously little. Commons' *Legal Foundations of Capitalism* was so good that (as I read the results) "forward-lookers" in the legal field like Landis just did not dare to face up to its power. So it, too, dropped out of sight.

No, Social Meaning of Legal Concepts is tough sledding, and there have therefore been many who welcomed the present series. New York University has a long tradition of feeling for needed lines of growth in law. I shall remind only of Sommers and de Sloovere and Vanderbilt.

But to deal with a Legal Concept, one surely ought to have one to deal with. Inheritance and Power to Control After Death, or Criminal

Guilt:² these were Legal Concepts with teeth—though they might and did, like any other concept built out of living, lack sharp-drawn edges. There they were, in threatening sovereign self-sufficiency. One inquired very wisely into their social meaning, and found the inquiry to be revealing and helpful in control.

Where, now, has been or is any *legal* concept of *Consumer Goods*? I have done my not too successful best, over thirty years, to help *build* such a concept. I have fought against what I thought to be a mistaken tendency to see "food" as a central idea—in regard to which Cumming's paper is interesting.³ I have tried to work into the law of security some needed distinctions between the "consumer" and the "producer" type of installment deal.—So what? It is with molasses slowness that any desired legal concept either takes shape or wins acceptance. There simply *is* not as yet a "legal concept" whose social meaning is available for exploration.

I am no stickler for the constrictions of any label. It would seem to me an entirely reasonable expansion of the program to inquire into, let us say, the development of a legal concept of consumer goods, and of their marketing,⁴ so far as such development has occurred; and to explore any need for possible further development. But is it not clear that that would call for sustained creative lawyer-critique to companion the raw-material suggested by the present pamphlet?

The possibilities are interesting, especially because the available economic terms and the more expected lines of legal analysis may each mislead. Campbell rightly puts her finger on "goods" (water, streets, parks, etc.) which are "services," and which escape the "channels" chiefly discussed in the symposium. And some of the most important "consumer-goods" which are wholly or partly still in "the market," like housing, are both "economic" goods and have become in very considerable part the subject of legal regulation which like the F.H.A. operations are built on a theory of "consumer"-goods. There is extremely interesting statutory regulation of "installment-selling" of movable durables. There is no less interesting regulation of borrowing: and what economist would dare disregard credit as (economical) "goods." There is, to go on, an area unexplored in such a symposium as this, of the household-consumer in the social relief field; and there is another area which nobody seems to want to touch, involving the relation of any type of farm relief or aid

² SOCIAL MEANING OF LEGAL CONCEPTS, Nos. 1 & 2.

³ This reasoning is bothersome: *E.g.*, if color and *A, B, C* grades are difficult to put together, what stands in the way of "Pale Green *A, B, or C,*" and at need "Dark Green *A, B, or C?*" Or: If the brand has come to mean flavor; why does not the brand continue to mean flavor, and to draw business, after minimal grading requirements are satisfied? One of my own students, Dickinson, has just done an excellent job, in the "food" field as such—and with some justification for the category—contrary to my advice and urging.

⁴ "Sales" is not a wise focal idea.

to the family, and of how far that relief or aid has no perceptible relation to any perceptible family.

This is the kind of material I should have hoped for, since the program, to maintain continuity, should at least have been expanded into: Social Meanings Developing New Legal Concepts.

KARL N. LLEWELLYN*

Chicago, Ill.

HANDBOOK OF THE LAW OF EVIDENCE. John Evarts Tracy.¹ New York: Prentice-Hall. 1952. Pp. xviii, 382. \$5.35.

Within the narrow limits of 367 pages, and without the assistance of copious footnotes,² Professor Tracy has undertaken to state the general rules of evidence in this country, together with the reasons underlying these rules and with illustrations of their application. After an introductory chapter devoted to historical considerations and definitions, the author analyzes the basic principles of burden of proof and presumptions; judicial notice; province of court and jury; documentary evidence, including the authentication of writings, the best evidence rule, and the parol evidence rule; witnesses, including the examination, cross-examination, impeachment, and rehabilitation of a witness, as well as the subjects of competency and privilege; the opinion evidence rule; the rule against hearsay and its exceptions; circumstantial evidence; real evidence; and the use of evidence illegally obtained. He even finds space for a concluding chapter on the validity of contracts waiving or altering the rules of evidence!

There are some phases of the law of evidence which lend themselves to generalization, and with respect to these the author has done an excellent job. He writes effectively. His style is refreshingly clear, at times almost conversational, and his illustrations are pointed and arresting. Unfortunately, however, there are many areas of evidence, perhaps too many, which can be approached only by plodding laboriously through detail, and in these areas the value of a brief general treatment is, at least to this reviewer, doubtful. Thus, it is of little assistance to the reader to be told merely that the "sound rule" is that a presumption, except the presumption of legitimacy, vanishes when evidence to the contrary is introduced, but that: ". . . the rule is not observed in every case and by all the courts."³ Sometimes, too, when the cases in point in this country on a particular problem stubbornly refuse to yield

* Professor of Law, University of Chicago Law School.

¹ Professor of Law (Emeritus), University of Michigan Law School.

² There are, on an average, slightly less than three footnote references to a page. It may be a matter of interest that the author makes no reference to the MODEL CODE OF EVIDENCE.

³ P. 30.