BOOK REVIEWS


The science of legislation probably owes more to Professor Freund than to any other American writer and teacher. He was one of the first to appreciate the growing importance of legislation in the scheme of American life and the possibilities of improvement of the content of the statute book through the work of legal scholars.

Legislation, like all law is not an affair of the laboratory alone, but must be applied to human life. It is in the application of scientific principles to the varying conditions of life and human environment that the art of the draftsman of statutes comes into its own. As a practical draftsman of statutes, as well as a student of legislation, Professor Freund was well acquainted with the importance of the art of statutory drafting as well as of the science of legislation upon which the art should be based.

Professor Freund divides types of law into declaratory, regulative and interpretative (p. 3). "The declaratory rule is in the nature of a rule of decision . . . the expression of justice, and, as such, claiming rational validity." "The regulative rule is the expression of government, in the nature of a rule of conduct . . . generally operating with form requirements, precise quantities, or administrative arrangements." The essential difference appears to be that the rule of decision is a general principle, whereas the regulative rule has to do with the application of the general principle to particular situations or the means of carrying it out through some function of government, which may be the courts, but is generally the administration.

The interpretative feature of legislation consists in the adaptation of the rule, whether declaratory or regulative, to particular cases, its interpretation, as the word is generally used. This function is usually left to the courts (pp. 12-15), but has not infrequently been exercised by the legislature itself. Each one of these classes shades into the other and there may fairly be debate into which class a particular statute or decision may fall (p. 56).

Professor Freund thinks that the declaratory law is usually left to the courts, but not infrequently the legislature has invaded the field, notably in the general provisions which are found in codes. The general rule laid down by a code is much like a general rule laid down in a decision, except that, as it is not based on a process of reasoning which opens the field for further interpretation of its meaning, it is apt to be narrower in its application. In practice, however, "the difference in flexibility between written and unwritten law is apt to be overestimated" (p. 7). Declaratory rules stated in the case have lent themselves to the process of interpretation through the courts in their application to particular cases in such a way as to permit a high degree of flexibility to the needs of justice between litigants, and also to the adjustment of the rule to new conditions in society. Professor Freund gives interesting cases of this development (p. 7), and it is well illustrated in Professor Deák's article on the rules of the French Code in respect to liability, to the new conditions created by the coming of the automobile. An illustration of a different sort has been the changes made in the meaning of the Sherman Act by successive interpretations of the Supreme

Court modifying the rule in practice from the stiff limitation of the early cases to the broad if indefinite meaning which has been given to the Act by the latest decisions, notably the recent *Bituminous Coal Association* case.²

Declaratory law, however, which is called for by a reform movement that has a social appeal, experience has shown will often not await the delays of the judicial process, so that in such cases, which become more frequent in a rapidly changing society than in a fairly static one, the role of the legislature as the organ for making declaratory law, becomes important (p. 8). Perhaps the best instance of this tendency lies in the modification of the law of torts as regards workmen. The fellow-servant law appears to have been satisfactory for a long period after its establishment by the judges, but when the demand for its modification became active, it was through the Employers Liability Acts and not through judicial rule-making that the change was accomplished. Later, when the revolutionary modification of the relation of master and servant by which the rule of negligence was thrown aside and absolute liability of the employer substituted, it was inevitably through the legislature that the change was brought about.

For regulative law legislation is necessary. "... normally speaking, the judicial process cannot produce the rule that is regulative in character" (p. 9). The judges, for instance, could never have fixed the various periods of time which are found in statutes of limitation. Furthermore, the greater complication of modern life and the demand for a wider regulation of social relationships led to the creation of administrative machinery to carry out the social purpose as expressed in statute. This can only be done by the legislature. For example, the Interstate Commerce Acts sets out the principle of fair and equal rates and service, but to apply this ancient rule to modern carriers, the Congress set up a special administrative agency and included a large number of regulatory devices which could not have been put into the law by the courts. So in compensation, once the principle of unlimited liability was established, it was obvious that there must be a limitation of the amount which could be recovered and the regulatory provisions of the compensation act determining the benefits to be paid for different injuries are a striking example of the necessity of the legislature in adjusting a new declaratory rule to social facts.

Another characteristic of the legislative law which Professor Freund does not definitely express, but of which there are many illustrations in his book, is the preventive law. The power of the Interstate Commerce Commission to fix rates and service conditions in order to prevent unfairness and inequality, rather than to allow them to happen and then give a suit for damages, is an example in point, and another, the requirements for safety in labor and building laws, which are intended to prevent the losses from accidents which, under the common law system, would be redressed by action in court. The courts were not without the instruments of preventive law, notably the law of injunction and the abatement of nuisances, but the paucity of their means of prevention as against those which the legislature might ordain by administrative act, is evident.

The book in the main deals with regulatory legislation which, with the organization of the administration, forms the great bulk of the legislative law. Regulative law is in the main concerned with means of carrying out the legislative intent and with the devices which have been developed, administrative and procedural, to accomplish the legislative will. Professor Freund remarks that "legislative technique... is essentially a matter of judgment and expediency." But he remarks that precedent is important in legislation since "legislators do not like to use new methods of expression, but a form once used has considerable persuasive effect" (p. ix). Like other human beings, however, the legis-

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² Appalachian Coals, Inc. v. United States of America (March 13, 1933); United States Supreme Court, No. 504.
lator takes to heart the warning of Alexander Pope: "Be not the first by whom
the new is tried." Experienced draftsmen not only realize the importance
of this point in preparing bills to pass, but they also know the value of using a par-
ticular device which has produced good results, either in their own or in other
jurisdictions.

It is, therefore, of great value to the legislative draftsman to have at his
elbow a volume like this of Professor Freund's which gives him in convenient
compass not only a large number of legislative devices, but citations to statutes
and cases in which they have been tried out. Professor Freund remarks that it
is comparatively easy to find the case law, but it is practically impossible to dis-
cover the legislative law and the legislative expedients which are of such vital
importance to the draftsman (p. vii). With the admirable State Law Index and
Digest prepared by the Legislative Reference Division of the Library of Con-
gress, of which three volumes have appeared, it will be much easier for the drafts-
man of the future to discover the legislative precedent he needs than has been
possible for the draftsman of the past.

It is not possible here to review at length the chapters in which Professor
Freund has collected and organized the experience of nearly a lifetime in the
practice and study of legislation. To the reviewer, however, Chapter VIII on
the "Definiteness of Terms," and the sections in Chapter VII on "Legislative
Style" are particularly worthy of the attention of beginners in the study or
practice of legislation and would repay rereading by practiced hands. The value
of the professional draftsman in improving the British statute book and the
striking betterment of the style of acts of Congress since the establishment of
the Legislative Counsel Bureau show the importance, to the people as well as
to the legislatures, of a practiced hand in the writing of laws. A glance at the
book under review will convince the least experienced reader of the great num-
ber of precedents and modern instances which should be in the mind of the man
who is trying to prepare an effective rule to work in a complicated society where
it will attract the attention of more enemies than well wishers (p. 190 ff).

The author makes the important point that the lawyer and books written
for lawyers pay particular attention to the probable court interpretation in deal-
ing with the language of laws or with administrative devices, but that the drafts-
man must consider in the first place satisfying the legislature with his bill, and
beyond the legislature the effect upon the persons who are to be called upon
to obey it. What the courts will do to it is an important but a secondary consid-
eration, and the chance of the act's being accepted by the courts will be greatly
increased, if it is expressed clearly and if it embodies regulatory devices which
the legislators first, and then the judges, can see are likely to carry out its pur-
pose in such a way as to cause the least possible injury to the people concerned.

In his discussion of the definiteness of terms and of the choice of phrases
and terms (Section 55), the author gives a very valuable collection of statutes
and of cases which illustrate the importance of definite and clear provisions in
legislation. The volume contains a table of cases and an index which will make
the book usable, not only for the student, but for the worker in the field of leg-
islation.

"Legislative Regulation" will long hold a place in the libraries of law schools
and of lawyers, but it also will have a peculiar value to those who knew and
respected Professor Freund as a pioneer in the field as the last contribution
which he will ever make to the subject for the development of which he had
contributed so much of his energy and of his enthusiasm. The reviewer cannot
close the book without a deep regret that Professor Freund will not be able to
give us another volume containing the fruits of his thought and of his experi-
ence in what seems to the reviewer the equally important, if not more important,
field of the technique which has been developed in this country and abroad in
BOOK REVIEWS

Columbia University.

Columbia University.


This season has brought forth two case books devoted to the same subject. Mr. Sturges' work, together with Messrs. Billig and Carey's Cases on the Administration of Insolvent Estates, which also appeared within the winter, mark a recognition, widespread at last, of the fact that the liquidation of the debtor's affairs is by no means confined to proceedings under the National Bankrupt Act, just as in England the bankruptcy laws as such never applied to certain classes of debtors. Thus Mr. Sturges' book opens with liquidations inaugurated by the debtor, including under this head two chapters, one devoted to compositions and general assignments and the other dealing with receiverships. From that we proceed to the systems of judicial liquidation that are afforded not only by bankruptcy, but by kindred legislation of the States.

Efforts of this sort undoubtedly have started on the right track, because their aim is to enable the instructor to enlarge the idea that for many years has been kept before us by such excellent case books on bankruptcy as those of Messrs. Williston, Holbrook and Aigler, and Britton. The case books on bankruptcy deal with liquidation under national legislation. Mr. Sturges' offering, like that of Messrs. Billig and Carey, deals with liquidation, but adds to bankruptcy cases a study of other methods. This idea, it may be added, did not originate with either of these case books. Mr. Hanna's Cases on Creditors' Rights, which appeared in 1931, followed that line when the editor dealt with methods of judicial liquidation. And Mr. Hanna, in his preface, mentions that a course on the same subject had been given at Columbia Law School before his time. That may be balanced against a recent article which mentions these three case books as indicative of a departure from what the essayist claimed was a false method theretofore used in law schools. This writer's contention, that until quite recently all law schools used, and even now most of them use, a "Digest" method of classification, is rather hard to justify in view of Keener's case book and treatise on Quasi Contracts (the very term was coined by Mr. Keener) which appeared in the early nineties, and the case book of Messrs. Pepper and Lewis on Business Associations, also of considerable age. The truth is that rearrangement of materials for teaching purposes is more a matter of normal growth than of sinaitic thunders.

In conception Mr. Sturges' book is to be commended. On the points he chooses to present for the students using his book, and their elder brethren who teach as well, one may pronounce the cases to be well selected, when one has in mind what the editor is after. There is also a well-stocked collection of references to the literature that has found its way into the various law reviews. Finally, it is noted in the preface that the materials now presented have been tried out in various law schools by friends of the author, so that the collection had the benefit of widespread private judgment before it was offered for public criticism.

It is well done. The fault, if any, lies neither in execution nor lack of imagination, but in a method which has many adherents.

To illustrate the point, not much is needed beyond the observation that the bulk of the non-case material—indeed, the real stiffening of the book—consists of literature attaching to bankruptcy amendments lately under the consideration of Congress. There is the Donovan report; there is the aid furnished our law-makers by the able work of Mr. Garrison; there are the comprehensive efforts of the Solicitor General; and there is other material of the same class although of less value. But while there is plenty to show that our insolvency laws are in the course of change, and a great deal of material is furnished as to that, we find no discussion as to the origin of these laws, and how it happened that the needs which they originally served have disappeared. The student, one might think, should be given more as to the origin of things than the citation of law review articles. Perhaps his convenience would be better served by some sort of background—a sketch, at least, of the past. This suggestion is fortified by the fact that Messrs. Billig and Carey, whose work this reviewer has criticised elsewhere, do that sort of thing by way of footnotes in addition to the principal cases selected, and Mr. Hanna, in his case book on Creditors’ Rights, does it by way of original sketches. The effect of the book under review, however, is to give the subject as a present day system which needs reform in many places, as undoubtedly it does. In his preface the author regrets that limitations of space and the like prevented his including materials relating to accountancy. The study of balance sheets and methods of valuing assets, he says, will give the student a “history of the debtor”. On the other hand, beyond references to articles, there is little in this book that will supply the student with the history of bankruptcy, or of kindred proceedings. Which is more important, accountancy, the pathology of the debtor, or cases and material showing the history that is appropriate to the subject of insolvency administration?

That question, however, this reviewer has no right to ask in the present connection. The editor has accomplished with skill, ability and patient attention what he set out to do. The result, in the shape of this book, should receive, and doubtless will, the commendation of all who believe in the method of treatment to which Mr. Sturges adheres, and there are many who thus believe. For a reviewer to voice regret that a different method was not pursued by one of Mr. Sturges’ knowledge and capacity is simply to make a confession of faith which has no place here.

One thing, however, this reviewer will permit himself to say, and in saying it he may faintly suggest his own view of the tendency to overemphasize the factual present. The book, it is suggested, will be of great help and convenience to a graduate student, or anyone else who, fairly acquainted with the subject, wishes to see in operation the principles that heretofore have informed our insolvency laws. Also for one who is interested in a reform of our laws, and knows enough to be a good reformer, the book will be a ready aid. But before one moves to any of these ends, there are things he should know. It is possible, too, that after closing this book, a reader may ask himself whether the students for whom it is intended are students of law or inmates of a School of Commerce. The authors of the Donovan report, the Solicitor General, Mr. Garrison, and the editor of this book, let it be remembered, themselves were educated as students of the law. But when the Solicitor General and Mr. Garrison are quoted here, the student should be reminded that these gentlemen were concentrating on a special effort, the alteration of an old structure in places where decay had set in. They were not there to educate, although the following passage from the factual material would seem to show the need of education even outside our Law Schools:

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*Book Review (1933) 53 Col. L. Rev. 183.*
"Senator (Y): Tell me why certain corporations are exempt from bankruptcy under the laws. Why should a railroad be exempt from bankruptcy, for instance? What is the theory behind it?

"Mr. (X): I cannot answer the question.

"Senator (Y): I can understand that in the case of an insurance company inasmuch as the United States Supreme Court has held that insurance is not commerce. There might be some reason for excluding that, but on the other hand the railroad business is essentially commerce." (P. 443.)

For the student's aid at least, the editor might have balanced the foregoing with a reprint of Article I, section 8, of the national Constitution, and such a case as *Hanover Bank v. Moyses*.

In like manner under the head of "receivership" are collected cases dealing with the equity receiver, the foreclosure receiver and the statutory receiver. There are statistics as to the number and amount of receiverships in selected jurisdictions; there is a facsimile of a "news story" in a Chicago paper; we also have the reproduction of a letter written to the author by a practising lawyer as to the latter's experiences with receiverships. But beyond reference to law review articles dealing with "the possible position of the receivership in the family tree of equity jurisprudence", there is no material that, without the aid of a lecturer, would show just how these different receiverships came into being, how they differ, and the purposes they were intended to serve. There is, indeed, the sworn testimony of an eminent counsel, testifying before a Senate Committee, that "our state laws do not provide for equity receiverships" (p. 379); but this merely suggests the thought that perhaps it is not necessary for equity receiverships in state courts that "state laws" provide for them; on the contrary, it is possible for the court's inherent jurisdiction to subsist until "state laws" abolish it by implication if not expressly.

To balance this, there is excellent material for the lawyer, as there will be for the historian, and even the legislator, of the future, in the statistics that are furnished and the quotations that are made from the state papers that bear the names of Messrs. Thacher, Donovan and Garrison. To repeat, the only criticism that the reviewer wants to express with respect to all this material is that the play is too much in the forecourt. The picture is all of a system as we have it today, and of the reforms of the immediate tomorrow; and there is not enough consideration of origins. Realism, as the term is now used, is always to be encouraged; but in order to know what a thing is, perhaps it is well to know how it came to be. At least, it is true of any book that is to be used by students in the average law school.

But perhaps the reviewer has gone too far, because after all, his criticism is intended to deal only with the non-case material. The decisions that are printed are well chosen, as has been said previously; and an instructor, whatever may be his prejudices, will be able to use them to good purpose with a class. This reviewer has never been sure, after all these years, as to the real function of a case book, as distinct from a treatise. Some case books, indeed, approach closely the treatise, in their notes and introductory matter. Others present a picture of the times. But in one way or another, every case book that contains a good selection of cases can be used. And Mr. Sturges' book can be used even by one who is not at all sure that the world began only yesterday.

Garrard Glenn.

University of Virginia Law School.

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*186 U. S. 181, 22 Sup. Ct. 857 (1902).*

The law "debunked"; the lawyer without his bag of tricks; the Judge minus his gown; the litigant in the spotlight of critical analysis; the criminal without the traditional branding that often disguises him; jurisprudence stripped of its veil of mystery and elevated to the dignity of social service, are all the subjects of highly expert testimony in "A Judge Takes the Stand" by the Honorable Joseph N. Ulman, Associate Judge of the Supreme Court of Baltimore, Maryland.

No dry treatise on legal philosophy this, but the applied psychology of the law, vibrant with life, interpreting the judiciary to the electorate and setting standards of unselfish public service for both Bench and Bar that give rich promise of the more rapid humanizing of justice. With crystalline clearness and by ingenious use of the "case system" it furnishes in interesting narrative form a highly authoritative explanation of some legal rules and principles often popularly quoted but not often popularly understood.

From the opening chapter in which the author confesses that it is absurd to imagine that prospective jurors who listen to a Judge talking generalities for an hour will remember any of it or be affected by it at all for more than another hour, the book is characterized by a disarming impartiality of viewpoint and a ready acceptance of the fact that the law is a faulty, human institution capable of infinite development and betterment.

The chapters entitled "Judge and Jury" and "Some Verdicts" easily prove that facts and cases are indeed stranger than fiction. The forbidding technicality of the phrase "traumatic neurosis" becomes surprisingly clear in the story of "The Sweet Singer of the South"; and the apparent waywardness and irrationality of juries, is rendered quite understandable by Judge Ulman's illuminating account of Johnson v. Robinson and Lacotti v. The Railroad.

Of absorbing interest also are the author's comments on the workings of jury verdicts in creating jury-made law, showing, among other instances, how the rough and ready rules of the police traffic court, because they are so firmly fixed in the public mind, are through the verdicts of juries remoulding the substantive law of "torts" in personal injury cases.

Typical of the author's disinterestedness and fine public spirit is his dissertation on substitutes for court trials through such measures as Workmen's Compensation Laws, and illustrative of his refreshing humor is the statement of the manner in which he settled without trial many cases listed before him by the application of "the most profound doctrine of jurisprudence developed by the mind of man . . . the magical formula known as 'splitting the difference'". Here is a jurist conscious of the dignity of his calling without being obsessed by his own importance.

It is not only the layman who will find interest in this volume. The familiar legal saws "I object" and "It is unconstitutional" are the subjects of chapters that contain a wealth of scholarly learning and shrewd commentary invaluable to the student and lawyer just as the titles "Murder" and "A Day in the Criminal Court" head chapters of enthralling interest to every student who has ever scanned the headlines of an American newspaper or followed the career of a dashing desperado at the movies.

Judge Ulman's style is a model of clarity and precision such as might be expected of a trained and cultivated mind. It flows easily without special distinction perhaps, but with an unobtrusive effectiveness that emphasizes subject matter rather than form.

The distinguishing feature of the book, however, is its glowing devotion to the cause of social service through its advocacy of gradual reform and perfec-
BOOK REVIEWS

The large American investment in securities of foreign governments followed by many recent actual and threatened defaults has resulted in a search for adequate remedial procedure. The situation may justify calling attention to the latest Annual Report of a Corporation organized, so long ago as 1868, for continuous service in relation to defaults on such securities held in England. The report of the Corporation, which was under license from the Board of Trade from 1873 and which was reconstituted by Special Act of Parliament in 1898, consists of a sketchy statement of its origin, functions and procedure followed by 45 pages of Annual Report, a balance sheet and revenue account, and an appendix of various general reports covering separately over 26 countries. There is also a statement of the principal defaults prior to the present world crisis and the general reports relating to certain countries describe certain municipal as well as provincial and state obligations.

The Annual Report recounts current negotiations and developments to within a few days of the date (March 1932) of the report under headings for some 17 countries or groups of countries and allows a series of glimpses of fiscal difficulties of governments, of historical influences on debts, of the public nature of the subject matter, and of plain good and bad faith. These glimpses are enlarged, fortified and made more understandable by the general reports in the appendix. The difficulties and complication of details concerning the debts of the States successors to the Central Powers, and particularly of the successors to Austria-Hungary and Turkey, the failure of further negotiations with Russia, the succession of efforts to arrange and revise satisfactorily the plans for liquidating Mexican debts, and the keeping alive of the question of payment of debts repudiated by American states and particularly those of Florida and Mississippi are striking. It is regrettable that there is no statement of how the apparently strong financial position of the Corporation was attained. There is a table of contents, but no index.

It is noteworthy that the Council regards that it is charged with semi-judicial functions and that consequently it is desirable that the Council be independent in respect to finance. It may, therefore, be of interest to set forth that in about 1873 the percentage of default on foreign loans quoted in London was 54 and in about 1925, including Russia and Turkey, it was 14. The position in 1873 was so serious that one thousand bondholders subscribed £100 each to form a Corporation Fund upon which the Council was founded. Any expenses, recovered when settlements are made, are used to aliment this fund and, when settlements are administered by the Council, any commissions, etc., are
used for the same purpose in as far as they exceed the requirements of current expenses.\(^1\)

An example of the wealth of information available in the appendix may be shown by a list of materials under Argentina and Austria-Hungary, which are typical—one as a leading Latin American borrower; the other as a European borrower with many successor states. Under Argentina are tables of External debts divided into ordinary Issues, Special Issues and Cedulas of the National Mortgage Bank, and of internal debts, some general facts, a chronological statement of the history of the external debt, short surveys of the financial situation, of the public debt, external and internal, of revenue expenditure and budget, of foreign trade and of currency and exchange. There is also a special table of the debt of the Province of Buenos Aires with a chronological history of debts and additional fiscal information. For Austria and Hungary there is a table of allotment of named loans by the Reparations Commission to Successor and cessionary States, a table of certain loans recoupoened by the Caisse Commune, a chronological history of the Pre-War debt from the outbreak of the War, when that debt went into default, a table of financial data about the successor states and full translations of the agreement made ad referendum concerning certain Austrian and Hungarian debts on February 11, 1931, in Paris and of the two declarations annexed thereto. The information furnished for each country is not symmetrical, complete or selected under any discernible system but is valuable and marked by tables and a short chronological history for all or parts of the debts of all countries discussed except Russia. For Russia there is a sequence of negotiations and diplomatic contacts or failures which relate in part to the obligations of the former government in that country and which might have been chronicled profitably, but which are omitted.

An international lawyer will be intrigued to search the nature of such an agreement as that mentioned of February 11, 1932, to which six governments

\(^1\) The methods used by the Corporation of Foreign Bondholders are various. An indication of its activities in connection with defaulted American bonds is indicated in this Review (p. 899). In that connection persistent persuasion by direction of publicity in and to particular channels was used. A study of the methods of the Council should be undertaken for its experience would enlighten us about a proper direction of American efforts for similar purposes.

It may serve a valuable purpose to quote from pages v and vi of the Report concerning methods—

"The Council may, and in some cases do, act on their own initiative. For instance, they appoint the British representatives on the Councils of the Repartitioned Public Debt of the Former Ottoman Empire and of the Caisse Commune of the Austrian and Hungarian pre-war Public Debts, and they have frequently intervened on behalf of individuals whose rights have been prejudiced by the action of foreign Governments.

"As a general rule, however, the Council act through various Bondholders' Committees associated with them under the Rules and Regulations of the Corporation. In the case of the default of a foreign State, or in other circumstances where the rights of Bondholders are interfered with, the practice of the Council is, on their intervention being solicited by a requisition from those interested, to convene a Public Meeting of Bondholders, and to suggest that a Committee, to take charge of the particular interests affected, should be appointed either by the Meeting or by the Council on its nomination, the former course being usually adopted.

"The President and Vice-President of the Council are ex officio members of all Committees, and, if deemed desirable, the Council appoint one or two of their other members to serve thereon in order that the Council and the Committees may be kept in touch. These Committees carry on the negotiations for a settlement, and advise the Council as to whether proposals made by a foreign State shall or shall not be recommended for acceptance by the general body of the creditors. The Council, of course, reserve entire freedom of action to themselves, but happily no case involving any material difference of opinion has yet arisen, and the history of the past fifty-eight years shows that the relations between the Council and the various Bondholders' Committees have been of a thoroughly harmonious and cordial character."
and seven bondholders’ Associations of as many different countries are parties. Moreover, the agreement is the work of a conference consisting of such diverse parties who sent delegates and is signed by the president of the conference. The socially minded will find the materials presented in the report shot through with the postulate that government is first for certain processes which, of normal life, come before the payment of debts. A certain measure of internal well being and fiscal sufficiency is not a legal condition precedent to the existence of the obligation but their absence is likely to delay provision for interest, sinking fund and principal. Professor Borchard pointed out at the last meeting of the American Society of International Law how a mere failure to pay a bond in accordance with its tenor by a government can hardly be construed to be a breach in the strict sense. A private failure to carry out a contract to pay money may lead to a judgment and execution and lay open the debtor’s goods and enterprises to examination and distribution by or on behalf of creditors. But a government must exercise functions which give it excuses for delay in payment not available to private persons. Here is material to be considered in connection with the nature of a state. Can it be said to be no more than a corporation? Must the conception of a state contain elements which are so deep in social, moral and human considerations that some quality of solemnity beyond visible realities does count? Stimulation of thought in many directions is afforded by the materials of such an annual report.

It is interesting on this side of the Atlantic to note the position of the Council, stated in its report in words of Daniel Webster, with regard to defaulted debts of American States. “It is our duty, so far as is in our power, to rouse the public feeling on the subject, to maintain and assert the universal principles of law and justice, and the importance of preserving public faith and credit.” In pursuance of such a position, the report points out how the United States was refused a loan in England in 1843 on account of a then existing default by a state, sets forth opinions publicly expressed in important connections against defaults, quotes a circular of a Committee of the Amsterdam Stock Exchange made as late as May 13, 1931, contains references to justice done in other American matters after seemingly endless waiting, urges the responsibility diplomatically of the Federal government for the States which are parts in it, discusses Federal subsidies and state aid as possible funds from which deductions should be made on behalf of holders of defaulted bonds of beneficiary states and asks that the practice of the United States and its parts conform to its own precepts in connection with the collection of debts to it of foreign governments. It would be too much here to discuss many questions, including those of Constitutional Law, raised by such suggestions; it is enough to indicate the vigor and versatility of argument with which issues, often thought in many serious quarters to be asleep or worth only a winking and condescending smile, are fought.

A history of the work of the Council of the Corporation of Foreign Bondholders would furnish a valuable aid in the technique of practical arrangements upon defaults in governmental debts, would add to the available materials for study on a subject in which it is good fortune that Professor Feilchenfeld’s work has lately appeared, and would in the hands of a student of intelligence and imagination lend further opportunity to raise and analyze questions about governmental practice of law, constitutional and international, which go to the root of the operation and science of government. Meanwhile, here is a current supply, annually replenished, of helpful materials for practitioners and of stimulating materials for those with a spirit of curiosity.

Isaac J. Silin.

Erie, Pa.

This stimulating and thoughtful book approaches the subject of the diplomatic protection of nationals from a novel angle: so far as the reviewer is aware, it represents the first attempt to introduce into international jurisprudence the new methods of approach, the new conceptions of the nature of the legal process, the functions of courts and lawyers and the place of law in human affairs which have recently stirred legal science in the field of private law. The author courageously reveals the implicit assumptions underlying the established system of thought on the subject, questions their validity and suggests alternative hypotheses which more adequately explain the whole range of our present knowledge or experience.

Having for a number of years been a member of the Solicitor's Office of the Department of State or intimately associated with international claims commissions, Dr. Dunn is familiar at first hand with the problems confronting officials in foreign offices when called upon to decide controversies concerning the protection of nationals abroad. He considers the geographic, economic and political conditions leading to such controversies and the emotional factors and attitudes influencing action in this field, and sketches the historical development of the institution of diplomatic protection. He finds that the traditional conception of the way in which this institution operates in practice rests upon certain underlying assumptions which he regards as no longer tenable.

The first and most important assumption discarded as inadequate is the traditional notion of the legal process that there is only one correct rule or principle of law applicable to every given set of circumstances which may be ascertained through a study of precedent and by formal logic or syllogistic reasoning; in other words, that legal decisions result from formal laws of thought from which all individual prejudices and predispositions are divorced.

The second assumption attacked is the view that governments, particularly strong governments, show a regrettable indisposition to observe strictly the rules and principles of international law when such observance would adversely affect the material interests of their nationals in weak and backward countries.

With regard to the first assumption, the author asserts that because of the definite and inescapable limitations on what formal logic can do in the solution of international law problems—rather than on account of the frailties of human nature—the legal process does not and cannot entirely eliminate the exercise of personal value judgments. The rules and principles of international law are not always mutually exclusive. Many novel situations may be determined by two or more different principles, each leading to a different result. In legal controversies both parties may adduce conflicting rules which they are able to support with precedent, and frequently, from the viewpoint of logic, both solutions are equally plausible. In choosing between them, therefore, judges often base their decisions on what they term "reason" or "reasonable". This merely signifies that in their opinion the propositions which they have enunciated will presumably have the approval of intelligent men. Such procedure is, of course, a departure from the traditional concept that law is pre-existing, definite and can be applied impersonally. Under the convenient phrase "reasonable" judges hide their personal value judgments.

A large part of the book is devoted to proving that controversies regarding the diplomatic protection of nationals are actually decided by non-legal factors. Dr. Dunn does not wish to minimize the importance of legal reasoning, but merely desires to throw light on the unacknowledged factors which often determine the choice of the official or judge between two or more conflicting legal
rules or principles. Under the heading “factors associated with public office” six unacknowledged factors are particularly discussed:

(1) The necessity of reaching a decision even when the law does not provide an unequivocal solution; (2) the desire of officials and judges to win the approval and respect of their professional brethren which sometimes causes them to follow the restricted views of a notably conservative class of the community; (3) the primitive notion of revenge upon a wrongdoer which frequently enters into the compilation of damages; (4) the desire to correct some existing condition or practice which meets with their disapproval, and to prevent its recurrence; (5) the institutional factor which causes most officials connected with any institution to enlarge rather than diminish the importance of that institution; (6) the administrative factor; i.e., the tendency of foreign offices and general claims commissions to develop their own particular scheme of habitual reactions to recurrent problems, with a consequent reluctance to consider new and improved methods of dealing with these problems, if thereby existing habits of thinking are upset.

In addition to these factors associated with public office, Dr. Dunn discusses certain “general human factors”, such as the carry-over of local ideas, the influence of the nationality as well as of the political and economic background of deciding judges.

It is, of course, impossible to give here a detailed discussion of all the interesting views of the author. He demonstrates with considerable persuasiveness that the reasons stated by arbitral courts and international claims commissions for their decisions generally cannot be accepted as complete and accurate because no mention is made of any of these unacknowledged factors. A frank recognition of their existence, it is claimed, would enable us to devise means of regularizing their influence in a manner that would be in harmony with the general aims of the legal institution and would introduce greater certainty and predictability into the law. Though agreeing with the author that the acknowledgment of these factors would undoubtedly lead to a more honest approach to the difficulties involved in each decision, the reviewer has not been convinced that this would necessarily result in greater certainty and predictability of the law.

With regard to the second assumption: viz, the unwillingness generally of strong governments to observe the rules of international law in their dealings with weak and backward countries when non-observance would benefit their material interests, Dr. Dunn contends that this is entirely too simple an account of the complex motives, attitudes and pressures present in the minds of the men conducting the foreign affairs of states. Their actions are not in fact motivated by the ingenuity and singleness of purpose which such a view presupposes; on the contrary they are usually marked by hesitancy, uncertainty, and a careful study of the probable effects of their decisions. It is comforting to be assured that foreign offices usually make great efforts to decide questions of protection of nationals abroad in accordance with the prevailing principles of international law governing the subject. Nevertheless it remains true that when confronted with two possible solutions, both equally acceptable from the viewpoint of formal logic, they tend to choose the principal which is most favorable to the material interests of their own government.

The assumptions underlying conventional thought on the subject having been examined and found wanting, Dr. Dunn turns his attention to a consideration of the existing body of laws governing diplomatic protection. His purpose is to observe how far the accepted system of laws actually succeeds in providing us with a set of workable rules and standards of conduct, and how it might be made to fulfill its functions more satisfactorily.
His chapter on "The search for workable rules and standards of conduct" contains a profound analysis of the rules and principles determining the acts for which states are held to be internationally responsible. In discussing the theoretical basis of the international responsibility of states for injuries to aliens within their borders, and the specific acts for which states are held to be under a duty to make reparation to the state of the injured foreigner, Dr. Dunn considers fully and, in general, favorably, the draft convention on Responsibility of States for Damage done in their Territory to the Person and Property of foreigners, prepared by the Research in International Law of the Harvard Law School. He finds that, underlying the institution of diplomatic protection, is the assumption that conditions of order and security, essential for the carrying on of normal social and economic relations across national boundaries must be maintained: such intercourse enriches human life and is desirable from the standpoint of the welfare of the world community. It should be fostered and safeguarded through the device of legal control, even though this may at times restrict the complete independence of action of individual members of the international community. A certain amount of injuries and losses to individual foreigners cannot be avoided, regardless of the attitude and action of governments, and can occur without unduly disturbing normal trade and intercourse between different nations. The risk of these can be absorbed by the individuals participating in this trade. There are others, however, which, if permitted to occur without restriction, would disrupt the established pattern of social and economic relationships. These, Dr. Dunn holds, should be borne by the state. In the words of the author, the institution of diplomatic protection may be looked upon "as a device for allocating the risks of injuries and losses that are necessarily associated with the normal conduct of international trade and intercourse".2

While the standards of conduct formulated on such a theory would not be definite, but would depend upon a forecasting of future events, and a perception of social needs and desires, Dr. Dunn claims that if this were done in an open, conscious and informed manner instead of intuitively as heretofore "we would vastly improve the chances of obtaining intelligent decisions in line with the underlying purposes of the institution of diplomatic protection".3

This book is not put forward as a competitor of the works of Borchard, Eagleton and others. It is, as the author states at the outset, "an experimental study of an intricate and continuing international problem that has heretofore defied solution by any of the conventional methods of approach".4 More of its kind are urgently needed, if we are to develop a rational science of international law. It should be read by every person interested in international law and relations.

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This timely and useful book consists of three parts. The first part is a review of sales taxation in the past; the second is a study of the sales taxation in the 1932 Federal Revenue Act, and the third is a group of summarizing statements of the sales taxes of other countries. The volume includes full notes, an excellent bibliography, and an unusually good index.

1 At 191.
2 At 192.
3 At 1.
The coherence of the work, considering its scope, is striking. The author announces an intention "to present a brief account of the historical development of this tax, to describe the features of the general sales tax of a number of nations, to indicate the chief problems of tax administration, to consider the shifting and incidence of the general sales tax, and its economic effects upon sellers and buyers" (p. 2). These objectives he steadfastly pursues.

Briefly mentioning the sales taxes of antiquity, the author advances to the Spanish alcavala upon which he pauses to record that starting in 1342 this sales tax remained in the fiscal system of that country until the nineteenth century. He notes Adam Smith's condemnation of it and points out that its descendant still exists in Mexico (p. 4). After describing the French sales taxes which obtained from the fourteenth to the dawn of the seventeenth century and the Neapolitan tax of the fifteenth century, the author concludes that, "Ancient and medieval general sales taxes appear to have been iniquitous in their collection, unjust in their burdens, and unpopular with taxpayers." The economic, political and social differences between those times and the present, however, are not overlooked (p. 5).

The book contains comprehensive studies of the present French, German, and Canadian sales taxes and detailed summaries concerning those of Italy, Belgium, Austria, Poland, and the Philippines. Brief explanations of similar taxes of some twenty-five other countries appear in Part III of the book. A careful analysis and appraisal of the West Virginia Gross Sales Tax is followed by brief studies of sales taxes of Connecticut, Delaware, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, and Pennsylvania.

Sales taxation as a problem in federal legislation begins with the agitation for such a tax during the Civil War (p. 8). No general sales tax was adopted during that period, but consumption and production taxes which were in effect were heartily disapproved. The World War brought in its wake a renewal of the sales tax movement, and in 1921 it became a severe issue, though no general sales tax appeared in the revenue act of that year. (See ch. ii.)

The Revenue Act of 1932 provides for sales taxes upon some twenty groups of commodities as well as taxes on sales of capital stocks, bonds, and conveyances. Previously existing tobacco and miscellaneous internal revenue duties are continued. Too little time has passed since the adoption of the law to judge the efficiency of its administration, and only a vague estimate can be made of its ultimate productivity. It seems safe to assume, however, that Congress will make little or no retreat from the field of sales taxation until the national finances are in better condition than they are at this time.

This being true, some attention may well be given to the arguments for and against the type of tax under discussion. In 1865 the proponents' arguments were: "(a) Tax collections would be easy because of a flat uniform rate. (b) A general sales tax would treat foreign and domestic goods alike and would create no discriminating distinctions. (c) If the general sales tax should operate to remove middlemen in the marketing of goods, the nation would benefit in lower prices from the more direct marketing. (d) The tax would assure a large and certain stream of revenue. (e) It would bear equitably upon consumers because, as a proportional tax at a flat rate, it would be just and fair. (f) Business would suffer no inconvenience from the light and simple general sales tax" (p. 8).

Opposing arguments were that: "(a) Previous general sales taxes, like the Spanish alcavala, had been iniquitous and disastrous in their burdens upon commerce, industry and consumers. (b) A general sales tax would seriously retard the ebb and flow of American industry. (c) Such a tax would artificially eliminate middlemen by encouraging direct marketing to consumers and would thereby dangerously undermine the distributing system. (d) A general sales tax would be impracticable in administration because of the inadequate records kept by most
business establishments. (e) It would be impossible to satisfactorily define sales for purposes of taxation” (pp. 8-9).

In the sales tax discussions which immediately followed the World War the proponents used, in addition to the former arguments, the contentions that the sales tax, if in part substituted for other taxes, would (a) do away with business stagnation by recalling capital from tax exempt securities, (b) reduce the price level because of being more economically collectible, (c) be more fair and uniform, and (d) be shifted to consumers, thus removing a handicap placed upon business by other methods of taxation. The opponents were equally sure that the sales tax would (a) disregard ability to pay and tax consumption inequitably, thus burdening the masses unduly and the wealthy classes too lightly, (b) would not be shifted in some situations and in such cases would result in unequal business taxation, particularly since gross sales bear no normal relation to net profits and (c) would offer many difficulties of administration (pp. 19-22).

Practically the same contentions have been expressed for and against the sales taxes of France (pp. 91-94), Germany (pp. 99-107, 112), Canada (pp. 123-129) and other countries (ch. x), after some years of experience with them. In only Canada, however, does the opposition seem to be “wearing down the resistance of the proponents of the tax” (p. 129). But in West Virginia criticism has brought about considerable revision since the act of 1921 and the author concludes that the gross sales tax is still in a controversial stage in that state and would be likely to suffer revision or even repeal as the result of a change in the political alignment.

After a scholarly and detailed discussion of the incidence of general sales taxation and of its effect upon competition, distribution, and other phases of business, the author, with equal care, studies its effect upon consumers and their reactions toward it. He believes that because the sales tax tends to be absorbed by wage earners, it acts to lower living standards; that production is adversely affected because the tax tends to reduce the demand for various articles and services; and that it “operates to disturb the class structure of society and to force social reorganization, for it increases inequalities in personal income distribution by placing persons with small incomes at a still greater disadvantage” (p. 246). The opinion is also expressed that, “If the burdens of the general sales tax on the lower incomes cannot be counterbalanced by adequately progressive taxation on the higher incomes, this tax should be removed at the earliest opportunity” (p. 246). In another chapter he concludes that “the experience of West Virginia and other American states and the nations which employ a general sales tax does not justify a general sales tax as a normal source of federal or state revenue in this country” (p. 260).

The contents of the book is logically divided into parts, chapters, and sections, and the substance of each section is indicated in bold type. The type used is eleven-point on a twelve-point slug, and the type-page is twenty-five picas wide and forty-two picas long including folio line, on pages six by nine inches. In the opinion of this reviewer this has resulted in a volume which is easy to read. The narrative style of the author carries the reader rapidly through the chapters of somewhat technical materials. It seems unfortunate, to one of a profession accustomed to a different style of page make-up, however, that the notes were not placed at the bottoms of the pages rather than in groups by chapters in an appendix. This minor defect, if one it is, does not impair the opinion that the work here reviewed will enjoy a well-deserved, general distribution and usefulness in this present period of wide-spread study of taxation.

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BOOK REVIEWS


The writer of this review lived for a number of years after the World War in one of the far inland western states. At no time since has he been in an environment where the air is so charged with the vitality of keen interest in international affairs as in that distant western state. The preface to the book under review rightly attributes that interest to an awakening to the fact that the external activities and alignments of Washington have a long distance and widespread internal effect. The costs of these effects in value, property and even life itself, are often far out of proportion to benefits received. The failure of American financiers to help prevent the collapse of the Kredit-Anstalt in Vienna and the consequent fall in the price that the western farmer can get for his grain, brings home to him that the financial leaders on the Atlantic seaboard are not nearly as interested in him as he is in himself, and he has begun to make international relations one of his primary interests. The congressmen from the West are taking the lead in formulating national policies in international affairs and the senior Senator from Idaho, Senator Borah, has, since 1924, exerted great influence in this respect as chairman of the Senate's committee on Foreign Relations. The Foundation for the Outlawry of War at the University of Idaho bears the Senator's name in fitting recognition of his great service to the nation in its international affairs. The inauguration of the Foundation was accompanied by four brilliant lectures delivered by Professor Hudson of Harvard and the book "Progress in International Organization" preserves those lectures in printed form.

Professor Hudson contrasts the international organizations before the war with those which have been established since. Those before the war were largely confined to means of international transportation and transmission such as the International Union of Railway Freight Transportation, The International Telegraphic Union, The International Postal Union, and the like, with the single exception in the field of international political adjustment of the Permanent Court of Arbitration at The Hague. The court had just begun to prepare its procedure in order to catch up with the speed of the world in action when the World War interrupted these plans. Professor Hudson recognizes that the Treaty of Versailles produced enough maladjustments to call for recourse to international machinery for readjustment for many years, thus adding to the many new problems arising since the World War in world affairs. His book records his lectures setting forth the structure and functions of the League of Nations, the Assembly, the Council and the Secretariat, as well as many of the more important organizations for which the League of Nations has been responsible in helping to establish, including the Permanent Mandates Commission, The Economic Committee, the Bank of International Settlement, the Committee on Intellectual Co-operation and other working units of international machinery. Professor Hudson in chapter five describes the work of the autonomous International Labor Organization and the value of its international conventions which have been adopted by most of the countries of the world, as well as the benefits it has been able to render employers and employees in advisory capacity—as evidenced by its report to Henry Ford on adequate indicia of equivalents at the time he wished to pay his employees in Europe the equivalent of American wages. The Chapter on the World Court explains its relationship to the Permanent Court of Arbitration, why it is more truly a "court", the distinction between its judgments and advisory opinions and its present place in world jurisprudence. International rules of conduct agreed upon by States in international conferences received the term "international legislation" from Professor John Bassett Moore some twenty-five years ago and the term has gradually
gained considerable usage. When we consider laws passed as being the result of "conscious effort" to make or change rules of conduct and apply "the conscious effort" rule to these international rules of conduct it seems that they may well be called "international legislation" as they have been by Professor Hudson in his estimable four-volume work and as they have been in his lecture devoted to the subject of "The Current Development of International Law" reprinted in Chapter VI of the book under review. Professor Hudson points out the record of international law past, present and future to be found in the many treaties and international engagements made since the war—now closely approximating the 3000 mark in number—and expresses greater optimism for the progress of codification of international law as another means of legal development than many feel justified in entertaining on the basis of present accomplishments and present tendencies.

Professor Hudson could have ended with his lecture on the development of international law and have had a well rounded out series of lectures, giving to his hearers and subsequent readers all they might be specifically entitled to in the way of an impartial appraisal of the international legal organizations as they are set up and as they work, but all those who believe that the chief end of these organizations should be peace are bound to be grateful for his lecture on their peace accomplishments. Their dismal failure in specific instances is recognized, but their successes are also recorded and appraised in such a way as to leave no doubt where the balance is and to give confidence in their future place in maintaining and securing a better world order. After describing the gradual allayment of the suspicion of the United States and her back-door, side-door and front-door participations in the activities of these international organizations, Professor Hudson brings his lectures to a close by measuring progress not in terms of the success of our own endeavors nor necessarily in terms of the use we make of the achievements of the endeavors of others, but rather in terms of contribution to mankind's advancement over a long time and from a long range standpoint. He ventures the prophecy that the habits of nations and their peoples will eventually obtain such a momentum in the use of the international instruments and machinery so lately set up, that achievements by their means will be in the not distant future far greater and farther reaching than now result from our rather awkward and clumsy attempt to use them. This is not an unreasonable prophecy in case our education in the matter can outstrip the march of calamity due to selfish nationalism.

The appendix contains the Covenant of the League of Nations, the list of membership in the League, and the Statute of the World Court. The lectures delivered at Moscow, Idaho, were not restricted in their presentation to students in international law, but were given to all the students in all departments of study at the state university and to the members of the legal profession and the general public as well. The book addresses the same large and varied audience. Necessarily it is in a popular and untechnical vein. But this does not mean it is careless or loose flown. On the contrary it combines in a style of rare good taste accurate and carefully selected material with a manner of expression which is dignified, pleasing and very effective in its convincing qualities.

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