

BOOK REVIEWS

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1929. Oxford University Press, pp. 338.

This annual publication, under the distinguished editorship of Professor Pearce Higgins of Cambridge and Professor Brierly of Oxford, is now in its tenth year. The present volume fortunately contains an index to the first ten volumes of the series. Sir Cecil Hurst, now a Judge of the Permanent Court of International Justice, discusses the modern developments requiring a new approach to the subject of Diplomatic Immunities. Though the question involved in *Engelke v. Musmann* was a narrow one, it reached the House of Lords, placing the final decision as to the right to immunity within the control of the executive department. With this result Sir Cecil agrees, but he rightly draws attention to the great number of persons, such as officials of the League of Nations and members of arbitral tribunals, who are strictly not entitled to diplomatic immunity under accepted rules, but who ought to be so recognized in the interests of international cooperation and peace.

Mr. Alexander P. Fachiri discusses the vexed question of the international responsibility for States for the expropriation of the property of aliens without full compensation, in the absence of discrimination or a denial of justice. The cases and principles discussed have particular interest in view of the diplomatic conference called to meet at the Hague this year to codify this branch of international law. "Extraterritoriality in China" is the subject of a paper by Sir Skinner Turner, late Judge of the British Supreme Court for China. He seems to be in substantial agreement with our own Strawn committee that the abolition of extraterritoriality should await the establishment of a stable government, an independent judiciary and the interpretation of the new codes free from political and military interference. The article may be profitably read in connection with that of Mr. George W. Keeton on the doctrine of the clause *rebus sic stantibus* as applied to certain Chinese treaties. Mr. Keeton is the author of a recent work on the history of extraterritorial jurisdiction in China. Professor H. A. Smith of the University of London supports the liability of the United States Government under international-law principles for the damage caused to Canada by the diversion of the waters of the Great Lakes into the Chicago Drainage Canal. His views seem to have received support from Secretary Stimson in 1913 while Secretary of War, but his action was later reversed by Mr. Weeks. Curiously enough, the Canadian view is almost identical with that of New York and other Eastern States affected by the diversion, now suing before the United States Supreme Court. International law is thus called upon to protect the interests of constituent States at the same time as that of a foreign country. Indeed, in another article in the Year Book, Mr. Lauterpacht of the London School of Economics and Political Science deals with the very question of "Decisions of Municipal Courts as a Source of International Law." The writer insists that a state may not be at liberty to modify, to the detriment of other states, the law embodied

in the pronouncements of its highest courts. The decisions of our Supreme Court have always been of the highest importance in determining international law as recognized by the United States. But Phillimore's doctrine of the binding force of judicial decisions as against the political department of the same government has not always gained acceptance before arbitral tribunals.

Among contributions by American writers to the present volume may be mentioned Professor Hyde's article on "The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes" and Professor Garner's article on "International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice." Professor Garner breaks into new ground in demanding that verdicts of juries against the rights of aliens, when such verdicts are manifestly or notoriously unjust, should be deemed the basis of claims by foreign governments on the ground of denial of justice. He maintains that there is no good reason for distinguishing between a wrong resulting from the decision of a judge and one resulting from the verdict of a jury. Ordinarily, a complainant is required to exhaust all remedies by appeal before claiming a denial of justice; so that in most cases, it will be a refusal of a court to correct the verdict which will be the ground of an international claim. There is however a class of cases where the wrongful acquittal of one charged with a crime against an alien constitutes the basis of complaint. Professor Garner mentions several recent cases of this nature occurring in European countries, and the claims presented against the United States by Italy following the New Orleans riots of the early nineties come within this category.

The Year Book as a whole presents an excellent cross section of intellectual activity in the year of grace 1929 directed toward the application, development and progress of international law.

Arthur K. Kuhn.

New York.

EDWARD COKE: ORACLE OF THE LAW. By Hastings Lyon and Herman Block. Boston and New York: Houghton Mifflin Company, The Riverside Press, Cambridge, 1929. Pp. viii, 385.

The general scope of this biography is indicated by the descriptive subtitle, "the story of his Long Rivalry with Francis Bacon: Some account of their times and contemporaries: Famous Trials in which Coke Participated: His stand against James I to maintain the supremacy of the Common Law: His Share in Wresting the Petition of Right from King Charles I: to which is added A Statement about the Law Writings of Coke on which Generations of Lawyers were Trained." Although the authors are members of the bar they cautiously do not go far afield into legal intricacies and deal with much else besides Coke the lawyer and judge. Hence the exhaustive study of the rugged prodigy who has played such a striking part in English and Anglo-American legal development still remains a desideratum. What we have here is rather an account of Coke's chief activities interwoven with

an historical background and with sketches of the stirring episodes of the Elizabethan and Jacobean period with which he was more or less concerned.

The authors appear to be decidedly well-informed, and, though occasionally straining for effect, write pleasantly and vividly. One acquainted with the era will add but little to his stock of knowledge; for example the familiar stories of Essex of Raleigh, and of the Gunpowder Plot bulk large in the narrative. Apparently the authors believe with the late Senator Beveridge that for the benefit of the general reader even the better known incidents should not be dismissed with a mere allusion. In our restless age, when most folk prefer to look and listen rather than to read and meditate for any length of time few have leisure or inclination to study about prohibitions, *praemunire*, *post-nati*, *commendams*, Peacham's case, and what not, as set forth in the substantial volumes of Gardiner and Holdsworth. Those who are mildly curious about such matters should be grateful to Messrs. Lyon and Block for serving them in agreeably digested form. In addition they may catch glimpses of sixteenth century London, of the picturesque system of legal education then in vogue at the Inns of Court, and of the terrifying legal procedure which the troublous times and the weakness of the central government necessitated.

The story is divided into five books—the Boy; the Lawyer; the Judge; the Patriot; and the Writer—each introduced by an apposite quotation from Coke's own works. Even in the book on "the Judge" over a third of the seventy odd pages is devoted to the spicy Essex divorce and Oberbury murder, while an appreciable amount of space in "the Patriot" is allotted to a stormy episode in the tough old jurist's family affairs. Also, ten of the twenty pages reserved for "the Writer" are occupied with an outline of earlier legal literature, leaving space for only the scantiest estimates of Coke's own writings, though, as far as they go, these estimates are sound. The celebrated Bonham's case is disposed of in a few lines and is not mentioned in the index. Shelley's case, in which Coke appeared as a young man, is relegated to an appendix, where, however, it is explained as clearly as its involved nature will permit. Some will recall the famous legal pleasantry of Shelley, "a miserable ghost" in the lower regions where he had been sentenced "to read and understand all the decisions and books relating to the celebrated rule laid down in his own case."

It is interesting to observe that Coke's alleged repartee to James I, anent the King's relation to the law, which Professor R. G. Usher pronounces apocryphal, is discreetly omitted. In the opinion of the reviewer two points should be stressed: that Coke on occasion damaged a good case by strained technicalities, and that his "patriotism" was due to his jealous defense of the common law. Actual slips are refreshingly rare: "Duke" of Westmoreland (p. 47) should be "Earl"; apparently Sir Thomas is confused with Sir Ralph Sadler (p. 109); it might have been stated (p. 270) that Raleigh's *History of the World* only reached 130 B. C.; it is scarcely correct to call Sebastian Brant's *Ship of Fools* "a book of the time," since it was published in 1494; one would hardly say that a writ of right issued out of a Lord's Court (p. 336); and the title assigned to Bracton's notable treatise (p. 337) is that usually given to the work attributed to Glanvill.

Arthur Lyon Cross.

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DELAWARE CORPORATIONS AND RECEIVERSHIPS. By Josiah Marvel. (Fourth Edition.) Corporation Service Company, Wilmington, 1929. Pp. xxxvi, 343.

The first part of this book is an annotated edition of Article IX of the Constitution of Delaware, the General Corporation Law as amended in 1929, and the Franchise Tax Law. The latter portion consists of the statutes, and rules of the court of chancery, relative to receiverships, with a digest of decisions.

The annotations are not at all analytical or constructive, but consist merely of a collection, under each provision of the law, of more or less pertinent decisions with a terse statement of their general position. It is a handy source book for the practitioner who deals with Delaware corporations, as is evidenced by the popularity of the earlier editions. The new edition is warranted by important recent decisions and the rather extensive statutory modifications in the law in 1929.¹

William F. Kennedy.

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THE LABOR INJUNCTION. By Felix Frankfurter and Nathan Greene. Macmillan Company, New York, 1930. Pp. 228.

The scholarly work before us deals with the substantive law governing the conflicts in which labor injunctions are used, with the procedure in injunction cases, with the scope of injunctions and with the procedure and punishment in cases of contempt. The appendices contain detailed data on injunction cases, including a large number of New York State and Federal injunctions and a copy of Senate Bill 1482, 1st session, 70th Congress. A chapter on Conclusions is devoted chiefly to a defense of this Senate Bill, in drafting which one of the authors collaborated.

The work points out the more striking defects in our present procedure, especially in the Federal courts. The improvident issue of *ex parte* restraining orders is the first and greatest of these. Next comes the length of time which these orders may run, before a hearing is required, together with the practice of some judges of allowing renewals upon mere affidavits without examination of witnesses. Again, the extended scope of restraining orders is criticized. These orders are frequently so broad as to include "any interference" with the plaintiff in the conduct of his business. Next comes the use of the injunction to build up a whole code of substantive law, which forbids many acts that should be allowed in the competitive struggle between unions and employers. Finally there is the enforcement of restraining orders by punishment for contempt, without the usual safe-guards of criminal procedure.

These familiar and well-grounded complaints against the labor injunction are examined and illustrated effectively by the authors, with numerous citations to appropriate cases. While it cannot be said that anything new has been developed, the book gives in convenient form a comprehensive critique of present practice.

¹Berle, *Investors and the Revised Delaware Corporation Act* (1929) 29 COL. L. REV. 563.

The authors have done a real public service in gathering and presenting this side of the case. Although the final chapter concludes with a stirring appeal to lawyers to take a more active part in public affairs, the work is not of interest primarily to the attorney. It is rather aimed to influence public opinion and to guide legislation. Written from this angle, it seems to give a one-sided presentation, if not a downright brief. Its title should be "The Defects of the Labor Injunction". From a broader view-point, one would prefer to see some discussion as to how far injunctive abuses can be removed by an intelligently planned cooperative movement of Bench and Bar. The United States Supreme Court, under the Act of 1842, possesses full power to remedy every important weakness here noted, by amendments of the Federal Equity rules. It has shown a willingness to revise these rules on repeated occasions and to invite representatives of the Bar to cooperate. If such a method can bring reasonable results it will be infinitely superior to the earnest but bungling performances of political legislation.

Few will welcome congressional legislation on this subject after even a casual glance at the panaceas which have been soberly offered to the Senate Judiciary Committee and endorsed by some of its most prominent members. It has been proposed to remove injunctive protection from the right to work or to secure work, from the right to conduct a business, and even from intangible property. By one of those flashes of inspiration, which so often come to the law-maker, it was discovered that the latter proposal would remove equity protection from all patent rights!

One misses too, a certain sense of proportion in the present work. Little or no space is given to the undoubted effectiveness of the restraining order in preventing far-reaching evils in the industrial conflict. The benefits of the injunction as a protective device, when civil damages and criminal prosecution fail, are not mentioned, but attention is concentrated upon weaknesses and evils.

One gathers also that the use of the injunction by unions themselves is insignificant, an impression which may be corrected by reading Mr. Edwin E. Witte's article in the *YALE LAW REVIEW*, January, 1930. Nor will the practicing attorney agree with the authors' earnest advocacy of Senate Bill 1482. This Bill seems to rest on the zig-zag theory of social progress; since unions have suffered injustice from past injunctions, let us now visit such injustice upon the employer and the non-union man. So, for example, no complainant shall receive injunctive relief unless he has made every reasonable effort to settle his labor dispute through negotiation or through government mediation or arbitration! Meanwhile the respondent may merrily organize strike, boycott and picket line without seeking either negotiation or arbitration.

How many employers receive their first notice of industrial complaint with the calling out, unheralded, of their entire labor force? How shall such negotiate? How many employers, especially in recent years, have seen their men called out without even a grievance, on the ground that some other employer in the same industry was "unfair"? How many indefensible combinations based exclusively on racketeering graft, were again and again brought to public attention in the New York building trades in the time of Brindell (all of which are once more being revived in the same trades at this moment in New York)?

These indubitable facts of industrial struggle do not square with the authors' conception of the scene.

The attorney will also be inclined to look askance upon another millstone which the Bill hangs about the complainant's neck, *viz.*: that before securing relief he must show, by witnesses under oath, in open court, and subject to cross-examination, that as to each item of relief sought, he will suffer greater injury than will be inflicted upon defendants by the granting of relief. Few attorneys will deny that the injunction has been improvidently granted, few also will deny that the corrective here advocated would bar the complainant from effective relief. Enough has perhaps been cited to show that the authors have sought zealously and with high motives, to secure a political correction of injunctive defects by fastening their eyes chiefly upon certain limited but highly important evils of our present practice. They have produced a work which should be examined by all serious students of socio-legal progress.

James T. Young.

University of Pennsylvania.

CASES AND OTHER READINGS ON THE LAW OF NATIONS. By Edwin DeWitt Dickinson. McGraw-Hill Book Company, New York, 1929. Pp. xxii, 1133.

Professor Dickinson states in the preface to his book that his selection of cases departs a little from the beaten path of earlier case books. Opinions may differ with respect to the selection of cases as well as with respect to classification and arrangement of subjects. Space allotted to a brief review, of course, does not permit detailed discussion of such matters. However, it may be noted that certain somewhat unusual features in Professor Dickinson's book would seem to be very useful in meeting difficulties peculiar to the study of international law. The insertion of abstracts of laws and treaties and of what the author calls "readings" may be particularly mentioned.

Professor Dickinson speaks of his selection as "limited", and in relation to that point he refers to his exclusion of certain subjects, including some pertaining to the law in relation to war. The selection of cases seems to be a very ample one with respect to the subjects with which the author deals. Certainly in an introductory course it would seem that for purposes of instruction much better results might be obtained by a limited, careful selection than by a profuse compilation of cases with little concern as to the merits of the opinions used or as to confusion of thought, not infrequently revealed, between questions of domestic law and questions of international law. Professor Dickinson's book shows no such indiscriminate collection. Nevertheless perhaps it might be suggested that, by a contraction of materials bearing on some subjects, the book could have been restricted to its present limits and still amplified to cover what might be termed fundamental as well as elementary rules and principles relating to certain other subjects which could appropriately be dealt with in an introductory survey of international law.

Professor Dickinson points out that his book contains considerable material pertaining to municipal law. However, it is also noted that this material is of a kind that has a bearing on international relations. It is therefore something

of which use may profitably be made, having in mind not only the broadening of the student's understanding, but his convenience in having proper materials made easily accessible.

The book naturally begins with materials bearing on the nature, sources and evidence of international law. The author uses the caption "Nature and Authority of the Law of Nations", under which is a considerable compilation of writings and of opinions of courts. It may be suggested that this conventional, preliminary chapter of any book, whatever may be the precise caption, is by far the most important one in any work dealing with international law. Strange though it may appear, it is believed to be a fact that the basic defect—or perhaps one may say fallacy—of opinions of some international tribunals that have often been justly criticized in a severe manner is found in a failure of recognition and application of fundamental principles with respect to the nature of international law and the method of ascertaining and applying it.

Professor Dickinson has collected interesting material. Among opinions used is the often-quoted opinion in *The Paquete Habana*,¹ Mr. Justice Gray, speaking for the court in that case, discussed generally the nature, sources and evidence of international law, and then undertook to marshal evidence on which he relied, thus illustrating the method of establishing the existence or non-existence of a rule of law. The portion of the opinion which interestingly illustrates that process is omitted by Dr. Dickinson, doubtless to economize in the use of space.

The author has collected considerable material under the caption "Nationality in the Law of Nations". The treatment of questions of citizenship in case books and by writers seems at times to suggest a notion that such questions are in some way governed by international law. Citizenship is a domestic matter regulated by municipal law. International law recognizes the plenary sovereign right of a nation in matters relating to nationality. It may perhaps be said that to the general rule there is a measure of exception in respect to the imposition of nationality on aliens against their will. But though these principles are clear, it is obviously appropriate to deal in a course in international law with questions pertaining to nationality.

It can probably be said that the most important knowledge for the American student to acquire is that generally speaking citizenship is not governed by international law. The other reasons, or at least it may be said the principal other reasons, why instruction in the subject of nationality is proper, are that the multiplications of nationality consequent upon the conflict of domestic laws result in international difficulties, and that nationality is the justification in international law for the intervention of a government of one country to protect persons and property in another country. The importance of the subject in international relations is therefore obvious.

It may doubtless be considered to be proper to undertake in a course on international law some instruction in domestic laws respecting nationality, even though it may not be possible to impart any extensive knowledge of American statutory or constitutional law, and much less any considerable information respecting the laws of other countries. But it is practicable to lay a foundation

¹ 175 U. S. 677, 20 Sup. Ct. 290 (1900).

with respect to the fundamental principle of *jus soli* in Anglo-Saxon countries, the principle of *jus sanguinis* in countries in which the civil law obtains, and the manner in which we find throughout the world a combination to some extent of both principles. For this purpose of elementary instruction it would appear to be desirable to make use, as Professor Dickinson has done, not only of cases but of abstracts of statutory and constitutional law.

The author has an extensive chapter entitled "Jurisdiction of Crime and the Extradition of Fugitives in the Law of Nations". The material collected with respect to the first part of this chapter appears to be concerned with the principles relating to that measure of control which a nation may be said to have over its nationals wherever they may be outside of territorial limits. The possible application of those principles is interesting and undoubtedly goes beyond the scope of criminal matters merely, both from the standpoint of domestic law and of international relations. Perhaps it may be said that the control which a nation has with respect to rights of person and of property beyond territorial limits partakes of a combination of personal and of territorial jurisdiction.²

The author has chosen to devote considerable attention to the subject of extradition. That process is concerned with the administration of criminal law dealt with by nations through contractual agreements. The only international law applicable to the subject would appear to be the rule of that law which condemns the violation of a treaty. The interpretation of extradition treaties must largely be made in the light of a comparative examination of the penal laws of the contracting parties. The formalities employed in effecting the return of persons charged with crime from one jurisdiction to another constitute a very technical procedure.

In the author's chapter designated "Protection of the Interests of Foreign States in the Law of Nations" are some precedents that might be considered to have their most pertinent application to the law of war with respect specifically to rights and obligations derived from neutrality.

In this chapter the author has, very appropriately it would seem, devoted considerable space to questions relating to the protection of nationals abroad. Considering the prominence of questions of this kind in the everyday affairs of nations it would seem to be highly desirable that the student's attention should be drawn to them. And it seems to be entirely practicable to undertake in an introductory course some treatment of general rules pertaining to the treatment of aliens and of specific rules relating to the responsibility of a nation for certain agencies of government. On this subject of the treatment of aliens there are many good opinions of international tribunals, and it may undoubtedly be properly said, some bad ones. It may be illuminating and instructive to the student to make use of both kinds. Selection in this situation becomes particularly important.

Professor Dickinson quotes an opinion dealing with the question whether diplomatic interposition may be restricted by contractual stipulations entered into by a government with a private individual. The opinion appears to fall

² McDonald v. Mallory, 77 N. Y. 546 (1879); Crapo v. Kelley, 16 Wall. 610 (U. S. 1872); 1 KENT COMM. 26; PHILLMORE, INTERNATIONAL LAW (3d ed.) 441; WHEATON, INTERNATIONAL LAW (8th ed. 1866) § 106.

within the category of some that have been very severely criticized.³ In some of these opinions are interesting references to matters of "jurisdiction"; the question whether "international law forbids citizens to agree personally to such contracts"; "the law of nature"; "inalienable, indestructible, unprescriptible, uncurtailable rights of nations"; "policies like those of the Holy Alliance and of Lord Palmerston"; "abuses of the right of protection"; and "an inferior country subject to a system of capitulations".

It might have been desirable to quote some other opinions bearing on the recognition and concise application of fundamental principles of law with respect to important subjects such as the nature of international law as a law between nations whose operation is not controlled by the acts of private individuals; the nature of an international reclamation as a demand of a government for redress from another government—and not a private litigation; and the distinction between substantive rules of international law that a nation may invoke in behalf of itself or its nationals against another nation, and jurisdictional questions before international tribunals which are regulated by covenants between nations and, of course, not by rules of international law or by acts of private individuals. A footnote contains a considerable number of citations.

The author devotes a chapter of considerable length to the subject "Treaties in the Law of Nations". Just as it certainly is profitable for a student to learn that matters pertaining to citizenship are governed by domestic laws, although they are often discussed in our country in terms of international law, so it is equally important for the student to learn that the proper law governing the legal effect of treaties, and probably it may be said the only rule of law, is that which condemns the violation of a treaty—a rule of international law.

Treaties have frequently been violated as a result of legislative action, and the resulting legal situation has been discussed by courts in terms of domestic law. It has been said that when Congress, dealing with a subject within its constitutional authority, passes, and the Executive approves, an Act resulting in the violation of a treaty, the one last in date will control, the treaty and the statute being on the same footing. The opinion in *Missouri v. Holland*,⁴ which Professor Dickinson has reproduced, appears clearly to indicate that the Supreme Court of the United States broke away from that idea and showed that, even from the standpoint of our domestic law—which does not govern the legal effect of a treaty as the proper law in respect of that question—treaties and statutes are on a very different footing.

Professor Dickinson has explained that "most of the relations of war" should be set apart to be studied elsewhere than in an introductory course. Whether questions in relation to war should be taught in an introductory course would appear to depend in a measure at least on the time devoted to study in a given course. Superficial work may be worse than nothing, but a general survey of a subject of study is of course not necessarily superficial. A professor of

³ 6 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 306; CLARKE, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1910) 149; MEMORANDUM FROM SECRETARY OF STATE ROOT TO THE PRESIDENT OF THE UNITED STATES, CORRESPONDENCE RELATING TO WRONGS DONE TO AMERICAN CITIZENS BY THE GOVERNMENT OF VENEZUELA (1908) 83.

⁴ 252 U. S. 416, 40 Sup. Ct. 382 (1920).

history might give a course in the nature of a survey of a long epoch without being chargeable with shallow instruction. Such survey might be a very proper foundation for intensive subsequent study of certain briefer periods or of historical methods.

It would not seem to be impracticable or inadvisable to undertake to impart to a student in an introductory course general principles with respect to legal relationships between neutral and belligerent nations, some basic principles with respect to the exercise of belligerent rights on the high seas, and some information concerning rules that have been formulated for the conduct of war on land in relation to personal and property rights of non-combatants, and in relation to operations of armies against each other. Materials for the study of questions pertaining to international as well as civil strife are of course abundant. To be sure, in an introductory course it might be possible to do little more than to indicate the nature of some questions with which the nations have undertaken to deal, immensely important, far-reaching questions with a vast, intensely interesting historical background. But assuredly it would seem to be desirable that the student should be taught something as to what those problems are and as to the manner in which rules in relation to war have repeatedly been circumvented during great international conflicts. More detailed study must obviously be reserved for other courses. The same is generally true, however, as regards the law in time of peace.

But if Professor Dickinson has chosen to restrict his book in the manner described by his preface so as to deal with a limited number of subjects, that fact of course in no way detracts from the results of elaborate efforts in collecting valuable material in relation to those subjects.

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Washington.