

## David Dudley Field Centenary Essays (Book Review)

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acquainted with his subject and qualified to assist others through his work here reviewed.

CLYDE D. SANDGREN.\*

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DAVID DUDLEY FIELD CENTENARY ESSAYS. Edited by Alison Reppy. New York: New York University School of Law, 1949. Pp. xxiii, 400. \$6.00.\*\*

The commemoration by the New York University Law School, under the direction of Professor Alison Reppy, of the hundredth anniversary of the adoption of the Field Code of Procedure, is fully justified. As William D. Mitchell says in one of the essays which have been collected in book form, "It is not easy to arouse a crusading spirit about procedural reforms."<sup>1</sup> Procedure is not exciting,<sup>2</sup> but is essential to the proper administration of justice. Its unemotional character is a challenge to the toughness of the minds of the men who have fought for procedural reform. Of these fighters David Dudley Field was one of the first and probably the foremost. In the field of modern civil procedure in England and in America his name, in Judge Clark's phrase, "towers in lonely eminence."<sup>3</sup>

Field's ultimate objective of simplifying the administration of justice was based upon three great reforms; the fusion of law and equity, the abolition of the forms of action, and the evaluation of pleadings on the basis of factual rather than formal presentation. These innovations comprised, in the words of Professor Sunderland, one of the contributors to the series of essays, "the most drastic reform ever undertaken in the history of English and American jurisprudence."<sup>4</sup>

The first of these reforms, the fusion of law and equity, was to be accomplished by the elimination of distinctions in pleading resulting solely from the way in which equity jurisprudence had developed. Only deeply entrenched prejudices could oppose such a reform. Such prejudices have been found, however, not only at the Bar, but also at the Bench, and the New York courts have been notoriously adept in finding ways of utilizing their ancient learning at the cost of thwarting legislative efforts at procedural simplification in this direction.

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\*\* Professor Newman has reviewed this book for the New York Law Journal. Vol. 122, 66 N. Y. L. J. 700, October 4, 1949.

<sup>1</sup> P. 73.

<sup>2</sup> Note Lord Chorley's statement that procedure tends to be regarded as an inferior subject by professors in England, and even to be treated with contempt (p. 101).

<sup>3</sup> *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144 (1947).

<sup>4</sup> P. 84.

The second great reform of Field, the abolition of the forms of action, has for similar reasons been less than completely successful. Here, also, the threads of custom, "light as air but strong as links of iron,"<sup>5</sup> have opposed the complete fruition of the reform.

When we come to Field's third great reform, the evaluation of pleadings on the basis of factual recitals rather than of the theory of recovery, although the justification of this escape from formalism is clear, nevertheless, as Dean Pound remarks in the first essay of the series, "It took seventy-five years to give full effect to Field's idea of diagnosis of the facts established at a trial as a judicial function rather than a preliminary prophetic duty of the pleader."<sup>6</sup>

With little to guide him Field "worked out a system of civil procedure which has endured for a century,"<sup>7</sup> and which has been adopted in substance in some thirty American jurisdictions, and a system of criminal procedure which has been adopted in sixteen states,<sup>8</sup> and which has profoundly affected legislation elsewhere.

Field also drew up a code of evidence which was never adopted, worked for eighteen years on a code of substantive law which met the same fate, and prepared a project of a code of international law which, although it never, of course, became law, has been properly characterized by Lord Chorley as a tribute to Field's vision of the importance of international solidarity.<sup>9</sup>

For lawyers who require an avenue of expression other than their practice, and there are many such, Field's energy and determination should be an inspiration. For eighteen years<sup>10</sup> he labored without reward,<sup>11</sup> at considerable personal expense<sup>12</sup> and in the face of tremendous political opposition,<sup>13</sup> at the work of "ridding the common law of accumulated archisms"<sup>14</sup> in procedure, as had largely been done already in the field of substantive law. In result, not only have the law and also society been benefited, but Field stands shoulder to shoulder in reputation, in the opinion of so competent an authority in the history of procedure as Professor Reppy, with Brougham, Romilly and Bentham,<sup>15</sup> and, among American jurists, in Dean Pound's opinion, with Edward Livingston.<sup>16</sup>

The essays naturally reflect the general approach of their authors to the great ocean of truth which is the law. Dean Pound deals with the sociological and philosophical values of procedural reform. Professor Reppy's article reflects his deep interest in legal history. Judge Clark as well as William D.

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<sup>5</sup> FRASER, *THE GOLDEN BOUGH* 263 (abridged ed.).

<sup>6</sup> P. 13.

<sup>7</sup> *Ibid.*

<sup>8</sup> P. 10.

<sup>9</sup> P. 305.

<sup>10</sup> P. 42.

<sup>11</sup> P. 49.

<sup>12</sup> *Ibid.*

<sup>13</sup> P. 53.

<sup>14</sup> P. 6.

<sup>15</sup> P. 18.

<sup>16</sup> P. 15.

Mitchell emphasize the importance of intrusting the rule-making function to the courts rather than to the legislature. The content of their two articles defies abstraction. Mitchell gives a masterly analysis of the perversion of procedural reform which has been caused by the piling up of legislative enactments; what Justice Cardozo has called "patches (on) the fabric here and there."<sup>17</sup> Mitchell's stricture is worth quoting at length:

"I think the New York Code demonstrates to the highest degree the deficiencies inevitable in statutory codes of procedure. It is too long, with too much detail, and too many traps for the unwary, and with too much emphasis on mere forms and modes of procedure. It is lacking in recognition of the principle that in the administration of justice the enforcement of rules of practice is not the end in view."<sup>18</sup> According to Mr. Mitchell, 86 of the new Federal Rules of Civil Procedure cover adequately the field occupied by 1,100 of the 1,578 sections of the New York Civil Practice Act, plus 133 of the 301 New York Rules of Civil Practice.<sup>19</sup>

This analysis hammers home the truth that the New York system of procedure is too detailed, remitting practice largely to the situation where a lawsuit is a chess game between lawyers, with the judge as umpire and sometimes moving the pieces, rather than a means for dispensing justice. This is said, without derogation to the work of Field, whose originally proposed code of 392 sections<sup>20</sup> was expanded by the legislature into a leviathan of 3,356 sections. As Dean Pound says, "Most of the deservedly severe criticism which has been directed against the Code of Civil Procedure applies rather to this attempt to govern by precise rule every detail of procedure and every act of a court or judge, than to the original Field draft."<sup>21</sup>

The same criticism, it might be remarked parenthetically, applies to our substantive law, in which the stream of authority has become, to borrow Professor Reppy's phrase, a veritable flood.<sup>22</sup> Professor Sidney P. Simpson's recent suggestion that only Court of Appeals decisions be reported deserves more attention than it has received.

Among the especially interesting articles are those by Lord Chorley, dean of the department of law of the University of London, on Procedural Reform in England, and by Professor Millar on Civil Procedure Reform in Civil Law Countries. The article by Professor Sidney P. Simpson on the Problem of Trial contains a forcefully stated criticism of the adversary system of trial, but offers no concrete substitute. A strong argument in favor of the retention of the jury system is stated by Judge Shientag in his outstanding paper, *The Human Element in Judicial and in Administrative Procedure*, in which

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<sup>17</sup> P. 80.

<sup>18</sup> *Ibid.*

<sup>19</sup> P. 74.

<sup>20</sup> P. 10.

<sup>21</sup> *Ibid.* The same elephantiasis of code legislation has occurred in England, where the Orders of the Supreme Court, 72 in number, occupy a text of over 300 pages, and the semi-official practitioners' handbook, called the *White Book*, comprises over 3,000 pages of commentary, with an index of 450 pages (p. 105).

<sup>22</sup> P. 25.

he explains<sup>23</sup> that the instinctive distrust, through the ages, of the one-judge court accounts for the retention of trial by jury. Judge Shientag's article should be read and re-read by all who work in the law, as well as by those who enjoy facile and elegant English prose. We quote, as an illustration of Judge Shientag's objective approach, the following:<sup>24</sup>

"Government regulation does involve an interference with the individual. If you believe that such interference promotes the public welfare and really gives scope to individual freedom and liberty you will call the regulation liberal or progressive. If you deny that, you call it despotic or by the 'hybrid and abusive term' bureaucratic."

Other worthwhile observations are that "there is no pain as great and as hard to bear as the pain of a new idea,"<sup>25</sup> and "the most valuable right of humanity is to depend upon the law and not on the caprice of man."<sup>26</sup>

Part Two, dealing with codification of substantive law, contains articles by Judge Goodrich on *Restatement and Codification*, and by Professor Hessel Yntema on *The Jurisprudence of Codification*. Part Three deals with codification of international law in three articles, one by Yuen-li Liang, entitled *The United Nations and the Development and Codification of International Law*; one by Professor Clyde Eagleton, entitled *International Organization for Peace and Law*, and the third on *International Control of Atomic Energy*, by Adrian S. Fisher, general counsel of the United States Atomic Energy Commission. Mr. Fisher's article contains by far the most lucid explanation, of the many which have come to the attention of this reviewer, of the fundamental differences between the plan of the United States and that of the Soviet Union for the international control of atomic energy. The paper is earnestly recommended for serious study.

Part Four sets forth informative speeches made by Lord Chorley and by Mr. Justice Jackson at the centenary dinner. There is a valuable bibliography of literature on codification. The bibliography is misnamed, as it is not exclusively on David Dudley Field.

New York University School of Law, former Dean Vanderbilt, who sponsored the project, Dean Niles, who lent it his assistance, and Professor Reppy, who gathered together such a galaxy of great leaders of the law to commemorate what to many lawyers might seem a relatively prosaic anniversary, are to be congratulated sincerely. This is not merely a commemoration which looks backward on an event of deep significance in legal history and honors its moving spirit. It is a commemoration which recognizes that the law, procedural as well as substantive, is an institution which, like all other social institutions, in order to best serve society must continue to progress. This new method of commemoration may well prove to be a springboard from which there will develop new achievements in perfecting the administration of justice among men and nations.

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<sup>23</sup> At p. 217.

<sup>24</sup> From p. 221.

<sup>25</sup> P. 218.

<sup>26</sup> P. 225.

In 1937 New York University School of Law published, also under the direction of Professor Reppy, a monumental collection of essays marking the conclusion of a century of development of substantive law. Among the notable contributors were Dean Pound and Professor Millar, who are also contributors to the present volume. A few years ago this reviewer, in commenting on one of the annual surveys of American law published by New York University School of Law, suggested the possibility of enlarging the service of the annual survey by enlisting an all-American team of scholars from the whole nation. This reviewer now nominates Professor Reppy as quarterback of the team.

RALPH A. NEWMAN.\*\*

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WHAT EVERY CORPORATION DIRECTOR SHOULD KNOW. By Percival E. Jackson. New York: The William-Frederick Press, 1949. Pp. 198. \$3.50.

This little manual is not pretentious, but in result it is even slighter than it seems. It is a handbook for corporation directors, seeking to point the corporate executive to the proper use of "the practical tools of the director's trade." Without elaboration of technical detail, and in a style which the author says he has chosen "for the tired business man," the book states in outline form the functions and duties of corporate directors.

*What Every Corporation Director Should Know* is broken into four parts. First comes the composition of the board of directors; next the organization and procedure of the board, including a section on compensation of directors; third, the powers and functions of directors; and last, their disabilities and liabilities. While the work is not intended to be an exposition of the law, the author in discussing the practical functioning of powers of directors necessarily and properly relates them to the legal bases of the director's powers. The counsel given and conclusions stated by the author rest upon a long background of varied legal experience.

Nevertheless it is hard to see how this work can be of very great help to the corporate director not a member of the bar, who is desirous to perform his duties properly. The author's extensive discussion of problems and relationships boils down to a very few working rules: while serving as director of a corporation do not acquire interests adverse to and in conflict with your duty to the stockholders, exercise as great care as you can in scrutinizing the matters that come before you, insist upon reasonably full reports from the management, and consult the technical men, such as accountants and lawyers, on all technical questions. These are simple injunctions and would, if well understood, eliminate the neglect and abuse which minority stockholders' suits have

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