

## BOOK REVIEWS

CASES ON PUBLIC UTILITIES. By Young B. Smith, Noel T. Dowling and Robert L. Hale, St. Paul. West Publishing Company. 1926. Pp. xxvii, 1258.

The reason and purpose of this book of cases is given by the authors thus :

"The rapid growth during recent years in the law relating to public utilities has given to this subject a position of importance which was hardly conceivable a generation ago. Not only have the courts modified or expanded common law principles to meet modern utility problems, but an enormous amount of regulatory legislation, both state and federal, has been enacted . . . . Consequently an adequate treatment of the modern law of public utilities necessarily includes, not only a consideration of common law principles, but also a rather thorough investigation of applicable legislation and the constitutional and administrative law problems incident thereto. Throughout the book particular emphasis has been placed upon the body of the law which has been developed in the United States under the *Interstate Commerce Act* and similar state statutes . . . . In an increasing number of American Law Schools the course on Public Utilities embraces not only the common law of carriers, but also numerous questions of constitutional law and statutory interpretation growing out of the creation and development of Public Service Commissions and other administrative bodies as means of governmental control. In some schools, the subject is divided into two courses, one on public service law generally and the other on carriers in particular. Still other schools offer only the course on carriers. The editors have endeavoured to group the material so as to make it available for teaching any of the courses."

Judged by their purpose the authors have succeeded admirably. They have gathered together and annotated an excellent group of cases. These cover the subject in adequate fashion. Chapter One deals with the regulation and control of public utilities both at common law and under regulatory statutes. The writer believes this chapter to be of particular value because it enables the teacher to show the historical growth of the law of public utilities and to develop, with the class, the functional aspects of the law. As the course is usually given to second and third year students both the history of the law and its function should be stressed although training in analyses of cases should not be neglected.

Chapters Two, Three and Four deal, respectively, with the supervision of public utilities, the service they are compelled to render, and the liabilities which engaging in public service imposes upon them.

Chapter Five, which was the independent work of Mr. Hale, deals with the problems of the law concerning the rates which a public utility may charge. Here Mr. Hale has done well with a difficult subject matter. The law is not settled. And Mr. Hale wisely includes much material which, though not now the law, is valuable for discussion and may be the law of tomorrow.

The footnotes to the cases are excellent. They maintain the high standard set, in recent years, by the American Casebook Series, of which this volume

is a part. Constant reference to the leading law reviews is a noteworthy feature. The index is full and adequate. The authors have done well to include in an appendix the *Interstate Commerce Act* and the *Elkins Act*.

To the reviewer the one serious drawback to the volume is its length. He believes that it is of considerable value in the training of law students that they should be compelled to read their casebooks from cover to cover. He thinks that the habit of skipping about in a case-book, taking a case here and there, in what appears to be the most haphazard fashion, is psychologically bad. It tends to intensify the helter-skelter attitude of the average student. It gives the instructor a chance to indulge in superficial preparation. That is a temptation often yielded to. Furthermore, it does not permit the diligent student, who is the rare and bright spot in every class, to read ahead and so be prepared to ask questions which help the instructor to illuminate the subject and lead the class forward. Again, knowing that no cases will be omitted, and that he will be held to know all the material in the case-book, has a subtle, but nonetheless real, influence on even the most lazy and indifferent student. But no student can be fairly required to read the entire eleven hundred ninety pages of text, in the book under review, in the limited time allotted to the course in public utilities in the ordinary law school. The course is usually a semester course. Two hours a week are given to it. The average student cannot be required to prepare more than thirty pages of case material for each hour of classroom work. The average semester runs fourteen weeks of classroom attendance. Nine hundred pages is about the limit of the ordinary student's capacity in one course in one semester. The reviewer, therefore, prefers to use Prof. Burdick's casebook in the subject of public utilities rather than the casebook under review.

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CONTRACTS IN THE LOCAL COURTS OF MEDIEVAL ENGLAND. By Robert L. Henry, London. Longmans, Green & Co., 1926. 249 pages.

In this book an effort is made to reconstruct the essentials of English contract law as administered in the local courts between the seventh and fifteenth centuries. Much of this we will never know; the Anglo-Saxons have left little dependable material of any sort outside of royal charters and dooms, and the illiterate country folk who administered the local courts could hardly be expected to do more than pass on to their sons the oral traditions they had received from their fathers. As to later material, Professor Maitland was the first to draw attention to the abundant local records, and through the efforts of the Selden Society enough has been put in accessible form to enable one to draw fairly accurate conclusions, although much material still unpublished may lead to changes in matters of detail. Judge Henry has drawn chiefly on the publications of the Selden Society for his picture of the administration of

contract law in the county courts, the borough courts and the merchant's courts of the Fairs. In supplementing what is known of Anglo-Saxon law he prefers to fill in the gaps by comparing Anglo-Saxon law with the law of the later Middle Ages rather than by drawing on Continental Germanic law. This is wise, for, as the learned author points out, the Anglo-Saxons were for six or seven hundred years cut off from their continental kinsmen and developed laws of their own. Indeed it is possible, although hardly within the bounds of proof, that they were influenced by the indigenous inhabitants whom the latest authorities agree were not extirpated to the extent once believed. The customary law, as he finds it, was fairly uniform and changes exceedingly slow; legislation did not touch it, travel did not disturb it; a body of oral custom painfully acquired in youth is not easily unlearned in old age. Indeed the tenacity with which many communities in these supposedly progressive states adhere to the procedure of the seventeenth and eighteenth century, is evidence enough of the blind conservatism with which we have always clung to precedents. Among the topics discussed are wager of law; witness proof and inquest proof in their bearing on debt; parol recognizances in court; tallies and deeds; covenants of warranty; the development of the delivery promise from the wed-surety contract, and the bargain with God's penny or earnest. The law teacher will find this book worthy of the most careful perusal, for the learned author has thrown light into many obscure corners; the practitioner too, if he has any feeling for the past, will find much that is instructive. Judge Henry makes clear to us how it was that institutions, such for example as wager of law, which now seem impracticable if not absurd, worked well enough in their own day, and why it was that they did work in the small and intimate communities where they were applied. But their day came and the old courts dried up, with much of their formal law, as more powerful remedies were provided elsewhere. One may hope that an equal amount of our present day procedure and conveyancing will dry up as effectually.

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INTERNATIONAL LAW. A Treatise, by L. Oppenheim, M. A., LL. D. Vol. II, Disputes, War and Neutrality. Fourth Edition, edited by Arnold D. McNair, C. B. E., LL. D. Longmans, Green and Co., Ltd., London, 1926. Pp. lvi—752 pages.

Much water has flowed under the bridge since 1921 when Roxburgh published the third edition of Volume II, and still more since 1912 when Oppenheim himself published the second edition. Consequently, there was bound to be considerable material in this, the fourth edition, which is not strictly speaking "Oppenheim." This is by no means a criticism of the editor, who considered himself forced by Roxburgh's precedent "to work in the new matter, freely and where it seems to fit best, but without giving warning of its pres-

ence" rather than "to indicate the new matter by means of brackets." But while this procedure may be "most conducive to maintaining the book as a living exposition of the law," still it is questionable how far it may be followed if the work is to bear the name "Oppenheim" exclusively.

Professor McNair in his preface states that the volume "is seventy-two pages longer than the third edition," which itself was sixty-five pages longer than the second edition (if the appendices are not counted). Nor do these pages "represent the whole of the new matter introduced, as a considerable amount of the text of the third edition has been put either into footnotes or into smaller type" or omitted. This has been the case with the international conventions and declarations which Oppenheim had grouped together in appendices at the end of the second edition. The reviewer, by the way, would have preferred the retention of Oppenheim's arrangement to the tucking away into obscure footnotes of these sources of conventional international law. However, the above additions and modifications, together with a tremendous increase in the footnotes, bibliographies, cases cited and references to periodical literature, show the extent of responsibility or, might one say, authorship of the present editor. Citations of this work in the future therefore should be credited to "Oppenheim-McNair" rather than "Oppenheim."

Space will not permit more than passing mention of any other than the new or completely revised sections. These deal with such matters as conciliation (including the Bryan Permanent Commission of Inquiry), the Permanent Court of International Justice, matters of domestic jurisdiction, reduction and limitation of armaments, economic boycott, neutrality and the League of Nations, indemnities and reparation, passage of men-of-war through international waterways, air warfare (a whole new chapter) and other subjects suggested by recent international developments. Much of the new material deals with the League of Nations and its agencies. Besides constant reference in innumerable places (indicated by nearly three entire columns of references in the index), there are over fifty pages devoted exclusively to this subject. For instance, the amicable and compulsive means of settling disputes between League members are isolated at the end of Chapters I and II respectively, instead of being treated under the various headings of those chapters. The trend toward the replacement of war by the pacific settlement of international disputes is not only evidenced by the increased space devoted to the latter in this fourth edition, but is reflected in the prefixing of "Disputes" to "War and Neutrality" as the title of Volume II.

Naturally the attitude of the editor-author throughout is that of a British citizen. Consequently, the application of the rules of international law to Great Britain is stressed. No fault is to be attached to this; on the contrary, it is refreshing to find the British point of view so ably expressed in so authoritative a work and the attempt to be judicial and fair-minded meets with unusual success even when, as in the British reprisals against Greece in the Don Pacifico case (page 84), the British action seemed to be a violation of international law.

In the preface to his second edition, Oppenheim himself sounds the following warning: "The discredit which International Law concerning War and Neutrality suffers in the minds of certain sections of the public is largely due to the fact that many writers have not in the past approached the subject with that impartial and truly international spirit which is indispensable for its proper treatment." However, in the present edition, with regard to the relationship of the League of Nations to international law, there are some statements (entirely independent of the question of arrangement mentioned above) which may sound somewhat strange to those who are not nationals of a State member of the League. Possibly excessive zeal or proximity has interfered with the proper perspective to be expected in work of this character. For instance, on page 5 is found the statement that "Before the establishment of the League of Nations there were four kinds of amicable means [of settling state differences]—namely, negotiation between the parties, good offices of third parties, mediation, and arbitration." On page 6, however, the statement is made that "after the World War, the Powers . . . adopted in the Covenant of the League of Nations *three* new means of settling international disputes in addition to arbitration . . . inquiry and report by the Council of the League, inquiry and report by the Assembly, and a judgment of the proposed Permanent International Court of Justice."<sup>1</sup> On the following pages, the editor-author treats of *six* means of settling disputes: Negotiation, good offices, mediation, conciliation, arbitration and judicial settlement, all of which, except the last, were in use before the World War and the last was accepted in principle at the Second Hague Peace Conference. Then follows the three *new* means provided for in the Covenant, but generically the first and second of these differ little if at all from the Hague Commissions of Inquiry and the third was accepted in principle prior to the Covenant and very probably would have been established in practice even if the organization of the League of Nations had not presented a suitable solution for the selection of judges.<sup>2</sup>

With regard to the League of Nations, however, the most astounding statement for a work which professes to be a general treatise on international law appears on page 71:

"If for the purposes of a dispute between a member [of the League of Nations] and a non-member the non-member refuses to accept the obligations of membership, and resorts to war against the member, *it is to be subjected to the same measures as a member-State which breaks its covenants.*"

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<sup>1</sup> *Sic*, though elsewhere properly called the Permanent Court of International Justice.

<sup>2</sup> *Cf.* the Central American Court of Justice, established in 1907, "the first of its kind," as the editor-author himself says (p. 45). The Convention of February 7, 1923, provides for the establishment of International Commissions of Inquiry, not "a new court," and ratifications of the United States, Costa Rica, Guatemala, Honduras and Nicaragua were deposited at Washington on June 13, 1925. *Cf.* also Knox's proposal for a Court of Arbitral Justice.

This may be the law of the League, but how it can be called international law for all the co-equal and sovereign members of the Family of Nations, including those outside the pale of League membership, it is difficult to see.

It will be of interest to note, before leaving the subject, that, since India and the British-self-governing dominions are members of the League though not States in the full international sense, a number of unique situations arise. The Council of the League may make recommendations in a dispute between two self-governing dominions or other parts of the British Empire. The self-governing dominions may register inter-imperial agreements, such as the "treaty" of December 1921 between Great Britain and the Irish Free State (p. 71, note 2). They may be parties in cases before the Permanent Court of International Justice (p. 49). Great Britain could be at war without the self-governing dominions or India being at war (p. 145, note 1). The editor-author's statement that "this is, of course, impossible as a matter of law" seems to have been impugned by the British Imperial Conference of December last. Moreover, non-members of the League, by accepting the jurisdiction of the Court, in accordance with Article 35 of the Statute and the Council Resolution of May 7, 1922, accept *inter alia* the implication that the British self-governing dominions are the peers of States.

With regard to arbitration and judicial settlement, likewise, there are several statements traceable to League zeal, made no doubt in perfect good faith. For instance, on page 41 it is said that the Permanent Court of Arbitration and the Permanent Court of International Justice "are at work side by side, and are likely so to continue, at any rate so long as there are States which are parties to the constitution of the Court of Arbitration which have not yet adopted the Statute of the Court of Justice—for the United States of America." And yet, on page 43 we find that "experience teaches that occasions may occur on which a court of arbitration feels itself free rather to give an award *ex aequo et bono*, which more or less pleases both parties, than to decide the conflict in a judicial manner." Moreover, arbitration is expressly provided for in the Locarno Pact. The date of the agreement between the United States and Holland to arbitrate the ownership of the Island of Miangas (more generally, however, called Palmas) before the Permanent Court of Arbitration is January 23, 1925,<sup>3</sup> not March 1926, as implied in the footnote 7 on page 41.

One of the editor-author's strictures against the Permanent Court of Arbitration, as contradistinguished from the Permanent Court of International Justice, is based on the fact that "there are in most cases different individuals acting as arbitrators, so that there is *no continuity* in the administration of justice" (pp. 43-44). It must not be forgotten, however, that *stare decisis* is not at all obligatory upon the Permanent Court of International Justice; in fact, by Article 59 of the Statute decisions have "no binding force except between the parties and in respect of that particular case." In view of this,

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<sup>3</sup> *Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage*, 25th year, p. 42.

how can such a court as the Permanent Court of International Justice "in each case consider itself bound by its former decisions," as stated on page 44. The editor-author answers this by saying (pp. 56-57) that "the habit of being influenced, consciously or unconsciously, by conclusions previously formed *in pari materia* is an inevitable mental process to which judges like others are subject." But this same psychology of *stare decisis* would not be without effect in the permanent Court of Arbitration even with its personnel changing.

It must also be remembered that the personnel of the Permanent Court of International Justice is subject to change in three ways: 1. New members elected to vacancies caused by death, resignation or failure to be re-elected; 2. Deputy members serving in place of regular members temporarily unable to serve; 3. National members in those cases where the parties at issue have not a permanent member on the Court. Furthermore, in the nineteen cases already referred to the Permanent Court of Arbitration, there have been thirty-six arbitrators, and of this number one-third have served in more than one case and over a sixth have served in four or more cases. The argument of "no continuity," therefore, is more apparent than real.

A serious omission, with regard to the Permanent Court of International Justice, occurs on page 50. No mention is made that the Permanent Court of International Justice was established by a separate protocol which has been ratified by only thirty-seven States out of sixty-nine States in the family of nations considered worthy by the Court of receiving communications concerning its activities, although a footnote on page 52 discloses the fact that sixteen have ratified the optional compulsory clause.

The reviewer is happy to note, in the bibliographies preceding the sections, the frequent citation of Grotius, Bynkershoek, Vattel and the other landmarks of the history of international law. Sometimes, quotations from these authorities find their way into the text. For instance, the opinion of Grotius, Bynkershoek and Vattel on neutrality, of Grotius and Vattel on armistices, of Grotius and Bynkershoek on contraband, of Grotius on the declaration of war, of Bynkershoek on intercourse during war, and of Vattel on reprisals. From a comparison of the Chapter on War in General with the corresponding portion of Grotius' *De Jure Belli ac Pacis* one is struck by the relatively little advance made, or should one say the far-sightedness of the founders, in the enunciation of fundamental principles. In fact, with regard to the illegality of war, which Oppenheim-McNair maintains (p. 114) is a necessary corollary from the sovereignty which States possess, Grotius (Book II, chapter ii) reaches the same conclusion but expresses it with words which are recovering their currency when he proves that war is not unlawful in the sense of being in conflict with either the law of nature or the law of nations.

Until comparatively recent times, modern treatises on international law have been devoted almost exclusively to customary or conventional law, disregarding the natural law of Grotius and his Spanish predecessors. But recent years have brought to the fore such phrases as "economic outlet," "expansion" and "open door," which express ideas very similar to those held, for

instance, by Franciscus de Victoria in the middle of the sixteenth century. And the World War has witnessed the attempt to extend the principles of customary law to unprecedented instrumentalities and situations, which can only be done by the light of right reason, or natural law. The editor-author of the present work has, consciously or unconsciously, felt this influence. On page 66, he says, of a particular matter which would take too long to detail here, that no legal obligation is expressed, "whatever the *moral* obligation may be." On page 101, he states that a certain incident, "apart from the *moral* issue, had raised certain questions of interpretation," etc. On page 132, "no *moral* or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was made." All of these statements imply that customary or conventional law is not sufficient alone to govern the relations between States, just as there is a place in municipal law for equity.

There are many other particular points which the reviewer would like to discuss, but they have no place in a general review such as this, especially where the questions involved are more or less moot. He hopes, however, that he has already said enough, either favorably or unfavorably, to whet the appetite of the reader to a more lengthy perusal of the book itself. For Professor McNair is to be congratulated in so successfully performing a very difficult task. "Oppenheim-McNair" will surely continue to be in the future, as "'Oppenheim' has in the past been for many readers the starting-point of an inquiry, either academical or practical" and all students of international law will look forward to the fourth edition of Volume I.

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STATEMENT OF OWNERSHIP, MANAGEMENT, CIRCULATION, ETC.

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