BOOK REVIEWS


The importance of any legal system is not so much the content of its adjudications as the fact of its existence. The wisdom of any decision, even the value of all our case law, is of less significance than the humdrum routine of bailiffs and clerks, whose universal drone proclaims that all our disputes are settled under the agis of the law. In this broad sense, Dean Van Vleck's valuable treatise is a study of procedure. It is a study, moreover, in a field of tremendous importance. The machinery by which our Government conducts the exclusion and expulsion of aliens comes into little contact with the property rights which bulk so largely in our courts, but involves hundreds of thousands of individual destinies.

For the most part, Dean Van Vleck's book is not concerned with the substantive statutory law which governs alien exclusions and deportations. The questions of how many aliens we can afford to admit, how the allotment should be made, and what constitutes unlawful presence in this country, are peculiarly within the discretion of Congress. There can be little doubt today of the wisdom of rigidly restricting the admission of foreign wage-earners to compete with our own workmen, or of the necessity of expelling those aliens who have entered this country unlawfully or who have become members of dangerous and undesirable classes. The book deals almost entirely with the methods by which these governmental policies are carried into operation.

It has been said that this is a study of procedure, but it is not court procedure which is involved, for both exclusion and expulsion of aliens are conducted almost entirely by administrative process. The relationship of the courts to this process constitutes one of the most interesting chapters in our history of administrative law. Dean Van Vleck's treatment of the subject of judicial review of these cases is, in the opinion of the reviewer, the clearest summary which has been made.

The attitude of the courts with respect to the administrative control of aliens, the author shows, has in the main been one of abstention. Questions in this field can be brought before the Federal courts only by application for writs of habeas corpus. Broadly, it may be said that the courts interfere with the administrative process only where a statute has been misconstrued or where the procedure is shown to have been obviously unfair. The Supreme Court has held that due process of law does not require court procedure, and that even the deportation process, which may involve individual rights of the greatest importance, is not criminal in nature, so that, although aliens are entitled to the guarantees of the Federal Constitution, the constitutional safeguards with respect to criminal actions do not apply. Even the issue of whether or not a person applying for admission is an American citizen does not entitle him, the Supreme Court has held, to a judicial determination of the validity of the claim.

In fact, even such protection as is afforded under the decisions of the courts is more theoretical than real. The great majority of persons coming within the nets of the Department of Labor have not the funds to employ counsel to protect their rights. The effect of the court decisions, therefore, is that, while certain minimum standards of fairness have been set up, the building up and operation of the system have been left almost exclusively within the discretion of Congress and of the Federal Department which Congress has charged with the carrying out of its policies.
As Dean Van Vleck points out, the courts have been largely influenced by the practical aspects of the situation. In both the exclusion and expulsion of aliens, the Department of Labor is faced with tremendous difficulties. In the admission procedure, particularly, speediness of action is essential. There is, however, another connotation of the decisions. The Supreme Court has fixed the limits within which legislative enactment and administrative rules can operate, but it has not evaluated the result. The latitudinarian doctrines which it has announced in effect place the responsibility for seeing that fairness is balanced against speed and humanity against efficiency upon the agencies to whose hands the evolution of this procedure is entrusted.

Dean Van Vleck has gone beyond the statutes and court decisions and has abstracted a thousand files of the Department of Labor, half of which are concerned with exclusion cases and half with expulsion or deportation cases. His book not only gives a clear and accurate picture of the system in actual operation, but presents a striking contrast in the two fields of alien control which his researches have covered.

In the exclusion process, the alien has not entered the country. Hundreds of applicants may present themselves in a single day, and Dean Van Vleck recognizes that the fundamental necessity is swift, summary action. In expulsion or deportation cases, however, the suspects are already within the country and, while the administrative difficulties of apprehension are great, the procedure is far more closely allied to actions against criminals than it is to routine administration. Even more in contrast is the effect of exclusion and the effect of deportation. The excluded applicant for admission has not cut off his roots from the country which he has just left and, while exclusion may mean disappointment and sometimes hardship, usually the loss is not irretrievable. The deportee often has severed all connections with the country of his birth. Indeed, he may have entered this country as a child and be subject to deportation only because of some subsequent entry. He may have married an American citizen and have American born children. Deportation in many cases involves sufferings only less than those incident to capital punishment or life imprisonment.

Yet it is the exclusion process which has been carefully investigated, about which volumes of testimony have been taken and shelves of treatises have been written, where there has been evolved a procedure about which Congress has passed statute after statute and which, while it has its defects, the author thinks has in general not sacrificed fairness to swiftness. It is the deportation process which, despite the ever increasing scope of the classes of deportees, has a procedure to which Congress in all its deportation statutes has given only a few short sentences delegating almost unlimited power to the Secretary of Labor, a procedure, in the words of Dean Van Vleck, “of executive justice, with a maximum of powers in the administrative officers, a minimum of checks and safeguards against error and prejudice, and with certainty, care, and due deliberation sacrificed to the desire for speed.”

In the exclusion process, there has been established a system of consular inspection abroad which sifts the applications before the aliens embark to such an extent that only a small fraction of one per cent. of aliens presenting themselves at our seaports are rejected. Such aliens as come through the meshes of our consular sieve are first examined here by an immigrant inspector who is given the power to admit at once. In case of doubt there is a hearing before a board of special inquiry where the statute calls for three persons to pass upon the cases, although it is often in practice a one-man court. There is a further right of appeal from the Board of Special Inquiry to the Department of Labor where the cases are passed upon by a Board of Review. This Board is not provided for by any statute, but is an interesting illustration of the process of
evolution in administrative law. While appointed by and subject to the Secretary of Labor, as Dean Van Vleck points out, it is, in embryo, a quasi-judicial tribunal.

Dean Van Vleck recommends with respect to the exclusion process that the personnel of the boards of special inquiry should be improved; that three experienced inspectors should be provided for each board; and that the Board of Review should be given statutory authority and elevated into a tribunal in place of a group of administrative assistants.

In the deportation process, the first step is the apprehension of the suspect. The suspect, of course, may be an alien lawfully in this country and in many cases is a United States citizen. Parenthetically, an interesting sidelight on the status of the classes through which the Department of Labor throws its nets is given by a recent statement of the Department, made after the Dean's book was written, to the effect that forty-four fully-fledged citizens of the United States applied for registration papers not knowing that they had been American citizens for years. The methods of apprehension are not within the scope of Dean Van Vleck's study, but they range from detection of a smuggled alien shortly after his surreptitious arrival, to raids upon peaceful gatherings which violate the constitutional rights of all concerned. After apprehension, the alien is detained, sometimes without a warrant, and is subjected to a searching examination by an immigration officer. At this examination, which usually forms the basis for the entire deportation proceedings, the suspect is not allowed to be represented by counsel, and is often not told that he is not compelled to give any statement or that anything he says may be used against him.

After the preliminary hearing, a formal warrant of arrest is applied for, generally by telegraph, and is issued as a matter of routine. The suspect is then given a hearing to show cause, if any there be, why he should not be deported. The immigration official who conducts the hearing also serves as prosecuting attorney for the Government and is, in many cases, the same official who apprehended the suspect and who obtained the preliminary statement from him. The presiding officer may also be the stenographer and the interpreter. At this hearing, the suspect is allowed to have counsel, although he is generally too poor to exercise his privilege. Dean Van Vleck finds that the right of suspects to compel the attendance of witnesses is restricted and that process is issued grudgingly. There are no rules of evidence.

The record so compiled is forwarded to Washington, theoretically to the Secretary of Labor but actually to the Board of Review. The recommendation of the Board, which generally follows the recommendation of the inspector who conducted the show cause hearing, is in most cases final, although the decision may be referred to an Assistant to the Secretary.

Despite the fact that the statutes provide that aliens convicted of crimes cannot be deported if the Judge who convicted them makes such a recommendation within a given time, that even alien enemies cannot be deported unless found by the Secretary of Labor to be undesirable residents, and despite the hardship and unnecessary suffering in which deportations so often result, there is nothing in the statutes giving any general power analogous to the power of pardon or probation. Dean Van Vleck gives instances where the Board of Review itself, although it is a creature of the Secretary of Labor, stretches the law or even ignores it in some hard cases. There are other instances where administrative discretion is sometimes used to avoid unnecessary suffering, but the exceptions are for the most part unauthorized, unformulated and sporadic.

Until the last Session of Congress, deportation was perpetual banishment. One recommendation in which all students of the subject concurred has, however, been enacted, and the Secretary of Labor has been given discretion in cer-
tain instances to admit aliens previously deported, although he is still given no
discretion to prevent deportation even where the circumstances are the same.

The author compares the deportation system to criminal procedure and
points out that no such system of criminal justice exists anywhere. It needs no
argument to show that any system of justice, whether by courts or administra-
tive departments, is fatally defective where one official may act as detective,
prosecutor and judge. Dean Van Vleck, however, does not rest upon the theo-
retical aspect. His book is replete with instances where the system has resulted
in unwarrantable stretching of the statutes, in arbitrary action and in unneces-

sary hardship.

His criticisms, like the other criticisms which have been made of the system,
are not of the Federal Department which administers the procedure, but of the
system itself. His recommendations go far, farther indeed than those of Dr.
Jane Perry Clark or the Wickersham Commission. He would have the suspect
allowed counsel before the preliminary investigation. Practically, if the suspects
were able to afford counsel, such a step might prevent a great number of de-
portations where deportation is necessary and advisable. Aliens who have en-
tered the country unlawfully and aliens whose presence has become undesirable
are not apt to advertise the illegality of their residence. To the reviewer, it
scems that if at the preliminary investigation the suspect is carefully informed
of his rights and if the hearing is fairly conducted, the balance of interests jus-
tifies the exclusion of attorneys at this particular stage of the proceedings. Dean
Van Vleck also urges that the vague phrase “likely to become a public charge”,
to which the phrase “moral turpitude” could have been added, should not be
used to secure the expulsion of persons not covered by the statutes.

These recommendations, important as they are, are details compared to
the necessity of the separation of functions in the deportation process. Dean
Van Vleck evidently feels that the individual rights concerned are too important
to be left to administrative process, and that the entire procedure should be
placed in the Federal Courts. This was also the feeling of one member of the
Wickersham Commission, but again the reviewer is of the opinion that the
recommendation goes too far. It has been pointed out that the administrative
difficulties in the deportation process are great, and they are becoming increas-
ingly more serious. At the present time there are over eighteen thousand depar-
tations a year and over one hundred thousand persons are annually involved
in the process. The introduction of the legal rules of evidence and the leisurely
pace with which the law so often moves might seriously interfere with the
proper administration of our deportation policy. Again, a great number of
suspects from the time of their apprehension to the time of their final deporta-
tion are confined in jails, even though they are not accused of any crime. While
the change would undoubtedly prevent injustice in many cases, the extension of
this period of incarceration, in a larger number, would probably result in addi-
tional hardship.

The logical remedy for the confusion of functions which our deportation
process presents has been indicated by Dean Van Vleck himself in his recom-
mandation for the exclusion system. The Board of Review can by statute be
made an independent body and there can be appointed to it men of judicial
caliber. These men would not be subject to the Department of Labor, which
would retain the functions of detection and prosecution. The Board, while not
handicapped by technical rules of evidence, would in effect sit as a court. Its
decisions could be made public and to it could be entrusted limited discretionary
powers analogous to those of pardon and probation, which almost every judge
in the country has at his command in cases involving far less serious conse-
quences.
This step, which was recommended by Dr. Clark and by the Wickersham Commission independently, is merely the development of the rudimentary bifurcation which has resulted in the establishment of the present Board of Review. It is the logical growth of an idea which, unauthorized by statute, already has taken form. It is in line also with the practical experience of this country in other fields of administrative law where bodies such as the Board of Tax Appeals and the Interstate Commerce Commission are recognized as a part and a satisfactory part of the American system of justice.

The general fairness of our exclusion procedure as contrasted with the general unfairness of our deportation procedure is perhaps to be explained by the fact that the former, in its outward manifestations, is more picturesque. For many years, Ellis Island was the symbol of the American melting pot, and focused public attention upon the conditions under which we allowed the ingredients to be poured in. The deportation process has lacked these pictorial and symbolic qualities. The suspects are scattered through the country. Their apprehensions, for the most part, are unknown to social agencies and reporters. The results of the process have been expressed almost entirely in statistics rather than in terms of human lives.

The need of rectifying our deportation procedure is not only demanded in order that the courts' decisions may be pragmatically justified. More is involved than the fulfilment of American conceptions of decency and fairness. There are millions of aliens lawfully in this country, from whom will spring many of our future citizens. The legal procedure with which the alien is most apt to come into contact, directly or indirectly, is the deportation process. It is of the utmost importance to ourselves that before this great class there shall be set up a system where not only shall justice operate, but where the provisions for the doing of justice shall be apparent. That assurance of the fairness of our institutions is now lacking.

Baltimore, Md.

Reuben Oppenheimer.


The continued multiplication of authorities has made necessary a fifth edition of Professor Joseph D. Brannan's annotation of the Negotiable Instruments Law. The fourth edition of this leading work, by Professor Z. Chafee, Jr., was a most fitting extension of the scholarly work of Professor Brannan, and the present fifth edition prepared by Professor Beutel bids fair to maintain the standards set by his predecessors.

Indeed, in certain respects, Professor Beutel has improved upon their work. Thus, in printing of the Uniform Act as a whole at the beginning of the book, with cross-references from section to section, is commendable from the standpoint of convenience and unity; and all must welcome the rearrangement of the annotations under the respective subsections, instead of under sections as was done in preceding editions. It is also gratifying to see that the marginal titles have been retained.

The cases decided under the Act since the last edition seem to have been faithfully collected; and the reviewer, who has examined many of these cases, finds that in the main they have been stated accurately and with sufficient detail.

Professor Beutel seems to have contented himself, for the most part, with a statement of the decided cases. Having had him as a student and knowing the penetrating quality of his mind, the reviewer confesses to a feeling of regret
that Professor Beutel did not oftener add discussion of new and interesting cases. In spite of the restrictions of space and the possible inhibitions of modesty, he might well have enhanced the utility and attractiveness of the volume by emulating the keen comments of Professors Brannan and Chafee.

One is pleased to observe, however, that in Part Three of the present edition, Professor Beutel has spoken freely in respect to the proposal to amend the Negotiable Instruments Law. His remarks are a résumé of his article printed in volume eighty of the University of Pennsylvania Law Review. The problem of amendment is a difficult one, and Professor Beutel has presented the negative as strongly as it can be presented. The reviewer is not sure whether Professor Beutel looks upon the present Negotiable Instruments Law as a commendable piece of legislation. If he does, the reviewer must disagree with him. Indeed, the reviewer feels strongly upon the subject, and not without justification: for his has long been the task of wrestling with this legislation in the classroom, and he has found it to be bristling with inaccuracies, inconsistencies, and violations of accepted commercial practice. The reviewer recognizes that it is not without commendable features; he gratefully cites as examples Sections 63 and 64, which give effect to the commercial view of irregular indorsement, both in respect to the person to whom the indorser is bound and the capacity in which he is bound, although the drafting of these sections is open to criticism. But the fact remains that the Act contains a multitude of imperfections. When he started to teach this subject, the reviewer attempted to atone for these imperfections by interpretation, but in many instances the process was so complex and spurious that he had to acknowledge defeat. Although he concedes that interpretation may and must still perform an important function in dealing with the Act, the writer's conviction is that its inherent imperfections are such that mere uniformity in methods of judicial interpretation cannot produce substantial uniformity of results throughout the states.

The reviewer is not sure what corrective measures should be taken. Amendment of the most unsatisfactory sections has been proposed. Among the alternatives are the complete rewriting of the Act, and the preparation of a Code of Commercial Law including, and somewhat transcending, the field of negotiable instruments as commonly understood. Inasmuch as the reviewer believes that almost all of the sections of the present law are open to criticism in respect to form or substance, or both, he would prefer a remaking of the Act to a process of amendment. It has been asserted, however, although not demonstrated, that the latter process would be the more readily adopted by the legislatures. Whichever of the two processes is employed, the finished product should be the result of most careful consideration, both in respect to content and drafting, and should be tested out by application to a multitude of concrete cases. This time the work should be done right.

The writer feels considerable sympathy, however, with the view of Professor Beutel that it might be well to unify in a single Code the law of negotiable instruments and banking.

Harvard Law School.

Morton C. Campbell.


With the appearance of a third case book on administrative law the subject may be said to have established its intrusion into the law school curriculum. The

BOOK REVIEWS

editors of the present volume do not labor the argument for the recognition of their field: they content themselves in the preface with a quotation from Mr. Chief Justice Hughes which includes his statement that "the activities of the people are largely controlled by governmental bureaus in state and nation". The volume itself supplies the rest of the argument, if argument be needed. The cases chosen present a vital dramatic theme. From the cradle to the movie and from the movie to the grave, human needs and pleasures are touched by the official conduct which gives rise to the legal problems here exhibited for study. The task which lies immediately ahead is (to quote again from the preface) "systematic exploration" of these problems.

In this exploration two processes are employed. The one may be called synthetic; the other, analytic. The first has to do with the relations of administrative law doctrines to what the editors call "the traditional system of Anglo-American law and courts". The second involves analysis of the decisions of administrative law and of their relations to each other. The former is conspicuously exemplified in the abundant material here offered (pp. 1-684) on separation of powers and on delegation of powers. The latter seems chiefly needed for the exploration of Part III, Judicial Control of Administrative Action (pp. 685-1148). In suggesting this schematization, it is borne in mind that neither process is used to the exclusion of the other.

The quantity of space (and of class-room time) devoted to the separation of powers raises a serious pedagogical problem: how far should the intruder be allowed to intrude? What are the boundaries which mark off this subject from constitutional law on the one hand, and on the other from the law of judicial procedure? The editors have not confined themselves to cases dealing with bureaucratic powers; they have sought to explore the scope and meaning of each of the three powers, presumably on the theory that one cannot understand the relation of the part to the whole without understanding the whole. Such a thesis raises grave difficulties in the orderly partitioning of a curriculum.

Under the heading, "Legislative Power", are opinions discussing (sometimes by way of dictum) legislative interference with pending litigation, the legislature's control over corporations of its own creation, legislative divorces, legislative declaration of forfeiture as punishment for crime, the power to compel testimony before legislative committees, etc. It seems questionable whether this extensive and rather confusing review of legislative powers is needed to help the student understand the holdings on administrative powers. A further difficulty is duplication of ground covered in constitutional law. While a hasty comparison indicates that the actual duplication of cases in recent case books is not very great, yet the challenge to the dominion of constitutional law over these topics remains.

The extensive materials dealing with the judicial power are a challenge to the teachers of procedure. A perusal of these cases makes one acutely aware that procedural courses have neglected the broader implications of their subject matter, that is, the meaning of judicial power and its relations to the other governmental powers. Such topics as the sanctity of judges' salaries (p. 194), the judicial attributes of a court of claims (pp. 206-233), of declaratory judgments and advisory opinions (pp. 233-267), and the rule-making powers of courts (p. 286) seem less germane to administrative law than to procedure. The extent to which the legislature may permit or compel courts to undertake administrative functions and the place of such determinations in judicial appellate procedure (pp. 293-325) come closer to the mark. The inclusion of International News Service v. The Associated Press (p. 334) seems indefensible on any theory. The camel has intruded his head into the tent. He is now exploring the tent.

Lest these comments be misunderstood, it must be pointed out again that the question here discussed is the scope of a course in administrative law to be given.
by the ordinary overworked instructor in the ordinary law school. His work must be cut to a definite pattern which avoids overlapping of subject matter in a crowded curriculum. His best plan would be to confine his course in administrative law to the intensive development of certain phases of constitutional law and of procedure. By a prudent selection he may adapt the present case book to his needs.

With the section on delegation of powers (pp. 459-684), the main theme of administrative power begins. Flexible tariff rulings, customs classifications, public land regulations, licensing of vocations, motion picture censorship, approval of insurance policies, etc., all raise the question, to what extent may administrative officials fill in the gaps of legislation? Here, as in Part III (Judicial Control of Administrative Action), a fascinating group of decisions has been brought together. In Part III they are classified, appropriately, by reference to the objects regulated—utility regulation, taxation, control of aliens, etc.

No attempt has been made to schematize administrative procedure. In contrast with Professor Freund's case book, the work of Professors Frankfurter and Davidson does not attempt to separate lack of notice and hearing from the scope of administrative discretion. Much less does it advert to the rules governing board meetings, the form and proof of official rulings, and the judicial remedies available for review—topics which Professor Freund covers with his usual care. Yet the editors of both are at one on the proposition that the rules and rulings made by the administrative as distinguished from those made for the administrative by courts and legislatures, should form no part of a course in administrative law. The investigation of the former is appropriate for individual research.

The editors have added to the decisions (which form nine-tenths of the volume) footnotes, statutes, presidential messages or proclamations and numerous excerpts from treatises and periodicals. The selections bearing upon a particular problem are well knit together in a continuous thread of judicial, legislative and administrative development. Notable examples are the group of cases relating to bridges over navigable waters (pp. 392-424) and to Federal suspension of sentence (pp. 368-386). The editorial work commands admiration for its thoroughness and restraint.

There ought to be a maxim, "spare the scissors and spoil the case book." The original notion that a case book should present in full the raw laboratory materials of the lawyer's science was a faulty analogy in the beginning and has long since ceased to be applied strictly. A case book is a pedagogical tool which gains concreteness and clarity of meaning at the expense of a good deal of discursiveness. The aim of the editor should be to minimize the amount of drivel-reading which the student must endure in order to discover for himself the pearls of wisdom. Making due allowance for the exceptional prolixity of public law opinions and for the numerous omissions marked by asterisks in the present volume, the reviewer feels the scissors might well have been used a little less sparingly. Fewer than 200 cases occupy some 1100 pages. Cases of ten to twenty pages in length are not uncommon.

This collection of materials displays daring imagination and insight. Its implications are sufficiently elusive to arouse the best minds in legal education. The volume is attractively printed and well indexed.

Columbia Law School.

Edwin W. Patterson.
BOOK REVIEWS


The problems with which the present volume is concerned have recently been impressed upon the public consciousness in ways trenching on the dramatic. The long struggle for a balanced federal budget, the financial chaos in some of our larger cities, and rumors of taxpayers' revolts have focussed public attention on the problem of public expenditures, while the complaints of owners of real property that they are being made to bear an unfair proportion of the burdens resulting from such expenditures have produced numerous proposals for shifting a part of that load to other shoulders. The public discussions that these controversies have provoked have all too frequently been marked by specious reasoning veiling economic motives generally easily discernible. It is for that reason that one should welcome any comparatively brief discussion that combines the concrete approach of factual material with a theoretical exposition of the principles that a critical examination of experience has shown to be significant in the fields covered by this book. It is this task that the author has undertaken to perform for classroom and the general public.

It is, of course, quite impossible to give a detailed discussion of the contents of a book of this character. Since, furthermore, its aim is not to advance any particular thesis but rather to describe the practices of our American governments and set forth and explain principles, a review is forced to confine itself to a description in broad outlines of the general approach to the subjects treated and an appraisal of the author's performance of his task. The author begins with a discussion of the problems of public expenditures, tracing the trend of federal, state and local expenditures over a period of forty years, analyzing the reasons for their growth, and setting forth the shiftings in their direction. This concrete study is followed by a discussion of the principles governing public expenditures. The treatment of this problem is largely theoretical, and the principles inevitably stated in terms sufficiently general to leave open innumerable opportunities for controversy as to their application. There is also a brief exposition of the economic effects of governmental expenditures and the manner in which these occur through the mechanism of our competitive price system. A concluding portion of this section of the book is devoted to the problem of governmental economies. Here are discussed in clear and concise form practically every important reform suggestion that has been broached during this strenuous period of mounting governmental costs and shrinking ability to meet those costs.

The balance of the book is concerned with the methods employed by governments to raise the revenues required to meet their expenditures. The emphasis is naturally placed on borrowing and taxation as the most important revenue sources, although other sources are indicated and described. The general method employed in the discussion of expenditures is also adopted in dealing with these subjects. A brief factual survey of the present extent of federal, state and local borrowing and taxation serves as a preliminary to the discussion of the theoretical aspects of these methods. The most important of the chapters devoted to governmental borrowing is that which deals with the economics of that method of governmental financing. The discussion is almost wholly restricted to the direct economic effects produced in the borrowing country. The direct effects on other countries in which the loans may have been made or their proceeds expended, and the indirect effects of these factors upon the economic position of the borrowing country, are not discussed. The point of chief interest here is the inflationary tendencies of heavy governmental borrowing, and how these are affected by such a factor as the place where the loan proceeds are expended. While the general reasoning is logical and sound, there are several instances in which slight inaccuracies in thinking occur. The author also dis-
cusses the important economic effects of the redemption of governmental loans. The American experience in financing the late war is effectively used and discussed. Few competent thinkers would dispute his view that the federal government was during that period "too ready to resort to loans, too timorous in its levy of taxes." The treatment of governmental borrowing closes with a brief discussion of constitutional and statutory attempts to limit borrowing by the local units in our American governmental system. The author is rather skeptical of their effectiveness and favors extensive central control of local borrowing and local finance generally.

The most important of the chapters dealing with taxation are those devoted to discussing the theory of taxation. The first of these is concerned with a brief exposition of the constitutional aspects of taxation in our American governmental system. The most important of the constitutional limitations on the federal and state taxing powers are noted and briefly described. They are not, however, always accurately stated. Instances of this sort occur on page 256 in discussing the validity of formulae for allocating net income to states having state income taxes; on page 265 in discussing the restrictions against exterritorial taxation by states; and on page 270 in discussing gross receipts taxes. Other instances could be enumerated. Some at least are due not to the author's failure to grasp the significance of the decisions but rather to inapt phrasing of the holdings in the cases relied upon. A serious illustration of the latter is also found in another connection on page 155 where the author states that "the exemption of federal bonds from state taxation, and of state and local bonds from federal taxation, can be accomplished only by a constitutional amendment", when it is quite clear that he intended to state that the abolition of such exemptions could be achieved only by such method. The principal other chapters devoted to tax theory deal almost wholly with certain of its economic aspects. The problem of shifting and ultimate incidence of taxes receives a most extended treatment. These matters are dealt with in general, and with respect to various kinds of taxes. The specific aspects of the problem resulting from the existence of forty-eight states with varying tax laws are given a treatment that is well merited. Attention is directed to an error on page 317, line 12, where "is consequently forced up" should read "is consequently not forced up." The remaining chapters of this part deal with principles developed for distributing tax burdens, and problems of tax administration. The author's extended discussion of the theory of taxation is in general clear and, except as hereinbefore pointed out, generally accurate.

The last part of the book is devoted to a consideration of the principal taxes found in our various American tax systems either in the past or present. An excellent feature of this treatment is that each is considered under four distinct heads: the history of such tax in our tax systems, its present status, the theory of such tax, and a critique thereof. This part contains a great deal of highly valuable factual material well organized, and well developed theoretical discussions. Here, too, however, the author is at times inaccurate in his statements or in phrasing propositions, particularly of law. On page 564 it is stated that "should the states exercise their death tax powers to the fullest, intangible properties might be taxed not once but several times at the death of their owners." This is clearly inaccurate and the author's slip is the more remarkable because of his subsequent citation of both Farmers Loan & Trust Co. v. Minnesota and Baldwin v. Missouri. Nor is the statement on page 373 that states "may not levy death taxes as upon the property so passed or received because of the uniformity provisions of the federal and state constitutions" legally correct. Barring lapses of this character, however, the reviewer does not hesitate to state that this part of the author's work has been exceedingly well done. In conclusion it may be said that the lawyer interested in taxation who has either never
had a formal course in public finance or forgotten it will find this book an excellent aid to increasing his understanding of aspects of taxation that at times receive too little attention from bench and bar in their discussions of problems in the law of taxation.

*University of Minnesota Law School.*

*Henry Rottschaefer.*

**Cases on the Law of Pleading Under Modern Codes.** (Third Edition.)

The reviewer, having read Professor Hinton's case book quite through, and having found it very interesting reading, desires to congratulate the compiler upon his excellent and practically helpful collection of cases upon this subject. Out of a total of 310 cases selected, 107 have been decided since 1900—which is quite as it should be, as indicating the modern tendencies of our courts in interpreting and applying code pleading. The apportionment of these 310 cases between the States, whether resulting from accident or design, is worthy of note. New York State leads, as was to have been expected, with eighty-two cases, with forty-five from Missouri, thirty-nine from Wisconsin and thirty-three from Minnesota. Only three English cases are included, which again is quite as it should be.

Nearly one-half of the book deals with "The Complaint under the Code", that division of the subject which is of great practical importance, alike to student and practitioner. The first case in this section, *City of Buffalo v. Holloway,* illustrates the necessity for alleging at the outset of the complaint the facts that, if true, raised the legal duty or obligation, rather than resting content with an allegation, in the form of a mere conclusion of law, that such duty or obligation existed.

The reviewer regrets to see the common counts receive an endorsement in *Grannis v. Hooker.* When the codes were being drafted and the reformations of pleading at common law were under way, why were not the ancient and honorable institutions of the common counts consigned to outer darkness, and why was not the plaintiff required, in all cases without exception, to give the defendant a reasonably circumstantial statement of the facts constituting the cause of action? True, the defendant can move for a bill of particulars, or take a rule to show cause why the complaint should not be made more specific. But why should he be driven to such expedients that he may be reasonably informed as to the plaintiff's claim? Such cases as *Harrison v. Missouri Pacific Ry.* and *Clark v. Chicago, Milwaukee & St. Paul Ry.* raise a question that, as a matter of reasoning, will probably never be finally settled; *viz.,* whether the plaintiff's statement that the defendant "negligently ran against, upon and over the plaintiff," etc., is an allegation of ultimate issuable fact, or a mere conclusion of law. The weight of authority today allows such pleading, but what would Mr. Justice Buller have said to it in 1779? We heartily agree with the court, in *Nichols v. Nichols* in the assertion that "difficulty is sometimes experienced in drawing the line between a statement of fact and a conclusion of law, and between a statement of the ultimate fact and a statement of the evidence by which such fact is to be established".

---

1. 3 Selden 492 (N. Y. 1852), Hintons Cases, 1.
2. 29 Wis. 65 (1871), Hintons Cases, 12.
3. 74 Mo. 364 (1881), Hintons Cases, 19.
4. 28 Minn. 69, 9 N. W. 75 (1881), Hintons Cases, 19.
5. 134 Mo. 187, 35 S. W. 577 (1896), Hintons Cases, 27.
We are indebted to Professor Hinton for his notes to the cases selected. The reviewer has often felt that he would particularly appreciate the author's or compiler's viewpoint on the question presented at the moment. It is not always helpful when the author or compiler remains too modestly in the background and we welcome notes such as that appended to Hill v. Barrett where Professor Hinton considers the vexed question whether freedom from contributory fault should be regarded, as a matter of pleading, as a part of the plaintiff's claim, or, as a matter of allegation, as a point of affirmative defence.

This reviewer would really enjoy pausing all the way through Professor Hinton's excellent case book, now to applaud the compiler and again to release a little of the reviewer's own ego by differing with the decision of a case. For example, Tooker v. Arnoux presents the attractively fine point that the general rule that the omission of an essential allegation in the complaint may be cured by an admission in the plea, does not apply where the plea does not affirm, but denies, the fact.

Another question where we would value Professor Hinton's opinion would arise in the problem presented in Potter v. Chicago & Northwestern Ry. where the defendant maintained that, as part of his prima facie case, the plaintiff must affirmatively allege that he was, at the time of the accident, in the exercise of due care.

As a matter of erratum, should not the word "plaintiff", middle of page 72, read defendant? And here may the reviewer express a "wish", as Professor Wigmore once put it, that the reply of the "general denial" may one day be eliminated in code pleading. If the plaintiff, as has so often and pointedly been stated in the authorities, must furnish the defendant with a reasonably detailed statement of the essentials of the plaintiff's claim, why should not the defendant set forth his defence with reasonable particularity? In other words, would it not be better, fairer and more in accord with the essential objects of pleading, to require the defendant in all cases to plead specially his defence or defences, with the proviso that the plaintiff be, in all cases, required to allege and establish a prima facie case before the defendant can be called upon?

Why do we still maintain, as in Walker v. Tucker decided in 1927, that allegation and proof of humiliation and mental suffering is not such special damage as will support an action for slander, where the charge does not fall under one of the classes actionable per se?

The interesting and typical case of Reilly v. Sicilian Asphalt Paving Company with the author's notes thereto, presents a question that remains for each jurisdiction to decide for itself; vis., whether damages to person and to property, occasioned by the same wrongful act, give rise to different causes of action.

In the interest of a later edition, an erratum may be noted on line 14, page 140, when "than" should be "then". Something more might have been given to show the present attitude of the courts, under Section 3, Admission by Demurrer.

We are glad to see two points, among others, driven home by Professor Hinton's collection of cases—first, the intimate relation between substantive law and code pleading, and secondly, that code pleading has not abandoned the time-honored fundamentals of pleading at common law.

H. B. Schermerhorn.

Vanderbilt University School of Law.

---

6 14 B. Mon. 83 (Ky. 1853), HINTONS CASES, 35.
7 76 N. Y. 397 (1879), HINTONS CASES, 47.
8 20 Wis. 533 (1866), HINTONS CASES, 68.
9 220 Ky. 363, 295 S. W. 138 (1927), HINTONS CASES, 89.
10 170 N. Y. 40, 62 N. E. 772 (1902), HINTONS CASES, 100.
SOME ASPECTS OF THE THEORIES AND WORKINGS OF CONSTITUTIONAL LAW.
xiv, 142. Price: $1.50.

This volume consists of four lectures delivered at Lafayette College in 1931. The last two, which deal with some aspects of the constitutional law and political institutions of Canada, are by far the more valuable, for on these subjects Professor Kennedy speaks as an authority of deservedly high reputation.

The third lecture, "Law and Custom in the Canadian Constitution", will be of interest to students of American constitutional law, who, as a rule, pay little attention to Canadian developments. Its central theme is the change that has come about through judicial decision and convention in the distribution of legislative powers between the Dominion and the provinces. In Canada the direction of change has been opposite to that in the United States. "The American republic began with a theory of state rights. Today, we watch the ever-increasing growth of federal power. Canada began with the scales heavily weighted in favor of the central authority; and today the provinces of Canada enjoy powers greater than those of the states of the American union. . . . In both federations the most cherished aims of the founders have been nullified." The fathers of Canadian Confederation deliberately departed from the precedent of American federalism in assigning residual powers to the Dominion rather than to the provinces, and in giving the Dominion government power to disallow provincial legislation. For a good many years the federal "veto" was freely used, but in the 1890's a new principle, which is still controlling, appeared, namely, that the federal government will not exercise its power of disallowance no matter how unwise or unjust a provincial act may be, if the act falls within the ambit of provincial powers, and that is for the courts to determine. The federal "veto" on provincial legislation remains as a legal power, but Professor Kennedy considers that it has been overriden by custom and "constitutional right".

With regard, also, to the respective spheres of Dominion and provincial legislation the intention of the fathers has been frustrated. It is plain historically that the intention was to give the Dominion legislature control over all subjects except those which are specifically assigned in the British North America Act to the provinces. Some of the subjects assigned exclusively to the Dominion legislature were specified, but in addition it was given a general power "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects . . . assigned exclusively to the Legislatures of the Provinces". But judicial decisions have created a constitutional situation very different from that desired and contemplated by the fathers. The general power of the Dominion parliament to legislate for "the peace, order, and good government of Canada" has been construed to mean a power to legislate only in cases of emergency. "As a result", says Professor Kennedy, "we are now in the position that the federal legislative powers are normally only those specifically enumerated in section 91 [of the British North America Act], while the provincial powers are equally defined and enumerated in section 92. The federal legislature can only invade provincial powers in the valid exercise of its enumerated powers; and the real residuum of powers, except in cases of national peril or calamity, either rests with the provinces under their exclusive power over 'property and civil rights in the province' or is unprovided for in the constitution. Thus the courts have reversed the whole scheme of 1867." Professor Kennedy believes that judicial interpretation has adapted the Canadian constitution to the needs of Canadian life, but he thinks that any further strengthening of the provinces would be unwise.

In the fourth lecture various aspects of Canadian political institutions are touched upon. The author finds a good deal to criticize in the senate, which "is
not and never was a serious and important part of our central government", in
the practice which requires that every province should have due representation in
the cabinet, in the autocracy of the Cabinet in its relation to the legislature, in the
civil service, and in the electoral system. In the judiciary he takes justifiable
pride. The method of appointing judges may not be ideal—they are sometimes
chosen as a reward for party support—and their salaries are inadequate, but the
Canadian bench has always been free from the suspicion of corruption. All
judges in Canada are appointed—Canadian opinion would not tolerate the election
of judges—and hold office during good behavior. They are removable by the
Dominion government on address of both houses of the Dominion parliament.
But no such removal has ever taken place.

R. L. Schuyler.

Columbia University.

INTERNATIONAL LAW IN NATIONAL COURTS—A STUDY OF THE ENFORCEMENT
OF INTERNATIONAL LAW IN GERMAN, SWISS, FRENCH AND BELGIAN
COURTS. By Ruth D. Masters. Columbia University Press, New York,

This valuable book consists of four parts each devoted to one of the nations
under review. The author is primarily interested in the methods and conditions
of "enforcement" of International Law by municipal courts, and not in what
are rules actually applied by these courts as rules of International Law.¹

For each country the following two questions are discussed: application of
treaties by courts, and herein: power to make different kinds of treaties, condi-
tions of their application, conflict between a provision of a treaty and of an
earlier, respectively of a later, statute, interpretation of treaties by the govern-
ment and by the courts with reference to the question of their application by
the courts, interpretation by courts of statutes having reference to questions
regulated by a treaty, effect of war and of other events on application of treaties
by courts, termination of treaties; application of rules of customary interna-
tional law: conditions of their application, conflict between a rule of international
law and a statute.

Dr. Masters' monograph shows that, for municipal courts, in the four coun-
tries under review, the question of "enforcement" by them of International Law
is (as of course everywhere) one of their own municipal law. They will apply
a treaty, if the same is, according to their own municipal law, a valid treaty and
is binding on the courts. They will apply provisions of a treaty in conflict
with a provision of an earlier or later statute, if according to their own (municip-
"al law) rule on such conflicts the treaty provisions should prevail, or if, again
according to their own (municipal law) rule on interpretation of statutes, the
provisions of these statutes are to be construed as not being applicable to situa-
tions covered by a treaty, etc. They will similarly apply a rule of customary
International Law, if and because, according to their own municipal law, they
are bound to apply such a rule. Again, if their own (municipal law) rule on
interpretation of statutes is that there is a presumption that the legislature did
not intend to violate rules of International Law, then, in all possible cases, the
Courts will accordingly construe a doubtful statute, etc.

¹ This, perhaps, may explain the fact that while, for example, the Digest of International
Law cases of the Reichsgericht (1879-1929), published in BRUNS, FONTES JURIS GENTUM
(Berlin, 1931), includes 412 decisions, the author quotes only 51 cases of German courts,
only part of them being those of the Reichsgericht.
The book contains an interesting discussion of numerous cases, and, while some important cases are not mentioned by the author, the survey is, in general, comprehensive and satisfactory.

However the survey of French cases relating to the recent Tenant laws is not adequate. As the matter is of practical importance, the following explanations are submitted:

Two laws of 1926 gave to tenants the right to prorogate their leases, but the owners of the property were given the right to evict, in some cases, their tenants. These rights were expressly denied to foreign tenants, respectively to foreign proprietors. But there were treaties with many foreign States granting to their citizens “national” or “most-favored” treatment. In 1927 and 1928 the Commission supérieure des loyers refused to grant to such treaty foreigners benefits of these laws on the ground that the treaties of their countries with France did not cover the case of these special benefits. To a similar effect were decisions of some other courts, but several tribunals held that these treaty foreigners are entitled to the benefits of these laws. In 1929 an exchange of letters took place between the French Minister of Foreign Affairs and the British Ambassador, and the Swiss Minister respectively, to the effect that under the treaties of France with these countries their nationals are entitled to the benefits of the tenant laws. Then the Minister of Foreign Affairs wrote to the Minister of Justice stating that treaty foreigners are entitled to such benefits, asserting at the same time, that the government has the constitutional right, in case of protests by foreign governments, to correct misinterpretation of treaties by courts. The Minister of Justice forwarded the text of this letter to premiers présidents and to procureurs généraux with the request that they draw the attention of their courts to the “indications” contained therein.

2 Germany: the important case of Bremen v. Prussia, 112 R. G. Z. 21 (1925), is not mentioned, while the Swiss case, in a similar question, Luzern v. Aargau, is at 110.

Belgium: Cour de Cass. Auslander v. Litwer, Journal du Droit International 1906 (1930), Darras 306 (1930), holding that convention of The Hague of 1905 on judicial assistance applies to Russians, notwithstanding repudiation of the treaty by the Soviets, as the Belgian Government did not expressly denounce the treaty. But cf. in France the case of Renault, analyzed by the author on pp. 172-173.


3 It is somewhat misleading to speak of the decisions of this Commission as those of the Cour de Cassation. Cf. p. 158, note 95, 97, 99. The author says, p. 158, note 95, that the decision in Beltrán-Masses v. Guilbert “was reversed by the Cour de Cassation on Aug. 1, 1927.” As a matter of fact the decision was affirmed by the Commission des loyers (“rejette le pourvoi”).


These decisions are not mentioned by the author, who, however, cites Weyl-Block v. Bigar, Trib. Civ. Colmar, Feb. 20, 1929, Journal du Droit International 127 (1930), and says (p. 161, note 163) that in this case it was held that “the law (of June 30, 1926, art. 5) did not intend to violate the treaty with Switzerland of 1882.” As a matter of fact it was held in this case that the treaty of 1882 secured to Swiss citizens in France national treatment and that these provisions of the treaty will prevail over contrary provisions of a later law until and unless the treaty is regularly and expressly denounced.

6 May 21-May 25, 1929. The author writes (p. 162): “On July 20, 1929,” probably having in view that these letters were published in the Journal officiel of July 20, 1929. Cf. also Darras 703 (1929).

7 July 11-July 26, 1929. Journal officiel Aug. 5, 1929; Journal du Droit International 1219 (1929); Darras 705 (1929).

Cf. in the same sense Cour de Cass. (crim.), King, Feb. 23, 1912, Norris, March 8, 1913, Pratt, Aug. 13, 1920, in Darras 343 (1912), 880 (1913), 264 (1921). None of these cases are mentioned by the author.
The author states that this interpretation was accepted by the Cour de Cassation and that governmental interpretations are binding upon the courts even in private law cases.\(^6\)

That seems to be wrong. It is true that the Commission supérieure des loyers accepted this interpretation.\(^10\) The eleventh chamber of the Cour de Paris accepted it as well.\(^11\) But the Cour de Cassation, Chambre Civile,\(^12\) has recently rejected this interpretation and held that it, itself, has the right to interpret treaties when the question and held that it, itself, has the right to interpret treaties when the question and related to private law rights, and that the treaty (before the court) does not relate to matters regulated by the law of 1926.\(^12\) And similarly many lower courts rejected the interpretation.\(^14\)

Do these cases mark a departure from the previously prevailing rule in France\(^16\) concerning the rôle of the government in the interpretation of treaties? Some peculiar features of the controversy in question should be noted.

The conflict was not between the "Political Department" and the Courts, but between the Executive, on the one hand, and the Legislature and the Courts, on the other. The Legislature, when passing the tenant laws, intended to ex-

---


\(^10\) Cf. p. 162: "The Cour de Cassation accepted this interpretation and forthwith applied and interpreted treaties in accordance with the letter of the Minister . . ." P. 164: "The Cour de Cassation will upon instruction from the Minister of Foreign Affairs, transmitted to it through the garde des sceaux reverse its interpretation of a treaty and accept his interpretation." P. 191: "The government may officially interpret any treaty; such interpretation must be followed by the courts, even in cases where private law interests are involved."


\(^14\) Henry v. Tixier, supra note 8, where it was held that the exchange of letters between the Ministry for foreign Affairs and the Swiss Minister has the force of an "interpretation bilaterale et un accord", "convention interpretative" and therefore "fait corps avec le traité." In Schreiber v. Ragorn (infra note 14), on the contrary, it was said that this bilateral interpretation, without a vote by the Parliament, is not binding upon the courts. To the same effect as Henry v. Tixier, supra, Brard v. Chiesa, Trib. Civ. Angers, Dec. 21, 1931, Darras 284 (1932).


---

\(^10\)P. 162: "Il importe peu que (the convention provides . . .) que cette disposition, dont les tribunaux judiciaires saisissent des conflits d'intérêts privés, soit nécessairement qualifiée pour déterminer le sens et la portée, implique, en effet, non que . . . mais simplement que . . ."


---

\(^12\) Cf. the well known case of Bigelow, Paris, Jan. 28, 1928, Darras 307 (1928), and 

---

\(^10\) Cf. in the same sense Cour de Cass. (crim.) King, Feb. 23, 1912; Norris, March 8, 1913; Pratt, Aug. 13, 1920; in Darras 343 (1912); 880 (1913); 264 (1921). None of these cases is mentioned by the author.
clude all foreigners, with the sole exception of those whose countries have similar tenant laws and extend their benefits to Frenchmen.10 The question therefore was not only whether the provisions of an earlier treaty did cover the eventual case of benefits subsequently created by the tenant laws of 1926 (interpretation of treaties), but, at least as much, whether these later laws did exclude from their benefits even treaty foreigners (interpretation of laws). The government having no right to give to courts binding interpretations of laws, the courts were at liberty to interpret themselves these laws. They went, however, farther, and declared that neither was the interpretation of the treaties in this matter by the government binding on them. This, perhaps, was not necessary for their decisions.

The task of the author was a very difficult one: to a great extent hers was a pioneer work. The book of Dr. Masters is especially valuable for the reason that it contains material for Belgium and Switzerland, not to be found, in a similarly comprehensive shape, even in Belgian or Swiss books.

A. N. Sack.

New York University School of Law.

10 Cf. for discussions in the Chambre des Députés and in the Sénat, the argument of the procureur général, in Sanchez v. Gozlan, supra note 12.

BOOKS RECEIVED


