above all things cautious, and the clauses pertaining to mortgages in the property act are part of the general design, to facilitate the transfer of property, without regard to theories or systems of any sort, as a glance at the act will show. In this country, in spite of the interest displayed by writers and jurists, it cannot be said that either the lien or title theory states have lived up to the strict logical implications of their respective doctrines. There are inconsistencies to be found everywhere, such, for example, as the rule in *Hubbell v. Moulson*[1] very properly criticized by Professor Walsh. It would also be difficult to prove that as a purely practical matter mortgage law is better administered in one group of jurisdictions than the other—in Montana say than Massachusetts. The author describes as futile and stupid the concept of legal title in the mortgagee in cases involving tenants of the mortgagor. Since the depression cases involving defaulted mortgages on office buildings and apartment houses would indicate that the right of the mortgagee to take possession and collect the rents pending foreclosure has its advantages when the mortgagor is desperate or dishonest. True, the mortgagee in a lien state may apply for a receiver, but it is not certain that he will get one, and it must be admitted regretfully that receiverships are too frequently a minor form of racket. The most reasonable objection to the application of the title theory to this situation, as to others, is that it perpetuates the practice of self help which, however discreetly exercised, is not regarded with favor in modern jurisprudence. But it is not so much imperfect theories as it is dilatory, technical and expensive procedure that plagues mortgage law.

However desirable it may be, it is unlikely that uniformity in mortgage law in the United States will be attained for a long time to come. As formerly at Roman law, so now evolution is in the direction of the lien concept, but the conservatism of property law may be expected to retard its universal acceptance. In these distressing days mortgage problems have been chiefly economic. What was once the soundest of investments is in sad disrepute. The need is less for better mortgage law than for better mortgages. Recent legislation has been chiefly in aid of distressed debtors but such a tendency must reach a limit if this method of obtaining credit is to attract public or private funds. Statutory changes at this time modifying the procedure are not likely to disturb the well-settled principles of substantive law so competently explained in this useful volume.

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WIRTSCHAFTSFÜHRERTUM UND VERTRAGSETHIK IM NEUEN AKTIENRECHT. By Dr. Johannes C. D. Zahn. Walter de Gruyter & Co., Berlin, 1934. Pp. 227.

Dr. Zahn's learned monograph on Corporation Law is one of numerous studies in comparative law published by German lawyers. These studies show that not only in Italy and France, as the American reader might learn from Dean Wigmore's review in the Illinois Law Review,[1] but also in Germany there is an intensive interest in this field of law. The numerous articles and textbooks on corporation law cited by the author—the list not being exhaustive—testify to the number of German scholars engaged in comparing German and Anglo-American corporation law.

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1. 53 N. Y. 225 (1873).

1. Book Review (1933) 28 ILL. L. REV. 582.

The American literature which he has used, Dr. Zahn collected while studying at the Harvard Law School, and later at the *Institut fuer auslaendisches und internationales Privaterecht* in Berlin, where also he had at his disposal a complete collection of all American statutes, reports, journals and textbooks. But he does not appear to have consulted Berle and Means' monograph on corporation law [2] which would have been most helpful. Notwithstanding this, Dr. Zahn presents to the German reader a well written and most interesting picture of many details of American corporation law, completing earlier studies of other authors.

The ambitious author has not confined himself to a simple comparison of the two systems of law, but has written his book with a distinct objective: he wishes it to be his contribution to the planned reconstruction of the German corporation law according to the fundamental principles of the Third Reich, *i. e.*, the legal concepts developed by the genuine Germanic law. To accomplish his purpose he seeks to discover the leading principles of the corporation law of the United States, whose law belongs to the great family of Germanic law. Perhaps it would be a fair criticism to say that like many scholars who have sought underlying principles he has allowed his objective to color his deductions. In short, he has discovered what he wished to discover.

He reaches the conclusion that American corporation law is based upon two fundamental principles: first, the leadership principle: the directors are the leaders of the corporation; second, the American corporation is a bundle of contractual relationships, between the corporation and the state, between directors and shareholders, between the shareholders mutually.

As to the first, Dr. Zahn concludes that the leadership principle is the true explanation of the great success of numerous American corporate enterprises. The second principle has enabled the courts to strike a proper balance of mutual duties between the individual shareholders. In striking contrast, the fundamental principle of the present German corporation law, in Dr. Zahn's opinion, is that of democracy of capital, a concept which prevents German corporation leaders from achieving the success of their American counterparts. Furthermore, according to the *"Koerperschafts"* theory the concept of "corporation" is not a concept derived from contractual concepts but is derived from the concept that a group or association of natural persons called a corporation has a personality of its own which is distinct from each and all the personalities of the members of the association. There exist no personal obligations between the shareholders mutually. The individual shareholder derives his rights not from a contract he has made with the other shareholders but from his status *qua* shareholder. As a consequence in the case of an abuse of the voting power by the majorities, the minority is not protected by the strict rules which govern a breach of contract but by the provisions of the law of torts, restricting liability in those cases to intentional abuses.

Dr. Zahn has developed a philosophic explanation of these contrasts, and sees them as arising from different views of life itself. The American outlook is liberal, individualistic, and materialistic, and recognizes as the highest value the greatest economic success.[3] As a consequence the American investor invests not in the enterprise but in the management, and thus the directors are given the freest rein to be as successful as possible. But Dr. Zahn has failed to complete his picture by presenting his views of the economic philosophy of the German people. Presumably he regards it as more idealistic.

Admitting—in fact asserting—that the so-called leadership principle of the American corporate system springs from a different ideology than that proclaimed

2. THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).
3. P. 14.

by German national socialism, Dr. Zahn does not hesitate to propose to draw inspiration from the American pattern. It is not the object of this review minutely to investigate the soundness of his contradictory and seemingly superficial philosophy. But it is startling that he would import the supposed results of ideas which he himself labels individualistic and liberal, two qualities so much scorned by national socialism; for if his premises were correct there would be no escape from the conclusion that the idea as a whole is unsuited to transplantation. Furthermore every foreign lawyer who would draw inspiration from the American corporation law must bear in mind that this law in its present stage of development is not a homogeneous body of thought, but is composed, roughly speaking, of two strata of legal concepts which are, in the last analysis, antagonistic, and each an outgrowth of its own economic background. Because of the changing economy, there is evidence that the contractual concept is gradually being replaced by the newer thought which conceives the corporation as an institution. Therefore, more valuable suggestions might have been gathered for his purpose had he focussed his attention upon the utterances of such noteworthy critics of corporate management as Mr. Justice Louis D. Brandeis, Thorstein Veblen, William Z. Ripley, and more especially upon the proposal of Adolph A. Berle and Gardner C. Means to build a new concept of the business corporation which would take into account the separation of ownership and management in corporate structures. Possibly it would have disconcerted Dr. Zahn to have discovered in the last chapter of the work by Berle and Means the contention that a corporation not only has a profit-making function but is an economic institution with a social function.[4] On the other hand one might inquire, in the light of his conclusions, how he would explain the fact that the German corporate legal system, of which he gives so unfriendly a picture, appeared to offer so little obstacle to the business careers of such outstanding personalities as Siemens, Emil Rathenau, Krupp, Borsig and others.

Be that as it may, other scruples are engendered by his methods. His studies would have rendered a more valuable service had he avoided the emotional approach and pursued his inquiry by the more cautious and realistic institutional method so highly developed by numerous scholars of both countries. Thus he might have come to the realization that "the" American shareholder (investor) and his counterpart "the" German shareholder, upon whom he erects his superstructure are, for his study, no proper "ideal types" (Max Weber) to work with. At least, it would seem, he should have differentiated between the large and the small shareholder and the large and small corporation; for their situations differ materially. And one cannot but feel that his conclusion that in the American corporation law system the fundamental power of control is exercised by the board of directors bears the stamp of a hasty generalization. The situation, in reality, is more complex and, as Berle and Means have pointed out, there are five distinct types of control in operation. Only with regard to the so-called type of management control would Dr. Zahn's statement seem to be correct. And in this case the power of control has its source not in the economic philosophy of the small investor who hopes that the quotation of his stock shall increase, but is the result of a simple economic fact, namely, the wide dispersion of stock ownership. Furthermore, with reference to the supposedly contrasting situation in Germany, Richard Passow's monograph *Die Aktiengesellschaft,* which in fact Dr. Zahn has cited, discloses that the preponderance of the shareholders' meeting exists only in contemplation of statutory provisions of the German Code of Commerce, while in practice the situation is as complex as it is in the American corporation system.

4. See further Dodd, *For Whom are Corporate Managers Trustees?* (1932) 45 HARV. L. REV. 1145.

But even assuming that the two systems as Dr. Zahn has pictured them do prevail in the two countries, and moreover assuming that the American system is a result of a conscious development of legal theory rather than an accident of its economic environment, his suggestion that it be transplanted in German soil is one which should be made with great caution. Powerful critics and the recent federal legislation are seeking to check its unlicensed career in its native land, and it might mean the transplantation of a principle which has outlived its usefulness.

In his proposal to replace the *"Koerperschafts"* theory by the contractual concept Dr. Zahn should have been even more careful. It is the claim of the proponents of the *"Koerperschafts"* theory developed by Renaud and Otto von Gierke that it is genuinely Germanic; and if the new German Corporation Act should embody the contractual concept, the German law would accept ideas now prevailing in those portions of the civil law which are governed by the principles of French law.[5]

The assertion of Dr. Zahn that the contractual concept affords a better protection to the minority of the shareholders against abuses of the voting power by the majority than the institutional concept is disapproved by recent decisions of the German Supreme Court, which show that the rules of tort law and the general provisions of the German Civil Code, which Dr. Zahn has omitted to mention, are broad enough to cover all cases of real abuse.[6]

The importance of studies in comparative law lies in their tendency to remove the scholar to a distance and enable him to view the principles of his native law with a healthy scepticism of their eternal truth. But to attain this proper perspective one must travel unburdened with preconceptions.

The reviewer though questioning some of Dr. Zahn's conclusions willingly concedes to Dr. Zahn's able work a worthy place among the comparative studies. Viewed not as a final word but rather as a groping after new steps in the development of this essentially modern institution, this treatise is entitled to the careful consideration of scholars both because of the learning it discloses and also for the liberality of its attitude of willingness to learn by the experience of others.

Friedrich Kessler.†

PRECEDENT IN ENGLISH AND CONTINENTAL LAW. By A. L. Goodhart. Stevens and Sons, Ltd., London, 1934. Pp. 55. Price: 3/6.

This lecture, which in the process of nature became a law review article, but which now appears bound in boards, is slight, misleading, and shallow. It warrants reviewing less for itself than for the lessons to be derived from its defects.

It contains some reasonably useful observations; I know nothing of Goodhart's which does not. English law has, *e. g.,* been codified to an extent we commonly overlook.[1] And the problem of code as against case-law is in truth vitally different from the question of the divergence between the Continental and the English traditions in regard to judicial precedent. The two problems have been too often confused. And sudden breaks with precedent are in fact less likely in England than on the Continent. Also, a general practice of courts is

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5. See I WIELAND, HANDELSRECHT 396-434.

6. See II *id.* 203 *ff.* and the cases cited.

1. *E. g.,* marine insurance, real property, companies.