

BOOK REVIEWS

MEN AND MEASURES IN THE LAW. By Arthur T. Vanderbilt. Alfred A. Knopf, Inc., New York, 1949. Pp. 156. \$3.00.

This excellent volume is the collection of five lectures delivered by the Chief Justice of the Supreme Court of New Jersey. They were given at the University of Michigan in April, 1948, as the fourth in an annual series made possible by the William W. Cook Foundation.

The first two lectures are devoted to taking inventory, and at each point the author has a constructive idea or suggestion. He deplores the lack of interest shown generally by the profession in the proper drawing and indexing of legislation as well as in criminal law and public law, and emerges with the feeling that the history of American law can best be traced in terms of its great textbooks and that it is to the law schools that the profession must turn for guidance. He suggests that legislation, and the reporting of it, be constantly revised and consolidated, so that only the effective laws are kept alive and these recorded in a minimum of space.

In considering legal education, this appears: "The great objective is to teach the law as it is in books, as it is in fact, how it came to be as it is, and finally, as it ought to be." I am particularly happy to see the Chief Justice put considerable emphasis on constitutional history and on English language and literature as prerequisites to the study of law. I should add voice training, for I imagine that all judges are at one time or another appalled by the grunts, creaks, and other strange noises that issue from the average American throat, to say nothing of poor writing and bad grammar in briefs and arguments. A lawyer loses effectiveness by such things, and I cling to the notion, as the Chief Justice also appears to, that a man can be both a democrat and a gentleman.

The next section of the book deals with the growth of substantive law, here and in England, and is mainly historical. This is a tracing of important legislation and of the men who instigated it, such as Edward I, Bentham, our Founding Fathers, Wilson, and the two Roosevelts—and there is a fine bit about one of the author's favorites, Lord Mansfield.

The final sections appear under the title: "Procedure—The Stumbling Block," and begin with a statement whose truth lawyers are only too apt to forget: "Every law student knows that the basic principles of the common law have been evolved out of our procedural law." The author again traces the history of procedure here and in England, and it is startling to have recalled such facts as that the English had no court of criminal appeals until 1907, thirty-four years after the Judicature Act of 1873.

It is in his final lecture, continuing with procedure, that Chief Justice Vanderbilt sets forth his suggestions for a program. The first of them, which looks towards judges who are prompt and even-tempered, advocates a single trial court of general jurisdiction in which all judges would have equal term, rank, and salary, even though they specialize in such fields as crime and probate. Administrative supervision is approved and various methods of choosing jurors and of selecting judges on a basis of minimum political consideration, such as the New Jersey and Missouri plans, are discussed. I am especially pleased by the description of a judge as a

lawyer hired by the State to conduct its Court business—a sober statement that is a fair successor to what Montaigne said of a man in high position four centuries ago: “Perched on the loftiest throne in the world, he still sits on his own behind.”

He ends by saying that we need a new concept of procedure, since its defects account for most of the criticism of the legal system. Fewer technicalities, control of proceedings by the court prior to trial, the right of the judge to take a judicious hand in the trial, oral argument on appeal after the Court has informed itself about the case, improved draftsmanship and continuous revision of legislation are advocated in a spirit of conviction that they are possible and practicable. The Chief Justice has spent a lifetime of such effective effort in the profession that the authority of his advocacy of such advances in the law is compelling.

We are fortunate to have such a full and clear synopsis of his thought in the form of these published lectures.

Curtis Bok.†

FEAR, WAR AND THE BOMB. By P. M. S. Blackett. Whittlesey House, New York, 1949. Pp. vii, 244. \$3.50.*

“The dropping of the atomic bombs was not so much the last military act of the second World War, as the first major operation of the cold diplomatic war with Russia.” The master stroke of this diplomatic war, however, consisted of the Baruch proposals which were widely acclaimed as munificent but were in reality unworkable, inequitable, and hardly constituted a genuine attempt to reach agreement. The author of these views is not Pravda but P. M. S. Blackett, British nuclear physicist, member of the United Nations Atomic Energy Commission and Nobel Peace Prize winner for 1948.¹

The book is a brief—an analytical, beautifully constructed argument of enviable coherence and concinnous persuasion leading to a strong judgment against Western atomic policy. Although Blackett’s position stands in almost total dissent from the national policy and although much of the argument is, in effect, in extenuation of Russian conduct, his case is built without intemperance or ideological diatribe. The author has been spoken of as an apologist for Russia and he is, in fact, an “apologist,”—the word here being used descriptively rather than as an epithet, since this reviewer does not share the view that to be such an apologist is, *per se*, to be discredited. It would seem rather to depend upon the basis of the apology and whether such apology is selective or indiscriminate.

The salient points of Blackett’s argument follow this pattern: Mass bombing of cities, inaugurated in desperation by the RAF, was a sig-

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* Since the publication of this book, Russia has discovered the formula for construction of atomic bombs; this momentous event would appear to strengthen the author’s thesis.

1. Mr. Blackett’s career has included distinguished service in the Royal Navy in World War I, pioneer work in the measurement of cosmic rays, co-ordination of scientific research on anti-submarine devices in World War II, for which he received the American Medal of Merit, and the postulation of a formula equating magnetism and gravity. The latter achievement, if sustained, would mark him as a mathematician of Einsteinian rank.

nificant failure in World War II.² The atomic bomb is a weapon of indiscriminate mass destruction and, as such, it cannot, itself, win a war which would be a long, protracted conflict of all arms ranging over several continents.³ Impelled by this erroneous estimate of the atomic bomb as the absolute weapon (to be dropped on American cities now that it is available to Russia) and shaken by doubts as to the use of the first atomic bombs on Japan, the United States has been led to insist upon an air-tight, super-security system of control in which the United States must take no risks. Meanwhile Russia, unnerved by the surprise American use of the atomic bomb to forestall Russian participation in the Japanese surrender,⁴ sceptical of the military efficacy of mass strategic bombing, and without the means or the bases to carry it out, has, in the face of American bomb-rattling, considered the existing stocks of bombs in the United States as the primary menace to peace and has stubbornly insisted that the first step must be their destruction, after which, they promise, international survey, inspection and control can take place. The author finds this proposal equally unsatisfactory.

Granting that during the proceedings of the UNAEC, the Russians gave substantial ground in their position, the book undertakes no argument that the Russian plan was acceptable as it stood when negotiations broke down. However, he devotes his attention to the iniquities of the Baruch proposal.⁵ The core of the objection to this plan was the fact that it called for intensive inspection, aerial survey and mapping of the atomic energy and thorium and uranium resources of the nations as a prelude to any other steps. This was to be done by a UN commission not subject to the veto and on which, therefore, the United States would be assured of an easy majority. With the United States in possession of a number of bombs which it had shown itself willing to use and in posses-

2. Blackett relies heavily upon the UNITED STATES STRATEGIC BOMBING SURVEY to show the insignificant effect on war production of the mass destruction of cities by which it was hoped to dehouse and demoralize a large fraction of the German working-class population and thus cause a collapse of the war-effort. However, according to USSBS figures, as the total tonnage of bombs dropped rose from 15,000 in early 1941 to 450,000 in 1944, German production likewise rose from index 100 to index 280, the USSBS estimating that it would have been 330 without any bombing whatsoever. The very heavy Hamburg raids of July-August 1943 killed 60,000 people, destroyed one-third of all the houses, but, in the language of the USSBS, "Hamburg as an economic unit was not destroyed . . . in five months it had regained 80% of the former productivity . . ." See also FULLER, *THE SECOND WORLD WAR* (1949), not cited by Blackett, ". . . the mass bombing of German cities was the number one military blunder of World War II."

3. Long before the October unification hearings, Army and Navy (but not Air Force) thinking seemed to agree. Since the publication of the book, Hanson Baldwin and Walter Lippman, writing separate articles in *Atlantic Monthly*, August, 1949, emphatically join the growing group who minimize the decisive effects of strategic bombing. Possony, *Strategic Air Power for Dynamic Security*, *Infantry Journal*, July, 1949, estimates 6500 atomic bombs to destroy totally the cities of a major power, and 10,000 in the United States to achieve the "40,000,000 people in the first 24 hours" bogey of 1946.

4. Blackett makes a very convincing argument for the point that the bomb, dropped two days before the date on which Russia started her offensive against Japan in accordance with the schedule set at Yalta, was dropped on an utterly beaten nation whose surrender was a matter of weeks, whose invasion was not scheduled for two months but which was even then trying to surrender. The bomb was hurriedly dropped in order to avoid a struggle for authority in Japan and he points out the chagrin and hostility which the West would have felt had Russia so ended the war against Germany and occupied it exclusively while our armies were sweeping across France.

5. The origins of this plan are traced back through the ACHESON-LILIENTHAL REPORT (March 1946) and the FRANCK REPORT (June 1945), to its disadvantage.

sion of the bases and means of delivering them, this type of information, almost valueless to the Russians, would be of great importance to Western General Staffs. Then, when the Commission determined, without the veto, that the survey was complete *and* when "an adequate system of control is set up which will provide effective sanctions for violations," and then only, would Russia receive the benefit of the know-how and would the American stocks of bombs be destroyed. The War Department estimated this period as five years. After this, there would follow the licensing and *ownership* of the plants by the vetoless UNAEC on which Russia is a minority. Even after the American bombs were destroyed, the American Air Force would possess extensive data on Russian targets and the plants which produced them would still be in existence and fully tooled, while the Russians would have merely an increased knowledge of how to build them. Blackett points out that the bomb hysteria in America has led to an idea that the risk in atomic bombs outweighs the advantage in atomic power. In Russia, on the other hand, the possibilities of atomic power are more favorably regarded, probably because of her vastly inferior and costly position in the area of conventional power. As a result, even at the current cost per kilowatt of atomic power, its use might be profitable, though it would not be in the United States. Hence Russia's insistence on owning her own energy plants free of quota, albeit subject to inspection.

The Plan's insistence on the abolition of the veto in all matters concerning atomic energy reflects the waning concept that the bomb is an absolute weapon which can be used to impose the will of the majority of the UN upon a recalcitrant great power without a third world war. This Blackett denies.

We may well agree with Blackett that the problem is not separate but entire, involving the whole question of disarmament, as the Russians, whether in good or bad faith, have insisted, as against our contention that a perfect system for atomic control must come first.⁶ No system of control can be devised which does not rely to some extent on the faith of the parties in each other and, if trust is possible at all, it is clearly impossible on the same stage with both the B-36 and the Red Army.

One feels that Blackett's dissent from Western policy is more profound than a mere disagreement over the Baruch Plan, important as it may be. Impliedly, the book's viewpoint is one not in sympathy with the overall policy of containment by military threat. The obvious Russian answer, says the author, to the clearly expounded views of the American military on the strategic bombing of Russia is to insure by all means that her effective military frontiers are pushed as far as possible from the Russian homeland. Thus, the implicit threat of the big bomber and the bomb, aside from ideological dynamism, draws Russia outward in all directions. Blackett apparently feels, without explicitly so saying, that the Western reaction to this is in the nature of the protest:

"Cet animal est très méchant,
Quand on l'attaque, il se défend!"

Henry W. Sawyer, III.†

6. During Atlantic Pact discussions in July the President stated that after the signing of the Atlantic Pact he would lead a crusade for world peace but in reply to Senator Vandenburg's suggestion that he emphasize the nation's faith in disarmament, the President, in press conference, replied that when the international control of atomic energy was agreed to by all nations, discussions of disarmament could be held, but that any talks before then were impossible. N. Y. Times, July 12, 1949.

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FREEDOM OF INFORMATION. By Herbert Brucker. The Macmillan Co., New York, 1949. Pp. 307. \$4.00.

Members of the bar, newsmen, teachers, and critics of the media of information and communication will be keenly interested in this effective and scholarly evaluation.

The author, editor of the Hartford (Conn.) *Courant*, brings to bear his experience as a reporter on the Springfield (Mass.) *Union* and the New York *World*, and as an editor of *World's Work* and *Review of Reviews*. His background includes ten years as a journalism staff member at Columbia University, and more recently he was chief of the Media Division, and associate chief in the Bureau of Overseas Publications of the Office of War Information.

In *Freedom of Information*, Mr. Brucker builds up a powerful defense of the historic free-press concept. Wittily, pungently he stresses the merits of press freedom; yet he does not gloss over weaknesses that even the most slashing critics of journalistic morals have sometimes neglected. His theme is that the channels of world information (not simply American press freedom) must be open and free from distortion or suppression by government or state police control, so that they can serve as a check on government. Assisted by his studies, as well as by his experiences as teacher, newspaper and magazine worker and OWI chief, he lays bare the whole problem of freedom of information. He describes the enslavement of the press and radio in Nazi Germany and Communist Russia; and, in contrast, he explains how American advertising has helped to save our Fourth Estate from political subsidies and extreme domination—how it has made possible an unprecedented objectivity in the reporting of news.

A recent editorial in *Editor & Publisher* declares: "The status of Tass, sometimes called a 'news' agency is no longer left in doubt. A refugee Czech in London filed a libel suit against Tass. The Court of Appeals dismissed the complaint. Said the Court: the Russian ambassador himself testified Tass is an official organ of the Soviet government. Therefore it is entitled to full diplomatic immunity. . . . The Court said its (Tass') representatives are not primarily newsmen but are Soviet agents."

A United Press dispatch reports: "The State Department announced that the Chinese Communists have ordered the U. S. Information Service to close its offices, including the Voice of America in Shanghai and Hankow. George Allen, assistant secretary of state for public affairs, said: 'This is new and dramatic proof that the Communist dictatorship, like all other dictatorships, strikes out the free flow of information immediately upon seizing power.'"

A Moscow-dated story, syndicated by the New York *Times*, reports: "Ilya Ehrenburg, in an article written for *Izvestia*, attacked the American press as 'a gigantic lie, a swarming banality, a skyscraper of stupidity. They can daily contaminate millions of readers.'"

U. S. Senator Margaret Chase Smith writes: "Freedom of the press is one of the cornerstones of our American democracy. As long as those who write, interpret, edit and publish the news do not abuse that freedom, they will constitute one of our greatest bulwarks against Communism and any other 'ism' that seeks to destroy our way of life. Since the world and the people and events and conditions are largely what the newspapers report to us, the American press has an almost superhuman responsibility in conveying the truth to the public. Outside of our hometown, the rest

of the world to us is what the press tells us the world is. That is why I feel so strongly that we need news reported, interpreted, and edited in earthy, simple terms."

How free is the U. S. press under the Constitutional Bill of Rights? Does it monitor for its readers as it should—despite the trend toward local newspaper monopoly? What about the mistakes it makes? Can we tolerate censorship in a democratic society that regards as its basic premise the search for truth? Mr. Brucker examines these questions in the light of history.

What are the various "journalistic" channels of information? Mr. Brucker lists:

- (1) Background sources: education, environment, conversation, lectures, sermons, books, magazines.
- (2) Newspapers.
- (3) Public-opinion polls and communications research.
- (4) Radio.
- (5) Facsimile.
- (6) News photographs and picture magazines.
- (7) Motion pictures.
- (8) Television.

It may not be too much, Mr. Brucker writes, to hope that eventually the Fourth Estate will "be free from even emotional ties to any political party, any group interest, any social or economic class. It lives in a world of its own, turning restlessly inquisitive eyes on all the other estates of men. By virtue of being thus detached it serves the whole of society with unprejudiced testimony as to what is going on, and so helps us all to have in our minds at least a reasonable approximation of the real world we live in."

This new volume by the author of *The Changing American Newspaper* is a realistic, illuminating critique of a principle and an institution which affect the thought and action of all people everywhere. If this were not so, why should the UN General Assembly, in its fall session, seek ratification of the freedom-of-information treaty called "Convention on International Transmission of News and the Right of Correction"? Perhaps the answer is in John 8:32— "And ye shall know the truth, and the truth shall make you free."

Joseph C. Carter.†

LANGUAGE AND THE LAW. By Frederick A. Philbrick. The Macmillan Company, New York, 1949. Pp. 254. \$3.75.

The literature of American legal education has frequent references to the deficiencies of law school students, with respect to their ability to write intelligible English. Law school faculties have heard complaints from practitioners that their graduates are unable to compose documents which will stand analysis, which say no more or no less than their authors intend. It is a relief, therefore, to have at hand a book which indicates, by inferences at least, that the ordinary practitioner is not without flaw in the court room.

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At the same time, it is somewhat of a blow to professional pride that this critique of forensic skill should come, not from a member of the bar, but from a teacher of English. The shining stars of the forum have been content with providing spectacular performances: they have not analyzed in writing the methods which have so largely contributed to their success. It has been the task of Mr. Philbrick to point out the skills which are required to produce the desired results in the court room. As the title of the book indicates, Mr. Philbrick is concerned with words. He points out that the lawyer speaks to persuade. In elaborating upon this function, he emphasizes that it may be done by stating facts, expressing feelings or inducing moods. His analysis of situations in which one of these is the most advantageous and how it is developed bears careful study by the court room lawyer.

Mr. Philbrick is greatly interested in semantics. As a result of this interest he is able to demonstrate that choice of words, both in framing questions and in addressing the jury, is a paramount factor in success in the court room. He analyzes the language used by the most outstanding advocates and points out the reasons for their success.

The last half of the book consists of excerpts from four cases which involved the great lawyers of their day. These cases under the author's analysis show to what extent the great trial lawyers put into practice the principles advanced in the first half of the book.

This volume is in no sense a handbook on how to try a case. However, it should be of assistance to any trial lawyer who studies it and makes use of the principles in his court room appearances. The successful practitioner follows these principles intuitively. The others can gain knowledge from this book and, if this knowledge is applied, improve their court room performances. While this will not be an easy task, the way is shown. The bar should be grateful to Mr. Philbrick for this critique of court room forensics where words means so much.

Carroll C. Moreland.†

CASES ON TAXATION. Second Edition, 1949 Revision. By Paul W. Bruton.¹ American Casebook Series, West Publishing Co., St. Paul, 1949. Pp. xxv, 976. \$9.00.

If the legal profession needs evidence of what hardly a layman alive in industrial America would give a second thought—that taxation is one of the strongest economic influences of our lives and times—it may regard the fact that some of the leading law schools, including that of the University of Pennsylvania, have recently made its study compulsory. Perhaps the teaching branch of the profession generally recognized the point before this pioneer step was taken. If so, it will stand as a sign to those who practice and to those who are studying in the law schools of the nation with a view to entering practice. Among the things in life that bring people to lawyers' offices there is hardly one that does not have a fairly direct connection with taxes, be it adoption, bailment, contract, divorce or any other topic in the farther reaches of the law digest alphabet. And in this age when clients have so widely come to consult their

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counsel in advance of contemplated transactions the lawyer often has the opportunity, indeed the duty, to guide the client to the path of lowest taxes. As said by Judge Learned Hand "there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everyone does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands. . . ." ² Moreover, this is a matter which the lawyer cannot abandon to the accountant and the so-called tax expert for it has been held on good authority to consist of the practice of the law from which they are barred.³

This is all prologue to the main proposition of this review. This important subject can't be taught without good materials, to which Professor Bruton's latest revision is a valuable up-to-date contribution. It is at best a hard subject to teach in law school. It combines statutory and decisional matter in a manner the common-law student finds difficult. It frequently deals with transactions and affairs which are yet beyond his experience. Its potential scope is so broad that it is hard for the instructor to know what range to attempt. This is true even if nothing is essayed beyond the Federal field. But when the field of state and local taxes is considered it is found so terribly provincial as to offer little possibility for instruction in any school of interstate patronage.

From all of these standpoints Professor Bruton's latest revision measures up very well. Of course, he is not a novice at the task and he has had ample opportunity to observe the earlier edition of his casebook in classroom operation. He provides enough material to allow room for the instructor to arrange somewhat his own course. It is doubted that the whole book could be covered in a 60-hour course. It includes about 180 pages on general principles of state and local taxation plus a considerable amount of state inheritance, gift and income tax material interspersed among the cases on similar federal matters. Hence the instructor who wants to go beyond the federal field has the opportunity to do so.

The selection of cases for any casebook is a matter on which tastes differ, and it is easier for the reviewer to criticize the ones included than to think of possibly better ones omitted. One may wonder about the selection at page 208 of the *Carteret Academy*⁴ case as an illustration of the point that the exemption of charitable real estate does not depend on whether the owner is in form a nonprofit corporation. The much more recent Pennsylvania decision in the *Ogontz School*⁵ case might well have been substituted or at least mentioned in a note. Since space is at such a premium in a book in this field, radical deletions in reproduction of court opinions are necessary and desirable. Indeed, it would seem that the process might have been more thoroughly applied here. For example, about 35 of the total 47 lines on page 235 consist of cumulative citations for almost axiomatic propositions in an opinion of Chief Justice Stone.

It is hard to avoid some confusion in a casebook between the court's footnotes and the author's. The footnote on page 434 is the court's and therefore not up-to-date and does not show the further extensions of the time for tax-free release of powers of appointment. It might help in such instances if the author appropriately supplemented the court's notes. A feature which is probably new in casebooks on taxation is the inclusion

2. *Comm'r v. Newman*, 159 F. 2d 848, 850 (2d Cir. 1947) (dissenting opinion).

3. *New York County Lawyers' Association v. Bercu*, 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dept. 1948), *aff'd*, 299 N. Y. 728, 87 N. E. 2d 451 (1949).

4. 102 N. J. L. 525, 133 Atl. 886 (1926).

5. *Ogontz School Tax Exemption Case*, 361 Pa. 284, 65 A. 2d 150 (1949).

as an appendix of several specimen federal tax returns and other forms. The instructor will find these useful and convenient. However, considering this is a 1949 revision, why were the 1947 forms 1040 and 709 used instead of the later ones which would reflect the application of the Revenue Act of 1948?

The foregoing comments, of course, concern trifles and the best proof of the worth of this book lies in the fact that no items of consequence are found which could be treated unfavorably.

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- THE ROAD AHEAD. By John T. Flynn. Devin-Adair Co., New York, 1949. Pp. 160. \$2.50.