

BOOK REVIEWS

GOVERNMENT LIABILITY IN TORT. Part I. By Edwin M. Borchard, New Haven, Conn., 1925, pp. 92.

One naturally idealizes one's country. Does it follow that one's country, the State, can do no wrong? That though it can, and often does, damage an individual, it cannot commit a tort? That the doctrine of *respondeat superior*, which ordinarily appeals to us, has no application to so ideal a principle? Abstractions often blind us to reality. We treat realistically enough the situation where A is injured by acts of the sort the law condemns done by B in the performance of duties authorized by C. C must ultimately bear the burden. Does it matter that C is the State itself? Not to A certainly. The rest of us as taxpayers may have our objections. The balance is to be struck as between us and A. But there are many abstractions in the way of striking that balance, as every lawyer knows.

A careful, detailed and scholarly study of this problem has long been needed. Professor Borchard's study so far is all of that, and promises to be still more. A second part, yet to appear, will contain an examination of the theories upon which state immunity is rested, of the history of the doctrine, and of foreign law, concluding with a draft statute.

In the present article, Professor Borchard, after a statement of his purpose and a consideration of the maxim "The King can do no wrong," reviews some astonishing instances of narrow construction of statutes aimed to lift the State's immunity, and then among other things considers exhaustively the problem of determining what claims are and what are not against the State, the legal situation as to corporations private in form acting for the Government, the liability of the United States, the jurisdiction of the Court of Claims, the problems arising out of State control of public utilities, and at great length the distinction often without a difference which courts attempt to make between governmental and private acts of municipal corporations.

The study is as yet unfinished. The part that relates to the theories as to the State's immunity is likely to be extremely valuable. Until that appears it is perhaps not desirable to say much. Nevertheless one great merit of the present part should be pointed out: it draws together subjects which lawyers tend to regard as unrelated but which are really instances of the same abstraction-ridden doctrine. By so doing it presents a striking picture of the anomalies, inconsistencies, and injustices of our present law as to State and municipal immunity.

Austin Tappan Wright.

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PUBLIC UTILITIES AND THE LAW. By William M. Wherry, Jr., New York, The Writers Publishing Co., Inc., 1925, pp. xii, 337.

This book is not a law book of the kind in which the practitioner is supposed to be able to find "the law" with "the authorities." Nor will he find much law in detail without authorities. The book is a general survey of the

relation between public utilities and the law, and some legal principles relative to and problems arising out of this relation are outlined. These problems are not all definitely solved; the author does not speak dogmatically on what the law is: indeed, he would be in hopeless difficulties if he attempted to do so with many of the points involved in this branch of the law which he discusses. He states, with no lack of conviction on his own part, what he thinks the law ought to be and he shows that there are conflicting views, and what some of them are. The book includes a model statute relating to the creation, powers and procedure of public utility commissions.

The author says that "No one interested in [public utilities] as investor or operator can afford not to be conversant with the legal aspects of these questions." So we see that the book is intended to be attractive to the lay reader, particularly one who looks at these questions with the utilities' welfare uppermost in mind; he will, however, seldom be able to conclude anything more tangible than that, even where the law is reasonably certain, the utility will receive its just deserts only by being on the alert and receiving expert engineering and legal advice at a time early enough to avoid trouble, rather than after difficulties have materialized; whereas where the law is doubtful there is no hope for it without such services whenever any policy is under consideration, and in the meantime, periodically, so as to see if some readjustments are not desirable though not theretofore contemplated.

This is a healthy state of mind to create. (Let anyone who doubts it read Arthur Train's delightful essay, *Have You A Lawyer?*) Lawyers can not be justly accused of avarice in subscribing to such views because clearing up a wreck is more lucrative to them than avoiding one. But the legal profession is following the trend in medicine in attempting greater activity in preventive rather than remedial measures; witness the current widespread adoption of the declaratory judgment procedure which offers great opportunities in the field of prevention. If the public utility manager comes to realize that he should seek engineering and legal advice before he goes on the rocks he will be doing his industry a great good. Of course the large utilities already follow such practices, but the smaller ones which do not, through ignorance, fear of expense or an unwarranted and unsubstantiated feeling of security, should be made to realize that they ought to do the same; in the end they will undoubtedly profit by such a practice.

Investors owe it to themselves to know what risks they are assuming and to remember that the utility in dire straits needs money, as well as the one in sound condition which wishes to make a healthy extension. If they know that a company is pursuing a sensible policy of meeting changing conditions they will be more ready to invest in it; thus such a practice not only apprises an investor of his security but makes a company more likely to get the money it needs on favorable terms.

This is all especially important at the present time when public utilities are developing so rapidly, not only as to numbers served and fluctuations in values, but in service changes made necessary or desirable through the advances of the sciences and arts. The development of this field of the law is equally active as is shown by the current literature of the profession; it covers all branches: reports of cases, articles in periodicals and treatises. The same

thing is seen in the literature of the engineers. Experience has shown that accurate forecasts cannot be made even for a short term of years. Mr. Wherry strongly advances the indeterminate permit or revocable franchise instead of rigid agreements to meet this problem; whether this device is adopted generally or not the point mentioned above is of equal importance; such a practice is necessary if utilities are to keep pace with the times.

The author also says that "no matter how experienced one may be in the handling of rate cases, it is always fruitful to survey the field as a whole and to get back to first principles." So it is seen that the book is also intended for the profession. While not many cases are cited, the problems are analyzed down to principles, and the result of reading, while not particularly instructive as to tangible existing rules of law, is suggestive and stimulating. Controversial points are discussed and conflicts shown. There is little detail (which is a good thing) but the subjects included are varied; most of them are directly concerned with rates. While not a "practical law book" at all it will probably prove of interest to those lawyers who are not versed in the details of this branch of the law, because it is suggestive and presents certain problems which will confront most every busy lawyer at some time or another.

The book is not a well rounded and finished statement of the law of the subject, but then it doesn't purpose to be. There are some minor inconsistencies, but they are either apparent or unimportant. The latter part of the book, particularly the chapters on Certificates of Convenience and Necessity and Public Utility Regulation as Process of Law, is not as well balanced or tempered as the earlier part. The citation of cases in separate paragraphs with wide spaces breaks the continuity of thought.

This book plainly shows the state of flux in which much of this branch of the law is, and this will be of interest both to intelligent utility operators and general practitioners who have not come in contact in connection with rate problems and allied questions, the one with the law and the other with the utility.

Philadelphia.

Allen Hunter White.

THE PHILOSOPHY OF LAW. By Roland R. Foulke, of the Philadelphia Bar. Philadelphia, The John C. Winston Co., 1925.

The author tells us that this little volume is "a short plain statement of the essential nature of law." He defines his title in this manner: "It is believed that the proper field of the philosophy of law is the explanation of the operation of the external factors of political power and public opinion in determining human conduct," and consequently there are chapters devoted to "Conduct and Factors Determining Conduct," "Political Power" and its various forms, and also a chapter devoted to "Some Current Ideas Examined" and another to "Jurisprudence." The discussion is given in the form of a number of theorems or propositions.

In the chapter on "Some Current Ideas Examined," the author urges "a few objections to some of the definitions and ideas which are of frequent

occurrence in legal philosophy." For example, the general looseness of expression is criticized when the author says: "The word 'right' is used in so many different senses that it has lost all possibility of accurate significance." Rights, natural rights, right of action, duties, end of law, origin of law, justice, custom, ethics and political power—the definitions of these terms are examined, and their utility and correct use suggested. In every branch of human endeavor, men ought to be able to get together and use terms having a sort of common denominator, a precise meaning capable of explanation, so that the hearer or reader may know the sense in which the speaker or writer is using a particular concept.

This volume represents the thoughts of a practicing lawyer on a subject which has engaged the attention of many thinkers on the law.

Harry W. Steinbrook.

Philadelphia.

STATEMENT OF OWNERSHIP, MANAGEMENT, CIRCULATION, ETC.

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