

## BOOK REVIEWS

THE MAKING OF THE CONSTITUTION. By Charles Warren. Little, Brown & Co., Boston, 1928. Pp. ix, 832.

When our law school was on Independence Square and we studied the Constitution within a few feet of the rooms in which it was framed, we could easily picture to ourselves the days when independence was declared, when Congress struggled on until it was stoned from the city and when Washington, Franklin and others spent the hot summer months in preparing a new scheme of government. Today the students have no such constantly inspiring surroundings. But we may still walk through Independence Hall; we may read the sketches which members of the Constitutional Convention wrote of their associates; and in the Library of Congress we may hold in our hands the manuscript of the elaborate notes which Madison wrote for posterity after each session of the Convention and see the enshrined Constitution itself. We may know the members of the Convention and their doings as well as we may know any gathering of men who have since passed to the unseen shore.

It is of that Convention that Warren writes. He tells us nothing of the origin of many of the provisions of the Constitution, such as the high-handed doings under Charles the Second which led to the passage of the habeas corpus act, an act which passed only because the tellers jestingly counted a fat lord as ten and failed to correct their figures; or such as the throwing of the Russian ambassador into jail for a private debt, an act which brought England to the verge of war and was expiated only when Queen Anne sent a warship to Russia with a message of apology; or such as the discussions in the Long Parliament which led it to claim the right to enact *ordinances* having the force of laws without the consent of the king, although *laws* would not be valid without such consent, a contention which our Constitution takes pains to meet. Many of the provisions of our Constitution originated long before the Convention assembled. But with those origins *The Making of the Constitution* does not deal. The story begins on Sunday, May 13, 1787, as definitely as another story of creation begins on the eve of a Sunday in the year 4004 B. C.

Day after day for four months the author takes us through the secret sessions of the Convention, telling us all that Madison, Yates, King and others recorded in their notes, giving us Washington's own account of the manner in which he spent his evenings and Sundays, quoting the guesses and comments of outsiders on the work which was going on behind closed doors, and, to a considerable extent, showing how the provisions which were drawn up during those months have fared in the courts. So full is his account that before we are through with it we share somewhat in the growing impatience of the delegates, and are quite ready for the farewell dinner and the homeward journeys. And yet only a few of these eight hundred pages might be omitted to advantage. Any one who wants a shorter story may well read Beck's vivid account of the framing of the Constitution and its ratification, or the small books of Schuyler and Farrand, which give us fewer details of the Convention but more of its

background. But Warren's chronicle will be quite useful to those who have mastered the shorter accounts and want to read Madison's story as helped out by the notes of other members of the Convention and by some references to the later history of the provisions which were framed in 1787.

The reader who is familiar with the period knows that the Articles of Confederation possessed more merits than are here attributed to them; that the book presents a merely one-sided statement of the contemporary attitude towards judicial control;<sup>1</sup> and that the members of the Convention were less representative than appears from the book; and that because of their attitude towards popular government, they devised a system which would quite possibly have been unworkable without the growth of party government which they did not contemplate. So also the author gives inadequate recognition to the legislative history of the country, as in his treatment of the making of appropriations for objects of public welfare which are not enumerated in the Constitution. Such appropriations have been made from the earliest times; without them it would be impossible to carry on the activities of the Department of Agriculture or most of the activities of the Department of Commerce; and except as to one recent law they have not been challenged in the courts. It was only when Congress attempted to save the lives of women and children by grants of money to the States under the maternity law that such appropriations were attacked in court. Fortunately for the country, nothing came of the attack and countless lives are still being saved each year by the very moderate expenditures of which the author disapproves.

Exceptions might also be taken to the author's treatment of some of the members of the Convention. For example, Gouverneur Morris, who spoke more frequently and more foolishly than any other member, who was a fluent speaker but a trickster according to his own statements and according to the testimony of more trustworthy witnesses, is treated with more respect than his usual opponent in the debates, George Mason, one of the country's ablest statesmen, a man who helped greatly in the framing of the Constitution, and whose merits are too often ignored because the decisions of the Convention in its last few days caused him to oppose the ratification of its work.

But while the book must be used with caution because it is less complete than may appear to an inexperienced reader, and because some of the opinions expressed in it seem not well founded, the author has gathered together a large amount of material which is valuable to any one who is seeking a detailed story of the Constitutional Convention. While this material is, in general, chronologically arranged, the author departs from this plan to very good advantage at times in order to present in one place the history of a provision which was discussed on more than one occasion. It is to be regretted that only five pages are given to indexing the eight hundred pages of text. The book goes into the history of the Convention in much more detail than any one would suppose from a glance at the index.

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<sup>1</sup> Cf. NEVINS, *THE AMERICAN STATES, 1775-1789* 168.

THE BUSINESS OF THE SUPREME COURT. By Felix Frankfurter and James M. Landis. The Macmillan Co., New York, 1927. Pp. ix, 349.

This book is noteworthy for its novel plan, its significant though small beginnings in the execution of such a plan, and its startling conclusions.

The plan is perhaps best stated in a footnote which deserves to be brought out to the light. "Our national history," say the authors, "will not have been adequately written until the history of our judicial systems can be adequately told through monograph studies of individual courts. . . . Nor shall we be able to know how our courts function until an effective system of judicial statistics becomes part of our tradition. . . . A very modest beginning has been made by Mr. Ernest Knaebel, the Reporter of the Supreme Court, in giving 'A Summary Statement of Business of the Supreme Court.' See *e. g.*, 265 U. S. 599. But a much more detailed analysis of the business of the Court is needed if we are to have what might be called a social audit of our political institutions comparable to the financial audit of our business institutions."<sup>1</sup>

The execution of the plan does not really include the statistical work that the authors put forward as desirable. The pages are, to be sure, replete with figures, but for the greater part of the period studied adequate figures are unavailable, and the available figures must have seemed to the authors hardly worthy of statistical handling. Thus, they make no "corrections" or adjustment in their figures of the growth of the Court's business by reference to the growth of population or the increase of jurisdictions or jurisdictional subjects, or the average pendency of a case, or the like. They take no cognizance of the lag in reaching the court of last resort of matters that have to go through long preliminary stages in court or out before they reach the Supreme Court. There are, to be sure, numerous indications in the book of what a statistician would have to read into or out of the figures before they could be expected to speak for themselves; but the statistical work has not been done, and the figures as they stand are likely to be misleading.

What the authors have done painstakingly is quite a different task. Essentially, their book up to the last chapter is a legislative history of the Supreme Court—a legislative history that includes bills not passed, agitations outside of Congress behind the inception of each bill and, incidentally and generally in the form of the arguments of the proponents and opponents of the bills, contemporary evidence as to the working of the Supreme Court both as a unit and as a part of the federal judicial system. Of course, such evidence is fragmentary. It talks more of the occasional failures of the system than of its normal workings. Furthermore, it talks more of external, impersonal matters than of those more intimate affairs into which legislation does not enter. For example, there is very little as to the actual organization of the Court, the manner in which it has at various times discussed cases and taken votes, and how the writing of opinions has been apportioned. Some of this information, although by no means all, could have been gathered from a study of the rules of the Court promulgated from time to time. But there

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<sup>1</sup>FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) 52.

is only one allusion to the rules of court,<sup>2</sup> and that has to do with the workings of the statutory Conference of Senior Circuit Judges which is interesting to the authors chiefly for its legislative proposals. But even the legislative history is not fully utilized; for example, the subject of judicial salaries—which certainly has not been devoid of interest or effect—is quite overlooked. Other types of evidence as to the workings of the Supreme Court, such as a study of the history of the Supreme Court Bar, the biographies of the Justices, the types of briefs filed and of arguments heard, the very different intellectual settings in which opinions have been written and the differences in the style and type of opinion resulting at different times, might have been used; but the authors apparently were determined to see what conclusions could be based on more purely objective evidence as to the business of the Supreme Court.

Out of the sources thus voluntarily limited through intensive use they have succeeded marvelously well in deriving a connected story—and possibly a moral, too. Again and again the growth of the country, the increase of wealth and business, the expansion of the federal powers, the increasing paternalism of our government, the increasing complexity of our civilization, and related causes have increased the work of the Supreme Court until its efficiency was threatened. Relief was demanded and tardily, grudgingly, given. Once it was the cutting down of circuit duties; now and then it was the addition of a judge; again, it was the shutting off or restricting of channels through which cases could come up for review. Each measure of relief has had in it something of a compromise, and each has been followed in turn by an avalanche of new business unforeseen at the time of the compromise. "Perhaps," say the authors, "the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction."<sup>3</sup> This factor has kept it capable of doing its work efficiently so as to be able to win and retain the confidence of the public. It would be foolish, however, to imagine that the problem of keeping it efficient is solved forever now that it has caught up with its schedule under the benign act of 1925 with its restricted obligatory review accompanied by a wide discretionary jurisdiction.

The authors turn in their last chapters to this problem of the future. "In future," they say, "when the Court's business expands, relief can hardly come from further contraction of the right to resort to the Court."<sup>4</sup> Instead they suggest a new analysis of law with an apportionment of such cases to the Supreme Court as will make it in the European sense (*i. e.*, questions of constitutionality and like matters of national importance) a tribunal for "public law" as distinguished from the staple business of the common law courts—in other words, they want the Supreme Court to be a sort of "Privy Council."

Such a radical departure from our judicial traditions may at first sight seem like a rather abrupt conclusion to an objective historical treatise on the business of the Supreme Court. But a second perusal suggests that the authors may have had such a conclusion in mind from the beginning and that

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<sup>2</sup> *Ibid.* 46.

<sup>3</sup> *Ibid.* 187.

<sup>4</sup> *Ibid.* 299.

there is something of the art of the advocate in withholding it until the end. The ground, coming to think of it, has been carefully prepared. The limitation of the work of the Court is first demonstrated to be a recurring necessity. The contraction of jurisdiction by the ordinary methods is shown to have reached its limit. As to practically all other proposals the authors have prepared the way to the declaration, "These proposals have been canvassed in the past and found wanting."<sup>5</sup> We are now ready for their constructive proposal, which is promptly softened by the assurance that the Supreme Court has already within the history recited ceased to be a common law court and that it has, itself, recognized in one way or another that its business is different from the "common run of litigation." It is now proposed that it be closed entirely to those whose rights happen to involve nothing outside of this "common run of litigation."

The authors have done a brilliant piece of work in making clear one of our major national problems. And the service rendered is none the less significant though some may regard their proposal not as a solution but as a warning of what might happen to our liberties if we relax in our eternal vigilance.

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THE ELEMENTS OF LAW, NATURAL AND POLITIC. By Thomas Hobbes. Edited with a preface and critical notes by Ferdinand Tönnies, Ph. D., to which are subjoined selected extracts from unprinted MSS. of Thomas Hobbes. University Press, Cambridge, 1928. Pp. xviii, 195.

The above work is one of the reprints which make up the Cambridge English Classics series, in which is included also an edition of Hobbes' *Leviathan*. It is a new impression of Mr. Tönnies' edition of 1889, which, published by Simpkin and Marshall, and largely destroyed in a warehouse fire, has been unobtainable for many years.

The story of the writing and publication of this book forms an interesting chapter in the bio-bibliography of Hobbes. Although not printed until 1650 and therefore not the first of his published works, it was written in 1640, and is consequently the earliest statement of a doctrine which was inherent in his three-fold system of philosophy and was the ground plan of his *Leviathan*. In 1637, Hobbes returned to England from his third sojourn on the Continent, and entered the family of the Earl of Devonshire. England was soon in a turmoil of political controversy over ship-money exactions and the Scottish Prayer-book. Charles, finally, in April, 1640, found it necessary to relinquish autocratic control and to call the Short Parliament. Seeing in that Parliament, says Hobbes, that the peace of the country and the safety of the king were endangered by attacks on the royal prerogative, he wrote "a little treatise in English," upon the power and rights of sovereignty, of which, "though not printed, many gentlemen had copies, which occasioned much talk of the author; and had not his majesty dissolved the Parliament, it had brought him into danger of his life." This "little treatise" was identified by Prof.

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<sup>5</sup> *Ibid.* 300.

Robertson and by Dr. Tönnies as *The Elements of Law*, the original manuscript of which is preserved in the Hardwick papers. The known copies of the original are enumerated by Dr. Tönnies in the preface to the reprint under review.

In 1650, Hobbes put into print two duodecimo works which have respectively the following titles:

- (1) *Human Nature: or the fundamental Elements of Policie; being a Discoverie of the Faculties, Acts and Passions of the Soul of Man, from their original causes, according to such philosophical principles as are not commonly known or asserted.*
- (2) *De Corpore Politico: or the Elements of Law, Moral and Politick, with Discourses upon several Heads; as the Law of Nature, Oathes and Covenants, Severall kind of Government; with the Changes and Revolutions of them.*

These two books were made up from the manuscript *Elements of Law* above described. *Human Nature* contains the first thirteen chapters of the first division of the original treatise. The remaining six chapters of that division stand as Part I of *De Corpore*. Part II corresponds with the original second division of the whole work. The book before us disregards these works of 1650 and restores the material to its original form of 1640.

Of a book, the content of which has been known and discussed since 1640, and which was printed in its present form in 1889, little need be said. But it is significant that at the present time, when the foundations of law are being re-examined, this book should be reprinted. It deals with those things upon which, so Hobbes thought, law is based, and devotes only one chapter of five pages to the technical subject of the nature and kinds of laws. Part I deals with men as natural persons, their faculties (sense, imagination, reasoning, speech, knowledge, opinion, belief, good and evil, honor and the passions), the condition of men in nature, natural laws, and the necessity of a body politic. Part II deals with the body politic, the kinds of government, sovereignty, religious freedom, rebellion and the duties of sovereigns.

His approach to his thesis was like that of the modernists, whatever one may say about the conclusions that he reached. He treated moral and social phenomena as a naturalist would, and paid practical attention to the guidance of human conduct. The object of his system was to gain power over things for human needs. There is a hint of behaviorism in his denial that speech came because man had reason, and in his assertion that "man became capable of reason because he invented speech."

The first part of this book, on *Human Nature*, which critics have declared to be the best of his compositions, justifies the remark of Pogson Smith that Hobbes' style is something quite unique in English literature. Certainly it holds one's interest as few seventeenth century treatises do.

The two pieces appended to the *Elements* have interest only to the student of the whole field of Hobbes' philosophy. They deal with his theories of motion and of optics.

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FOURTH ANNUAL REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, June 15, 1927-June 15, 1928. Publications of the Court, Series E-No. 4. A. W. Sijthoff's Publishing Co., Leyden, 1928. Pp. 548.

To those who are interested in the work of the so-called "World Court," but who have not the time or inclination to follow its documentary history or even the texts of its opinions and judgments, the Annual Reports afford a most valuable guide and reference book. They are prepared by the Registrar and, though they "in no way engage the Court," they are accurate and complete. The arrangement of materials follows a uniform plan. Chapter i generally deals largely with matters of personnel. Here one may find the names of the regular and *ad hoc* national judges; the composition of the Special Chambers; the list of Assessors; details of salaries and of the Court's premises. This year it also contains important material on the question of the diplomatic privileges and immunities of the members of the Court, a question which had been the cause of considerable friction with the Netherlands Government. The result has been the according to them of the usual privileges of diplomatic officials.

The second chapter deals with the Statute and Rules of the Court. Here one finds the list of States who support the Court—States popularly called "Members of the Court" though this term properly belongs to the judges. On June 15, 1928, fifty-two States had signed the Protocol of Signature of the Statute and of these, forty had ratified. Of the twelve which have not ratified, nine are Latin American States and another is Liberia; the adherence of the United States might influence action by these governments. Here also is to be found an important addition to Article 71 of the Rules of the Court whereby national judges are given a seat for advisory opinions as in contested cases. This marks one more step in the steady process of assimilating the procedure for advisory opinions to that in actual suits between States. The report of the Special Committee on this revision of the rules merits careful reading.

Chapter iii deals with the Court's jurisdiction. Here is an outline of the scope of the Court's activity. The picture is impressive. Twenty-seven pages are devoted to a listing of international treaties giving the Court jurisdiction; forty-seven new treaties of this type were concluded in the year ending in June, 1928, an excellent indication of the Court's increasing prestige. One also finds in this chapter details regarding the compulsory jurisdiction of the Court, including the status of the Optional Clause which has been signed by twenty-seven States. Data on the American Senate's reservations are also included here. Other chapters deal with the Court's finances and its publications, and include two chapters of Addenda to lists and materials appearing in the earlier reports.

Chapters iv and v are the most important to one who really wishes to evaluate the work of this international tribunal. These chapters contain summaries of the eighth, ninth, tenth, eleventh and twelfth judgments and of the fourteenth and fifteenth advisory opinions. The introduction to this chapter also notes four contested cases and one request for an advisory opinion referred to the Court but not disposed of when this report went to press. These include the Sino-Belgian dispute submitted by unilateral application under the Optional Clause—the first of such applications. This case has since been

disposed of by direct adjustment and the conclusion of a new treaty. The other three cases all involve France and relate to disputes with Switzerland, Brazil and Serbia. The last two involve the practical problems of payment of government bonds.

It is impossible here to go fully into the details of the cases disposed of by the Court in the twelve months covered by the Report, but a brief mention may indicate the type of problem which the nations of the world are adjusting through this judicial instrumentality.

Judgment No. 8 decided a dispute between Poland and Germany regarding the indemnity due for a German factory in Chorzow, Upper Silesia, which was taken over by the Polish Government. In a prior judgment the Court decided against the Polish contentions regarding the propriety of the expropriation. The new dispute involved the amount of indemnity claimed by Germany. The case was brought to the court by Germany under the compulsory jurisdiction clause of the German-Polish Geneva Convention of 1922. Poland filed a plea to the jurisdiction of the Court. This plea was overruled and the Court reserved the case for judgment on the merits. The judgment was adopted by ten votes to three. The German Government thereupon asked for an order granting interim protection, but this request was denied by the Court. The Eleventh Judgment was an interpretation of this and of the prior Judgment relating to the same facts.

Judgment No. 9 is in some respects the most noteworthy that the Court has rendered. Most of the cases referred to it have rested upon the particular terms of treaties; this case called for a decision on the basis of general principles of international law. The *Lotus* case, as it is called, involved a collision on the high seas between the French mail steamer *Lotus* and the Turkish collier, *Boz-Kourt*, resulting in the sinking of the latter and the death of eight Turks. The French officer in charge of the *Lotus* was arrested when he put into Constantinople, tried for manslaughter and found guilty. France contended that the Turkish courts had no jurisdiction in the premises. By special agreement the case was referred to the Permanent Court. A Turkish national judge *ad hoc* was appointed, thus making a bench of twelve judges. The judgment was adopted by the casting vote of the President of the Court, the votes being equally divided; in such a situation the President has two votes. The majority held that Turkey had violated no rule of international law in taking jurisdiction, the prevailing theory seeming to be that of the localization of the offense, *i. e.*, the taking effect of the crime on a Turkish ship which is assimilated to Turkish territory. Judge John Bassett Moore concurred in part of the majority opinion but dissented on other grounds. The six dissenting judges all delivered separate opinions, many of them being of great interest. The case demands the closest study by any one interested in general principles of international law and theories of state jurisdiction.

Judgment No. 10 involved the case of the Greek Mavrommatis concessions in Jerusalem, a case formerly twice before the Court under the Palestinian Mandate Treaty wherein Great Britain accepted the compulsory jurisdiction of the Court for certain matters concerning the mandate. In this third appearance of the case, the British plea to the jurisdiction was sustained by seven votes to four.

Judgment No. 12 was also a dispute between Germany and Poland, this time involving a controversy regarding German minority schools in Polish

Upper Silesia. Poland again pleaded to the jurisdiction and was again overruled. On the merits, the judgment, which was adopted by eight votes to four, in general, supports the Polish contentions.

The fourteenth Advisory Opinion related to the jurisdiction of the European Commission of the Danube, while the fifteenth concerns the jurisdiction of the Courts of Danzig. The former case, especially, was of great importance to Europe generally. The latter opinion was delivered unanimously and from the former, only the Roumanian Deputy-Judge, M. Negulesco, dissented.

It is impossible to do more here than to indicate, by what precedes, the extent and utility of the work of the Court. It is fortunate that the Court has had the advantage of the services of so able a person as M. Hammar-skjöld, who has been Registrar since it came into existence. Not only the excellent Annual Reports, but the whole notable documentation of the Court may be attributed to him.

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AIRCRAFT LAW MADE PLAIN. By George W. Logan. Von Hoffman Press, St. Louis, 1928. Pp. 155.

Many of us are interested in aeronautics. Most of us are interested in aviation. All of us are interested in flyers and flying. Newspapers and magazines present all kinds of aviation activities. Law reviews and legal periodicals contain many articles on the legal aspects of this most recent development. All of these articles, however, tend to be somewhat philosophical or highly theoretical. There was an opening for a more popular treatise.

After having read, as he states, "every printed word on the subject which could be found," Mr. Logan, of the St. Louis Bar, has presented a most interesting and compact volume written in a pleasant and easy style. Although "written especially for those interested in aviation as prospective craft owners, operators, investors and students," the book should be a worth-while addition to any law library.

Each chapter heading is a question which is answered by the text, supported by citation of authorities in the foot notes. These are: Where may I fly? Who may regulate me or my plane? What are my liabilities? What effect will riding in or operating an airplane have on my insurance? Where will cases be tried arising out of air crimes, air-made contracts, wills, marriages, etc.?

All questions are answered logically, reasonably and courageously. Due deference is given the legal writings, maxims and leading cases; but where modern development and present day circumstances makes agreement unreasonable, the author does not follow blindly or attempt to reconcile. For example, in answer to "What are my liabilities?" it is stated, "You are liable as operator, or as owner, for all damages done to persons or property on the ground irrespective of your negligence, unless the accident was due to the negligence of the injured person" with a footnote stating that, "This is legal heresy, a new theory."

The stimulating originality of the volume, its courageous disregard of

settled legal formalisms, when they appear unreasonable, and its ground work of common sense are best illustrated by some additional quotations and some excerpts from the text. "The application of the [*ad coelum*] maxim has been exaggerated; it was not intended to fly that high." As "lawyers, like night watchmen prefer to do no more work than necessary," the practical difficulties incidental to preparing and conducting suits against the owners and operators of individual aircraft will lead to a rule of law imposing liabilities for nuisance, if the facts so warrant, upon the owners or operators of the airport from which the individuals fly. "The writer joins with Dean Bogert of the Cornell Law School in his opinion that a federal act, taking exclusive jurisdiction over *all* aviation, would be sustained by the United States Supreme Court." It is to be regretted that the United States has not entered into the Air Convention of 1919 with the twenty-two nations that have adopted it. As to liability for collision between airplanes or aircraft, the common law rule is preferable to the admiralty rule where, each being negligent, the loss is evenly divided. "In spite of this weight of authority, it still seems that the word 'participating' (in insurance policies) will not long remain sufficient to include persons riding as passengers only." The words *hazardous*, *dangerous* and *participating* as used in insurance policies and applications "are likely to assume a different and less serious definition as transportation by airplane widens its scope and appeal." "As one author has said, the air ship opens a new field for crimes and a new field for criminal law." "A hydroplane apparently is neither fish nor fowl," being subject to common law rules at times and to admiralty jurisdiction at other times. "If a word of advice may be pardoned, it would be suggested that an airplane is no place in which to execute a contract. For a while, at least, it might be well to forego novel experiences in contract making and have them drawn with time and care and caution on the ground," "marriages, like contracts, should be entered into on the ground."

The volume ends with a digest of the *Air Commerce Act of 1926*, the *Uniform State Law of Aeronautics*, and digests of the statute law of the several states pertaining to aeronautics.

Perhaps the title, *Aircraft Law Made Plain*, may prejudice some lawyers. So also flyers may object to the use of "aeroplane" instead of the correct and modern term "airplane," to "hydroplane" for "seaplane" and may also point out that there are "pilots" but no "operators" of aircraft. But the book is quite different from the pamphlets on "Wills," "Real Estate," etc., occasionally compiled and distributed by trust and insurance companies for the benefit of the public. As well as being pleasing, and of value, to any person interested in the operation of aircraft, it should possess the same attributes for the lawyer, for the former, after reading it, will be more likely to consult the latter than he would have been before so doing.

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Harold F. Mook.

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1928. Oxford University Press, New York, 1928. Pp. 248.

Timeliness of the matter treated in the *British Year Book of International Law, 1928*, is its most outstanding feature, and its clarity and thoroughness of treatment are also quite impressive. In these respects it is like most of its

eight predecessors. The reviewer well remembers his impression of the first issue of this series of books, published in 1920. In was lying on the library table of Admiral Stockton, himself an authority on international law. The reviewer had then but lately returned to civil life from service in the Navy which had brought him into touch with the conveying of the belligerent merchant ships at sea, with neutral ships and commerce, and with their legal rights and duties. The feeling then current was that international law had broken down, that old customs long thought to be fixed had fallen before the new tools and new ways of warfare. International law as a bulwark of civilization was regarded as a broken reed rather than as a sure foundation.

In that frame of mind the reviewer picked up the *British Year Book of International Law, 1920-21* and read about British Prize Courts and the War, Submarine Warfare, The Peace Treaty in its Effects on Private Property, and the Legal Position of Merchantmen in Foreign Ports and National Waters, and as he read these clear statements of the rules of law he remembered, as clearly as he did the boatswain's pipe, how scrupulously all the rules of international law had been observed on board the ships on which he had served during the war, and how, when a breach of the law was charged against one nation or another, that nation had taken particular pains to justify itself by the very law which it had been accused of breaking. Before one can say that the law has broken down, one must know what the law is. The thought is made clear in the introduction to that first volume:

"The war has left in the minds of many people the belief that international law is a thing of the past, and therefore it behoves all those who believe that it is still a living force to work for that 'firm establishment of the understandings of international law as the actual rule of conduct among Government' . . . as a means of achieving international peace and security."

All the articles in that first volume were very timely in that they dealt with the law in cases where men were doubtful whether the law had not been disregarded, if not wholly cast aside, and they were attempts to show what the law is.

The present volume is equally timely in also dealing with the law involved in present-day questions of importance. For instance, everyone knows of the recent failure of Great Britain and the United States to agree upon the basis of limitation of naval armament. The wedge which split them was the question of the rights and the duties of neutrals. The same subject prevented agreement as to privateers in 1856. The same subject led to difficulties between Great Britain and the United States in 1915-16. And the current Year Book deals with various phases of the same question in articles upon Neutral Commerce in the War of the Spanish Succession, The Treatment of Mails in Time of War and The Pre-War Theory of Neutrality.

Another current matter is raised by recent legislation in the United States providing for the return to former alien enemy owners of certain property taken from them by the alien property custodian during the war. Judge John Bassett Moore in his *International Law and Some Current Illusions* refers to a rule of law to the effect that the private property of alien enemies may not be confiscated but must be returned. On this side of the

Atlantic that rule has been generally respected. After the Great War, however, alien private property was taken by European states by way of reparation for war losses. A decision by Chief Justice Marshall in the early history of America,<sup>1</sup> sustains that right as inherent in a sovereign government. Whether it is better to invite foreign investment by respecting private property even in wartime, or to make good, out of alien property, losses sustained in a war against such aliens, is a question of policy on which there is room for difference of opinion. What the law should be is open for discussion. But what is the existing rule? Once it is ascertained, discussion upon its amendment becomes more helpful. The article upon this subject in *The British Year Book of International Law*, International Law and the Property of Aliens, stays properly within its field in examining the authorities and principles and in stating what the rule is.

There is still another instance of timeliness. At this writing there is a treaty being discussed in the United States Senate, and many Americans are wondering whether the conduct of our foreign relations is not seriously hampered by the "intervention" of that branch of the legislature. The current *Year Book* has a very illuminating article, When Do British Treaties Involve Legislation, which shows a tendency on the part of the British Parliament to come closer to the American practice.

This is not a book for one in search of general information upon foreign relations and foreign policy. It is a law book for those who wish to study the rules of law as applied between nations. And the rules of law discussed are rules applicable to present problems still unsettled. The attainment of the "firm establishment of the understandings of international law" is made much more probable by the existence of this volume and its eight predecessors.

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THE LAW OF BUILDING AND USE RESTRICTIONS IN PENNSYLVANIA. By Spencer Ervin. Clark Boardman Co., Ltd., New York, 1928. Pp. xlv, 362.

The law of building and use restrictions has grown up in comparatively recent times, and is still in a formative state. Yet with the great diffusion of wealth in the United States since the war, restrictions have been imposed upon almost every piece of land that has been put into use for urban and suburban residence. Ground developers and home buyers seek restrictions constantly broader and more inclusive. At the same time, and for the same reason, neighborhoods change more and more speedily and restrictions then tend to become clogs rather than benefits, and their removal or avoidance becomes a problem. It seems likely, under such circumstances, that the law will develop very rapidly, and like all creatures developed over-quickly, will, unless carefully guided, become misshapen, and full of almost ineradicable deformities. The necessary guidance must come primarily, of course, from enlightened courts. The necessary enlightenment cannot be obtained from the decided cases, viewed merely as precedents, nor from an encyclopedic digest of such cases.

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<sup>1</sup> Brown v. U. S., 8 Cranch 110 (U. S. 1814).

Mr. Ervin, in his preface, indicates a purpose to supply this lack for this state; to point out to the bench and bar the problems which are arising in connection with this development, and the underlying theories upon which they should be solved.

Such an ambitious attempt, to be effective, must of course be based upon a thorough analysis of the decided cases. This the author realizes, and his discussions of the cases both from the Pennsylvania courts and those of other jurisdictions are illuminating. To the real meaning of these decisions must be added the inferences to be drawn from them, or logically derived from them. In drawing these inferences the author has sought outside assistance only from the Law Reviews. Not the least valuable feature of the work is the copious citation of articles and notes from the Reviews. From these materials has been constructed a complete view of the subject of building and use restrictions from which certain deformities in the present law are apparent and certain unfortunate tendencies indicated. The obvious criticism, that an effort definitely to mark boundaries in advance has a tendency to strait-jacket the law, while just when applied to judicial decisions or to restatements of the law, seems unjust to a treatise such as this one, for such a work is valuable in proportion as it points the definite line.

A treatise, unlike most other law books, should be capable of being read as a whole. Mr. Ervin's book easily meets this requirement. For this purpose it is perhaps overburdened with long discussions of certain possible but practically unused methods of creating restrictions. But, this obstacle surmounted, the reader will find many interesting discussions, shot through with common sense. Particularly suggestive are the discussions of auxiliary use and companionate use, of the entire subject of the availability of the benefit of restrictions, of inaction as a defence to enforcement, and of the validity of restrictions against transfer to or occupancy by persons of a specified race or religion, as affected by the interaction of the rule against restraints upon alienation and the Fourteenth Amendment to the Federal Constitution. The latter is perhaps the most significant subject discussed, and throws grave doubt upon the generally assumed validity of such restrictions.

Among the chief merits of the work from the view point of the practitioner are several summaries of the law, and certain forms and valuable suggestions for drafting restrictions.

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EXPLANATORY OUTLINE OF THE FUNCTIONS AND REQUIREMENTS OF BANKERS, TRUSTEES, REGISTRARS, TRANSFER AGENTS AND LAWYERS IN CONNECTION WITH THE ISSUE OF INVESTMENT SECURITIES. By William D. Eaton. Financial Publishing Co., Boston, 1928. Pp. 67.

There is an increasing multitude of details requiring attention in this present day in connection with the issue of investment securities. At the same time the demand is becoming more insistent for rapid action in the planning and launching of such issues. However broad an experience the banker or broker may have had with work of this character, there is always present the necessity of devoting much time to the examination of the conditions re-

lating to each particular issue in order that no important detail may be overlooked. Sufficient time for such careful planning and examination is not easily obtained in the hurry of a business day. A number of excellent books dealing with corporate financing and corporate trusts are available and are a great help in obtaining a comprehensive understanding of the subject and in supplementing the personal experience of those having charge of some phase of the work. Such books, however, are not readily adaptable either to the rapid planning of investment issues or to the subsequent checking up of the numerous items requiring attention. It is an important requisite of those jointly engaged in such work that there should be quick and intelligent co-operation among them to complete the work in the least possible time and with an assurance of accuracy. It is evident that each member of the several groups should bring to the subject a ready comprehension not only of his own work but also of the other groups concerned.

The considerations mentioned should assure a welcome to Mr. Eaton's booklet outlining and summarizing the functions and requirements of those occupied with such tasks. The booklet, in its introductory chapter, calls attention to the general scope and purpose of the outline with reference to the respective functions of each of the agencies involved, and points out the necessity of a clear understanding by each group of the functions and requirements of the other groups so that their work may be properly co-ordinated and helpful co-operation obtained. After outlining the facts to be determined generally, there are separate chapters detailing the requirements of each of the groups concerned in the issuance of the various forms of securities. Under each chapter there are divisions and subdivisions treating the subjects in their logical sequence. A special chapter treats briefly of the issuance of securities in corporate readjustments and reorganizations. The outline concludes with summaries comprising an advance check list of action to be taken and relevant facts and a closing check list.

No doubt each of those whose business it is to participate in work of this character has in some form or other made up or adopted a list or outline from which to check off compliance with the requirements. It is likely, however, that the booklet here reviewed treats the subject in a more thorough manner and may be used to advantage either by itself or in conjunction with such other lists. The use of Mr. Eaton's outline would be helpful as a chart or plan in preparing and carrying to completion the various details involved in the issuance of new securities. When so used the reviewer suggests that additional saving of time could be obtained by further subdividing the subject in one or more of several ways as, for example, by treating stock issues alone in one outline and issues of corporate obligations in another, or by the use of one outline to cover secured obligations and another to cover those which are unsecured. Although this would involve the repetition of details common to all issues it would also serve to eliminate a number of items not requiring attention in the issues separately treated so that the information necessary in any particular issue under examination would be more quickly available.

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PRINCIPLES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE GERMAN NATIONAL REPUBLIC. By Johannes Mattern, Ph. D. The Johns Hopkins Press, Baltimore, 1928. Pp. xv, 682.

The Johns Hopkins University could not have better celebrated the fiftieth year of its existence than by publishing this book, an elaboration of lectures which Dr. Mattern delivered at the University during the winter semester of 1924-1925. I wish he had said *Law* instead of *Jurisprudence*, because he means *law*, and I, for one, was misled by his title; but there is little else with which the most inveterate disposition to carp could find fault in this solid, serious and exhaustive presentation of one of the most important developments of modern public law.

The German Republic was born in war and revolution. There were many voices then—there are many now—which declared the offspring not to be viable. The breach between the old order and the new was enormous, far greater than we ordinarily realize. The German Empire of 1871 was something unique. The special conditions of its development, fully set forth in this volume, produced a type of government which was not in any proper sense a parliamentary scheme, although many externals of parliamentary government were present. Nor in spite of its federal character, was it in its functioning and regulation more than superficially like other federal organizations such as the United States or Switzerland. So, when the Weimar constitution created a system which in its political machinery was essentially like that of England and France, and which equally bore unmistakable evidence of American influence, it could reasonably be asserted, as the eminent Romanist, Otto Lenel, did,<sup>1</sup> that neither the parliamentary model of England nor the party model of the United States had any roots in Germany.

And yet, wide as the chasm was which the year 1919 created for German Constitutional growth, Dr. Mattern rightly emphasizes the continuity of that growth. This is a matter of no small moment and makes possible an adaptation of the new order to German predispositions, the very predispositions Lenel sought for and declared lacking. To be sure, to create a conceptual pattern for this adaptation often demands no slight logical ingenuity, but fortunately for the author and for Germany, this ingenuity has been amply exercised for generations. If it is a question of formulas that can be scientifically interrelated, there is nothing essentially new in the newer formulas. So, for example, a half dozen principalities in Central Germany were in 1919 amalgamated into a new state, Thuringia, which again is a creation of a larger state—the German Reich—of which the old principalities formed a part just as the new one continues to do. This is complex enough for incurable dialecticians, but after all no more complex than the formulas which pre-war orthodox publicists created to express the vicissitudes of, let us say, the duchy of Lauenburg, once independent, then a part of Brunswick in 1689, of Hanover in 1705, of Westphalia in 1807, of France in 1810, of Denmark in 1815, which was jointly governed by Austria and Prussia in 1864, in 1865 was bound to Prussia by a personal identity, its sovereigns, and finally was annexed by Prussia in 1876. This omits some minor vibrations of sovereignty. A public law that has survived problems of this sort, must have developed a technique which is not easily daunted by revolutions.

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<sup>1</sup> LENEL, DAS AMERIKANISCHE REGIERUNGSSYSTEM (Strassb. Wiss. Gesellschaft, Heidelberg, n. f. 1922) 20.

But it is the newer problems of Germany which form the real subject of the volume. They were complicated by political disturbances of the most serious character—rebellion, threats of secession, coups d'etat, foreign pressure and a disastrous economic crisis. Germany is not, even now, living under peace conditions. But it is more and more approaching those conditions, and when Dr. Mattern wrote, the course which German constitutional law seems to be taking was already indicated. Inevitably American experience will be repeated to some degree. But it is not in the least likely that the most difficult of our constitutional problems will present themselves with anything like the same force to German officials. Economic and personal regulation is a simpler and more familiar matter to Germans than to us.

The task of delimiting powers and adjusting conflicts in administrative and legislative machinery will loom largest for the present, and they are fully discussed in this book. It remains to be seen whether or not the Reichsgericht will develop to the full its almost inevitable function of umpiring these conflicts. Unmistakable steps have already been taken in this direction.<sup>2</sup> But the larger questions will probably not arise fully until a situation of complete economic readjustment has been reached. Those large questions concern the disintegrating impulse presented by Bavarian nationalism, by the renewed Kulturkampf in connection with education and by the tendency to syndicalism on the part of the trade unions. But there is no reason to believe that these cannot all be solved within the present constitutional framework.

One of the most interesting experiments is that of the introduction of the referendum on a scale certainly unprecedented in history. Dr. Mattern gives us a full account of it in his chapter xii, which is an expansion of an older study, issued by the Johns Hopkins Press in 1920. And in setting forth the most notable instance of a referendum, that of 1926, concerning the expropriation of the former German princes, he presents a curious illustration of the principle that political devices can always be met by other devices. In order to avoid the enactment of important laws by a handful of voters, it was provided that a general referendum shall be lost if the total number of votes cast should be less than half the number of duly qualified voters. The qualified voters in the referendum of 1926 numbered 39,686,848. Under normal circumstances, even in elections which engage public interest, it is rare that more than two-thirds of possible electors participate. Now, in this election, the Monarchical supporters, foreseeing defeat at the polls, resorted to the simple device of deliberately abstaining, and a campaign was conducted in the press to that effect. The result was that fourteen and a half million votes were cast for the bill and only a half million against it. The total was less than half and the measure was lost. If the Conservative elements had mustered their full strength, they might perhaps have cast ten million votes against it, which would have been a distinct minority, but nevertheless would have brought up the total to far above the half required. That a piece of democratic machinery could be utilized by a minority to defeat the will of the majority is a bit of political irony with which we are not unacquainted, and speaks well for the ingenuity of German politicians.

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<sup>2</sup> Cf. FRITZ FRIES, *DIE RICHTERLICHE NACHPRÜFUNG* (Erlangen 1926); LUDWIG ADAMOWICZ, *PRÜFUNG DER GESETZE* (Wiener Staats. Stud. 1924).