

should not have been convicted under the law. There is enough complexity to the legal issues involved to make us wonder, for at least a moment, whether despite the majestic and precise ritual of the trial, it was anything more than the community's revenge on a hated member.

Miss West handles the legal matters with competence, and the underlying moral judgment with eloquent indignation. Many English, she notes, had begun to say that Joyce was a vile little man but should not have hanged. They were doubly wrong, she insists. He was not vile but he should have been hanged. And when she has finished she has, I think, established both her points. As Joyce makes a claim to our attention in any study of fascism comparable to that of a Hitler, Goering, Goebbels, or Hess, so his trial is hauntingly similar to the Nuremberg trials. Here again is the question of whether the extension of law to the new case or the refusal to extend it would have been the greater affront to moral sensitivity.

It is something of a shock after reading this book to turn to a competent orthodox legal discussion of the case and realize how much of the color and meaning are lost in the process. It is not just the special flavor of treason that adds the dimension here; a reporter of Miss West's skill and perception could weave the same magic about a very large area of the law in our books. The law man cannot of course always study his law as poetry, but he should be indebted to Miss West for this reminder of how close to poetry, as well as to psychology, his law is.

Treason is the measure of many things today, but it remains a kind of mystery. Joyce merely broadcast; he did not fire a gun, drop bombs, kill. Yet he was more odious and more hated than the enemy, and the law says his crime was far the greater one. For Miss West and the English who were united by the suffering of the war, loyalty to one's own group was no idle phrase. In an illuminating comment at the start of the book she contrasts treason and incest: The one is a travesty of legitimate hatred as the other is a travesty of legitimate love. The ultimate fate and meaning of treason are for her, as she says at the close of the book, the misery and loneliness of deserting one's own for the stranger.

But incest and treason are conspicuous among the primitive taboos. Perhaps, in the end, treason also measures the gravest illness of our time because the loyalties against which it sins, even the best of them, are as yet too provincial and limited.

HARRY KALVEN, JR.\*

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**The Illinois Business Corporation Act Annotated.** Second edition. 2 vols. Chicago: Burdette Smith Co., 1947. Pp. xxi, xxi, 1281. \$20.00.

The legal profession of the State of Illinois has every reason to be grateful to the members of the Corporation Law Committee of the Chicago Bar Association for having produced these magnificent volumes which are bound to be an almost indispensable *vade mecum* for every legal practitioner even remotely concerned with the formation, management, and dissolution of corporations governed by the law of Illinois. Apart from this, its primary and immediate significance, however, this work is of outstanding value to those who, like the present reviewer, are interested in the development of American corporation law in a more academic capacity. The student of comparative Company Law will find this work an almost inexhaustible source of information. It

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will provide him with food for thought on many problems of legislative policy and technique, not only because of the novel and experimental nature of many of the provisions of the statutes, but also because the method of presentation adopted by the authors permits him to see these provisions as part of the living law of Illinois.

The first volume contains the Business Corporation Act of 1933, as amended, with a wealth of annotations. These annotations are not confined to an analysis of the decisions which have interpreted the Act and its predecessors. They give the legislative history of each section and, in many cases, the common-law background of its operation. Moreover, on many occasions, light is thrown on parallel legislation in other American states, and ample references are given to periodical and other literature. There follow fifty-five forms for use in connection with the Act. These forms are themselves annotated, and, apart from their practical value, make it possible for the reader to see how the statute is actually applied by lawyers and businessmen. In the second volume the General Not for Profit Corporation Act of 1943 is treated in a similar manner. The texts of the entire body of Illinois corporation statutes since 1872 is printed in full, and, an inestimable boon to the foreign reader, almost fifty opinions of the attorney general are reprinted in this volume. The General Index at the end deserves a special word of praise.

It so happened that, when the present writer received these volumes for review, a comprehensive scheme of Company Law reform had just been carried into effect in Great Britain, and it would have been impossible for the writer not to read this book in the light of the lively discussion which had accompanied the preparation and publication of the Report of the Committee on Company Law Amendment, 1945,<sup>1</sup> generally known as the Cohen Report, and the passing of the Companies Act of 1947<sup>2</sup> (now incorporated in the consolidating Act of 1948), which implemented most of the recommendations of the Cohen Report. The similarities as well as the contrasts between the legislation of Illinois and that of Great Britain are striking.

Most striking, in the first place, are the differences in legislative technique. A British lawyer is unfamiliar with the useful legal conception of a "not for profit" corporation. The institution itself, of course, exists, or rather, the functions fulfilled by the Illinois institution of that name are, in Britain, performed by a variety of forms of association. Readers of Maitland's classical essay on "Trust and Corporation" know that in England the trust concept, and in particular, the charitable trust, had to fill the gap left in English law by the absence of a corporation law sufficiently adaptable to supply the needs of those desirous of dedicating funds for educational, religious, and other charitable purposes. Many of those associations which, one imagines, are organized in Illinois under the General Not for Profit Corporation Act would in Britain take the form of Friendly Societies or of Trade Unions the property of which is administered by trustees and which are not corporations in the full sense. There is, however, also a species of company, known as the company limited by guarantee, whose members make no contribution to the corporate funds while the corporation is a going concern, and which is widely used for purely cultural purposes. This form of corporation is governed, with a number of modifications, by the provisions applicable to the business corporation, and in a sense, therefore, British law attempts to cover both the profit-making and the non-profit-making company by the same statute. On the continent of Europe, on the other hand, the non-profit-making corporation is a separate

<sup>1</sup> Command Paper 6659.

<sup>2</sup> 10 & 11 Geo. VI, c. 47 (1947).

and long-established institution. The law of Illinois is, therefore, in this respect, closer to the Continental than to the English legal tradition. The present writer has felt for a long time that the British guarantee company was an artificial product of a fortuitous development, and that it was a somewhat Procrustean undertaking to regulate charitable institutions by provisions destined to serve the needs of the business community. He believes that the method adopted in Illinois is superior from the legislative point of view.

There is one further matter of legislative technique which shows that, in some respects, American corporation law is closer to Continental than to English ideas. A British lawyer expects to find in a companies or corporation statute those provisions which are intended to protect the potential investor against misrepresentation of the company's affairs—particularly the law governing prospectuses, their minimum content, and the liability, both civil and criminal, for omissions and misstatements in a prospectus, offer for sale, or other document inviting subscriptions for shares or bonds. From a strictly systematic and logical point of view this is not, or ought not to be, a matter of company law at all, but it appears in the British Companies Act and was one of the major topics discussed by the Cohen Committee with the result that the new Companies Act contains a reform of what an American lawyer would expect to find in a securities and exchange rather than in a corporation statute. The reasons for this divergence in legislative development became clear to the reviewer when he read the excellent annotations to Section 16 of the Illinois Act of 1933. There does not appear to have occurred in Illinois any incident comparable to the regrettable decision of the House of Lords in *Derry v. Peek*,<sup>3</sup> which made it practically impossible for the subscriber to shares or debentures to recover damages for fraud at common law and which made it necessary for Parliament to amend company legislation almost at once. Thus the law of prospectuses, both in its positive and in its negative aspect, has remained part of Company Law in Britain, while in the United States security and exchange legislation has been allowed to go its own way, both in federal and in state law.

From the point of view of a European lawyer much the most interesting and also the most puzzling provisions of the Illinois statute of 1933 are those which refer to voting rights and those which regulate the capital structure of business corporations, especially with regard to shares of no par value.

A British company is perfectly free to create different classes of shares with multiple voting powers, with limited voting powers, or without any voting rights at all. This course is not, apparently, open to an Illinois corporation.<sup>4</sup> The rule "one share—one vote" is, it seems, embodied in the Act as a compulsory principle, although the state constitution enforces this principle only with respect to votes at elections. One would like to know whether in practice the difference is as great as it appears to be on paper. There is, apparently, no obstacle to the creation of different classes of shares with different par values, though Section 15 seems to prohibit differentiation in this respect between various series of the same class. If the corporation wishes to distribute voting power unequally among the stockholders, can it not do so by the simple device of issuing \$1,000 shares in one class and \$10 shares in another, thus in effect giving 100 times the voting power to members of the latter class compared with the former? If

<sup>3</sup> [1889] 14 A.C. 337.

<sup>4</sup> Illinois Business Corporation Act of 1933, §§ 14, 28, Ill. Rev. Stat. (1947) c. 32, §§ 157.14, 157.28.

this is so, what is the practical utility of paying lip service to "shareholders' democracy" through provisions such as those in Sections 14 and 28? More than that: Is there anything inherently wrong in the unequal distribution of voting power? Is not the phrase "shareholders' democracy" almost a contradiction in terms? Where voting is by heads, equality may be an ethical or a political postulate, but par values of shares, unlike human beings, are not born equal. It is, without any closer knowledge of the law of Illinois, at first sight not easy to see why the principle of equality should have been embedded in the Business Corporation Act but excluded from the Not for Profit Act.<sup>5</sup>

The Cohen Committee examined the question of whether shares of no par value should be introduced in Britain and arrived at a negative conclusion. The argument in favor was that the ignorant might be misled by a "nominal value which bears no relation to the real value of the share." But the Committee felt that the opportunity given by this class of share "to the unscrupulous to manipulate accounts" could "be defeated only by a series of elaborate provisions the substantial effect of which would be to re-introduce a capital account and, with it, most of the same complications which the no par value share was designed to avoid." The Report mentions the need for "provisions as to the price at which shares might be issued and as to the extent to which money received by the company in payment of the shares might be treated as a distributable surplus, not as capital, and used accordingly." The Illinois Act of 1933 shows that the existence of no par value shares confronts the legislative draftsman with a problem of almost unrivaled complexity. In the absence of shares of this type it is comparatively simple to give effect to the basic principle of the "guaranteed minimum of assets" which must be available for the security of the creditors against premature distributions to shareholders: The minimum is determined by the sum total of the nominal share capital and, in addition, of such reserves as are prescribed by law. No such simple solution is possible where the law permits the creation of stock of no par value, and the rule that dividends must not be paid out of capital becomes involved in a maze of technicalities. True, the lucid annotations to Sections 2, 6, 19, and 41 enable the reader to grasp the meaning of terms such as "stated capital" and "paid-in surplus" in the law of Illinois. Nevertheless, an outsider may be forgiven if he wonders whether the institution of no par value shares is sufficiently valuable to justify a system of legal concepts which makes the simple difference between non-distributable capital and distributable surplus vanish into the thin air of higher mathematics. On the other hand, a British lawyer is inclined to look with envy at the terse and simple formula<sup>6</sup> which the legislature of Illinois has used to cut the Gordian knot of unrealized accretions to fixed capital assets. Here the English courts have created unnecessary complications and an entanglement between the lawyers and the accountants which has been happily avoided in the state of Illinois. The purchase by a company of its own shares is no problem from the British point of view. A British company is absolutely debarred from acquiring its own shares (redeemable preference shares apart), not indeed by statute, but by the decision of the House of Lords in *Trevor v. Whitworth*,<sup>7</sup> which decided that the practice was incompatible with the very nature of a joint stock company.

<sup>5</sup> Illinois General Not for Profit Corporation Act of 1943, § 15, Ill. Rev. Stat. (1947) c. 32, § 164 (a)(14).

<sup>6</sup> Ill. Rev. Stat. (1947) c. 32, § 157.41(c).

<sup>7</sup> [1887] 12 A.C. 409.

It would be interesting to know how the provisions concerning the issue of shares for a consideration other than cash<sup>8</sup> operate in practice. There does not appear to be anything to compel the directors to give publicity to such transactions and, in particular, to inform the public, the stockholders, and the creditors on what basis the consideration (including past services) has been assessed. The temptation to "water" stock must, in such circumstances, become almost irresistible. On the other hand, it appears from the annotations to Section 18 that the courts of Illinois have been more alive to this danger than the English courts and that they have been less narrow in interpreting the meaning of "fraud" in this connection. Even so, compared with some Continental legal systems, neither Illinois nor English law can be said to go far enough in protecting the public against a very real danger. The reviewer believes that the "subjective" or "bona fide" test adopted in both systems, but rejected in other American jurisdictions, is inadequate.

To a British reader the question of *ultra vires* is of particular interest at the present moment. The Cohen Committee had recommended abolishment of the *ultra vires* doctrine in Britain and conversion of the provisions in the constitutions of the companies which define their objects into a purely contractual term operating solely between the corporation and its members. Had this desirable reform been carried into effect, there would have been the closest resemblance in this respect between British law and the law of Illinois.<sup>9</sup> Unfortunately the Government did not see its way to embody this proposal in the bill, but Parliament found a way out of the difficulty, and emasculated the *ultra vires* doctrine by providing that the corporate powers can be enlarged in all of the more important cases by a resolution of the shareholders passed by a three-fourths majority. Certain minority and creditor groups may apply to the court for a cancellation of the alteration, but, if they fail to do so within three weeks, the validity of the alteration can no longer be questioned by anyone.<sup>10</sup> This, in the reviewer's opinion, is no more than a "second best," and the Illinois solution of the problem appears to him to be far superior. He would submit that the provisions of the law of Illinois have preserved all that is worth preserving of the *ultra vires* doctrine. The doctrine is unknown on the continent of Europe, and its absence does not appear to have had any untoward effects. It is difficult to assign any reasons of either justice or business convenience to the doctrine, and its continued existence in the Anglo-Saxon world can be explained only as a relic of the peculiar history of the corporate entity concept in the Anglo-American common law.

Many other aspects of the statutes which are especially noteworthy to the European lawyer can only be mentioned in passing. Section 50 of the Act of 1933 which makes full payment of the shares a pre-condition for the commencement of business does not appear to distinguish between the corporation which appeals to the public for subscriptions and the "family business" which does not. Much may be said for this, but the absence of any differentiation in this, as in other respects, between what in Britain is known as the "private company" and what British law calls the "public company" is a striking characteristic of the legislation of Illinois. So is the absence of provisions for the investigation of a corporation's affairs by a government agency, comparable to

<sup>8</sup> Ill. Rev. Stat. (1947) c. 32, §§ 157.17, 157.18.

<sup>9</sup> Illinois Business Corporation Act of 1933, § 8, Ill. Rev. Stat. (1947) c. 32, § 157.8. Illinois General Not for Profit Corporation Act of 1943, § 6, Ill. Rev. Stat. (1947) c. 32, § 163 (a)(5).

<sup>10</sup> Companies Act of 1948, § 5, 10 & 11 Geo. VI, c. 47, § 5 (1947).

the elaborate rules on investigations by the Board of Trade in Britain. On the other hand, even the restricted right of stockholders<sup>21</sup> to inspect the books of the corporation looks very far-reaching to a European reader. The constitution-making power of the board of directors<sup>22</sup> is another institution unusual anywhere in Europe.

It is difficult, if not impossible, to form a considered opinion of a law which one has not seen in practical operation. If the reviewer has had the temerity to comment on the corporation legislation of a state situated many thousands of miles from his own country, his excuse must be the excellence of the work he was given for review. After many hours spent on perusing these volumes he was almost under the illusion that he was writing by the banks of Lake Michigan and not by those of the Thames. No greater praise can be bestowed on a legal work than that it depicts the law as a living organism and not as an agglomeration of dead pieces of machinery.

O. KAHN-FREUND\*

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**Preliminary Draft of a World Constitution.** By the Committee To Frame a World Constitution: Robert M. Hutchins, G. A. Borgese, and others. Chicago: The University of Chicago Press, 1948. Pp. xii, 92. \$2.00.

At Grinnell not long ago, the discussion of the various schemes for the establishment of the universal reign of law became so heated as to call forth the public rebuke of the president of the college. Such heat no doubt has its bad side; but it also has its good side. Without such heat, no great revolution was ever accomplished. Patriots like Patrick Henry and Samuel Adams were men of burning passion. They precipitated the American Revolution. They were not the builders of the Constitution, but without them there might never have been a Constitution. So, if we are to have a World Constitution today we must have a fiery zeal comparable to that of those early patriots. It must be a zeal that stirs the whole country and makes itself felt in the realms of power. It must be a missionary zeal not confined to the negative hatred of war but rather imbued with the positive ideal of the dignity of man. Such a zeal shows through the lines of this Preliminary Draft. The final constitution may be very different but it is zeal such as is evident here that will make that constitution possible.

The Preliminary Draft is not a lawyer's document, nor is it fundamentally an American document. Its philosophy is that of the classics and of the Continent rather than that of one steeped in American Constitutional and International Law. Perhaps that is no great objection. All that anyone can rightly ask is: Will it work? A possible answer to this is that the American and British models of government have worked better than most others.

The draft, however, is not without its American aspects. It provides for a federal form of government, for the judicial review of unconstitutional legislation. It contains a Bill of Rights. All this is to the good. A world government which does not reach the individual amounts only to a league. Leagues are secondary and temporary and essentially negative. They are inadequate for the protection of private rights. And without the power in the courts to declare legislation unconstitutional, there would be no ade-

<sup>21</sup> Illinois Business Corporation Act of 1933, § 45, Ill. Rev. Stat. (1947), c. 32, § 157.45.

<sup>22</sup> Illinois Business Corporation Act of 1933, § 25, Ill. Rev. Stat. (1947) c. 32, § 157.25.

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