BOOK REVIEWS


The declaratory judgment now has a permanent and important place in the practical scheme of American legal procedure. To Professor Borchard belongs a large part of the credit. Professor Sunderland of Michigan and Professor Borchard of Yale supplied the impetus for what in a very few years after their initial writings came to be a decided movement for the wide adoption of this procedure. They did more than start the movement. They did work in the line. Sunderland was responsible for the enactment of the first Michigan statute. Chagrined by the absurd decision of the Michigan court in holding it unconstitutional, he caused the Michigan legislature to pass a new act, using a different form of words so as to afford the court an opportunity to draw a distinction between it and the earlier act and uphold the later one if the court were so inclined, and he saw the later one upheld after the first decision had been widely condemned as wrongly decided. The saving of face is a custom not confined to the Orient and it is a wise man who not only recognizes the fact but can also make practical use of it. Sunderland did so superbly. His influence in the adoption of declaratory judgments statutes was by no means confined to Michigan but he is much interested in all procedural problems and devices and in later years has not concentrated on this particular one in the larger field in which he has accomplished so much. Borchard, on the other hand, although he has many and variegated interests and does much original and useful work in them, has produced an amazing amount of writing on declaratory judgments, both on the broad aspects thereof and on the details of the many cases. He has closely followed the development in this country and often commented upon various points at length. He was active in the drafting of the Uniform Act which has been so widely adopted and in the drafting of the Federal Act which was finally passed at the last session of the Congress. The profession is therefore very fortunate to have a treatise on the subject at the hands of Borchard for he brings to the work a thorough and sympathetic understanding as well as familiarity with the minutiae of the cases.

The main advantage of having a book on this subject is in having in one place material which will serve as a practical help in active practice. The periodical literature already contained historical, comparative and critical material in sufficient amount, most of it Borchard's, for the average practitioner. If this book be regarded from a point of view other than that of its service to the practitioner, it is fair to say that most of the matter in it which might be calculated to serve purposes other than his was already in the periodical literature, readily available, and by the same author. The primary need for a book on the subject may, therefore, be taken to be that of the practitioner who needs an immediate and practical help. This book serves that need well. Not only is the large number of cases analyzed and classified but their facts are set forth in sufficient detail to show their possibilities for use in aiding the solution of a practical problem.

While Borchard's book will be of immense help to practitioners in the rough and tumble of their practice, it is not, fortunately, cast in the form of a "lover's handy letter writer" or whatever is called its wretched equivalent in law books. The treatment throughout is scholarly and any user of it will have to devote some thought of his own in its use. The dedication to the memory of Hohfeld, late Southmayd Professor at Yale, is a further evidence of Borchard's seriousness and thoroughness.
chard's often expressed admiration of and indebtedness to Hohfeld and is indicative of the wide scholarship which has gone into the writing of this book.

I am delighted to see that no forms are given. Forms will be a matter of local practice. Any one who knows what he wants to set forth can readily devise his own form; if he cannot comprehend his needs after an intelligent use of Borchard's book he is beyond hope and the copying of any form would no doubt do no better than produce a monstrosity for a bewildered judge to decipher and disapprove.

Any attempt to speak dogmatically on many points of declaratory judgments would result in creating a false impression of a condition which does not exist. Borchard does not attempt it. Our courts are now necessarily passing through a period of experimentation, and stability or anything like it will not be realized for some time. Borchard's treatment of all angles is as thorough as it can now be on the basis of authorities as they now exist; but he is not content, happily, to write solely on a basis of decisions. His own critical analysis and comments are of inestimable value and will continue to have, as they have heretofore had, an immense influence on development. It will often be necessary for the reader to refer to several parts of Borchard's book to cover the treatment of any point from all its different aspects. It may strike some that this is a nuisance. I do not see how it could well have been avoided in the present state of the law. Of one thing I am sure, it will do the reader no hurt. One needs all the light one can get, and from as many different angles as possible, on a subject such as this, the development of which with us is still young. Borchard's treatment, from whatever angle, is always stimulating and refreshing and whatever repetition there is is not burdensome.

There are some sides of Borchard's treatment, retained in his book, with which I have always been inclined to quarrel. He objects to the notion of vengeance in our classical procedure, sees its elimination in the declaratory judgment, and advances this elimination as an argument for the adoption of declaratory judgment procedure. My reaction is that there are so many good reasons for its adoption that one so unsubstantial should not be urged for fear that the legal reactionary, of whom there are legion, will be alienated from a good thing. It is not enough to get a statute enacted and then held constitutional. The real result in the future rests with the bar; the use of the device that is attempted is all important and the use that is permitted is only a reflection which follows. The bar of today is the bench of tomorrow and no development of any lasting importance will be noted short of a generation of lawyers. The real value of the declaratory judgment lies in the fact that in many important situations a remedy is afforded where none existed before; not that the philosophical notion of vengeance is done away with, or that neighbors do not need to quarrel or display physical force in order to find out their legal relations.

Borchard gets much annoyed because courts often do not permit the declaratory judgment procedure to be used as an alternative remedy to existing procedural devices of one form or another. If there is an existing machinery to take care of his needs, no practitioner need have much complaint because he won't be given a declaratory judgment in a situation which can be remedied by the use of his wit in another direction. Borchard thinks he should not be called upon to use his wits in determining whether any remedy will suffice; the wits should be saved for the substantive end in view. Aside from the fact that such use of wits is not likely to exhaust him, the point has no basis qua declaratory judgments. Why have any different kinds of actions? Why not only one for all situations? Then why a declaratory judgment action? His idea has much merit from a broader view but is of significance here only in that the declaratory judgment procedure might be availed of to bring about a wider reform. I think it is attempting too much at one time and shifts the emphasis from a present
need for declaratory judgments in many instances even though classical forms
be otherwise preserved to another reform that has no especial significance as to
declaratory judgments any more than to replevin or estrepeinent or ejectment.

But these and similar points on which I would quarrel are not of sufficient
importance to frustrate a good thing. That is plainly shown by the wide adop-
tion of the procedure. The development of that procedure is of equal im-
portance, else its adoption will have been in vain. Borchard's book will have a
large influence on that development; and it will be a good influence. The courts
will not at once adopt all of his ideas but I venture to say that the divergence
will not be such as will be a lasting deterrent on the future development of the
procedure along lines which will be of increasing usefulness; they will be tem-
porary differences in the form of words.

The same session of the Congress which saw the passage of the Federal
Declaratory Judgments Act also gave the Supreme Court the power to make
rules governing procedure in actions at law. The latter is of much more
significance than the former but each should affect the other. The rules when
adopted should make it possible for the declaratory judgment to be of much
service; they may also have an effect on other points of procedure which
Borchard thinks should be accomplished through the declaratory judgment pro-
cedure itself. It seems to me that if the two ideas are kept apart, but both
incorporated in the rules separately, a new development in Federal procedure
will result which will not only be of tremendous importance in practice in the
federal courts but which will inevitably, and probably fairly quickly, shape the
course of practice in the state courts along more sane and useful lines. The
attention which Borchard has focused upon the declaratory judgment procedure
has undoubtedly aided in securing the granting of the rule making power to the
Court. Thus his work in the narrower field has helped produce a larger result
in a field of greater importance.

Allen Hunter White.†

INTERNATIONAL LAW APPLIED TO RECLAMATIONS, MAINLY IN CASES BETWEEN
THE UNITED STATES AND MEXICO. By Fred Kenelm Nielsen. John Byrne

The author of this volume has had a long and varied experience in the
public service. For years an Assistant Solicitor, and then Solicitor, of the De-
partment of State, he has acted as a delegate of the United States, especially
in a legal capacity, in various international conferences, and has served not only
as agent and senior counsel before international arbitral tribunals but also as a
member of them.† The present work specially reflects his personal participation
in the settlement of international claims by means of arbitration, particularly
under our general and special claims conventions with Mexico of 1923, the
special convention specifically relating to revolutionary claims. Both conven-
tions, after several prolongations, finally expired in August, 1931, before all the
claims to which they related were heard and decided. In April, 1934, however,
an agreement was concluded for the revival of the general claims commission,
the United States and Mexican members of which have since been appointed.
A new special claims convention was also concluded, under which Mexico is
to pay to the United States a lump sum in settlement of all the claims involved,
which are then to be adjudicated on the merits by a domestic commission to be
created by an act of Congress. Personally I am glad to see the revolutionary

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claims thus disposed of, as the rules laid down in the special convention of 1923 were susceptible of interpretation in a sense hardly consonant with the great principle of the equality of nations, according to which, as Chief Justice Marshall well said, “Russia and Geneva have equal rights.” “Power or weakness,” declared Vattel, “does not in this respect produce any difference.”

Of international law, the adjudication of claims and controversies by international tribunals, usually arbitral in form and in constitution, should be one of the chief sources. As Judge Nielsen points out, such tribunals, generally speaking, finally adjudicate differences which diplomacy has failed to solve, and which, although the amount of money at stake may be small, presumptively involve questions of law the decision of which may have far-reaching effects. In any event such decisions should tend to make certain and to stabilize the law. For these reasons it is highly important that the members of such tribunals should be chosen with the greatest care, and solely with reference to their qualifications for the performance of international judicial functions. They should be impartial, without special predilection for one nation as against another; they should know international law in that real and comprehensive sense which does not, by treating the law prior to 1914 as obsolete, put a premium on ignorance and raise propagandists to the rank of oracles; they should also, as far as possible, be men of experience in affairs, who are accustomed to deal with realities, and to apply principles to concrete facts, rather than to pursue imaginary goods, or, as Milton calls them, the faery visions that live in the colors of the rainbow.

The present volume is divided into two parts. The first part contains a discussion of general principles the application of which is constantly invoked in the adjudication of international claims. These embrace such questions as the nature and sources of international law, and the rules by which it is to be determined and applied; the right of “interposition” by a government in behalf of its nationals, including the connotation of the term “denial of justice”; nationality, whether single or dual, and the right of expulsion; the responsibility of governments for injuries inflicted upon aliens by private persons, including bandits and mobs; complaints arising out of false arrest, improper prosecution, delays in trial and mistreatment in prison; the responsibility of governments for acts of insurgents; the jurisdiction of governments over merchant vessels in their territorial waters, and various questions relating to the procedure of international tribunals and the rules of evidence which they apply. The second and principal part of the volume contains opinions in international cases and, as the title indicates, mainly in cases that have come before the commissions under the conventions of 1923 between the United States and Mexico. To these there is added the author’s dissenting opinion in the Salem case, which was lately adjudicated by an arbitral board of three members constituted under the protocol between the United States and Egypt of January 20, 1931. The claim was disallowed, but the United States arbitrator dissented from the conclusions of his colleagues on certain points.

*John Bassett Moore.*


In this sprightly volume, the author has undertaken to subject to critical examination the occasionally professed dependence of the courts—principally English and American—on the political departments of the government (primarily the executive) in the determination of issues involving questions of for-
eign relations. He sustains vigorously the thesis, which in the last few years has gained increasing currency, that the courts have shown too great a dependence upon the executive, particularly in making their judgments as to the capacity of foreign governments to sue and as to the legal effect to be given to laws and administrative acts of such governments, depend upon the irrelevant fact of the political recognition or non-recognition of these governments by the executive of the forum. Interest in the subject was doubtless stimulated by the gyrations of American courts in seeking to pay deference to the governmental policy which refused so long to recognize the Bolshevik government of Russia, and which, down to 1922, assumed to recognize instead Kerensky's ambassador as the authorized spokesman for Russia. The author exhibits an acute power of analysis and with other critics of the New York decisions may derive satisfaction from the recent judgments of the Court of Appeals in Salimoff v. Standard Oil Co., and Goldberg-Rudkowsky v. Equitable Life Ins. Co., both disavowing the factor of political recognition or non-recognition as a criterion for giving or refusing legal effect to Soviet laws and decrees.

The book is divided into four principal chapters: (1) a general background on Political Questions in Cases Involving International Relations so far as they arise in the courts, and especially questions of sovereign immunity, neutrality, interpretation of treaties and statutes affecting the prize courts; (2) the theory and practice of recognition as a political act; (3) the effect of non-recognition in the courts on the status and rights of the unrecognized state or government as plaintiff or defendant and on the validity accorded to the laws and acts of the unrecognized government in their internal and external manifestations; (4) recognition and the courts. The author deals with so many important topics, both theoretical and practical, that in a brief review attention can be given only to a few matters. He seeks to show, if possible, when the courts should legitimately follow the executive and when they should profess independence. It is a worthy goal, and for the author's lucid and challenging views which, on the whole, are sound and sensible, he is entitled to much credit. But the treatment is not very systematic. He jumps from thought to thought in an often baffling fashion, yet his style is stimulating and attractive and sustains the reader's interest.

On the question of "constitutional understandings," I should not have thought it doubtful that when the President and Senate conclude a treaty the House of Representatives is legally bound to execute it, even by the appropriation of money; they have no option to refuse. They can, of course, physically violate a treaty, but this is not legally privileged. Prize courts are, of course, bound by legislative decrees and orders in council, and though it is quite true that when these violate international law the prize courts will not then be administering international law, the fact remains. The remedy for legislative as for judicial breaches of international law is through the diplomatic channel or international arbitration, so that in a legal system the rule of international law must ultimately prevail over a contrary municipal law. Occasional physical violations of this rule do not militate against its validity. The Zamora, dealt only with the exceptional and rare prerogative order in council, not a legislative order in council; but the decision was used by the official and unofficial propaganda

1. 262 N. Y. 220, 186 N. E. 679 (1933).
2. 266 N. Y. (1935).
6. For a description of the distinction between the two, see Jenks, Sources and Judicial Organization of English Law (1931) 18-20.
in the late war to bolster the legally unsustainable legislative orders in council which mocked international law. In no case did or could a British prize court set aside these important orders in council or disregard them. The author correctly plays down recognition as a criterion of legal results, and even as an operative political fact. On the contrary, he is correct in exposing the dangerous tendency to use non-recognition as a form of political reprisal in the pursuit of Noble Impulses, more likely to promote further chaos and war. But he is brash, to say the least, in suggesting that our most profound international lawyer and statesman, John Bassett Moore, ought to revise his conception that the United States actually did recognize the Soviets in concluding with them the Kellogg Pact, especially when the author himself concedes that the word “recognition” has been used to express various ideas from the admission of existence to the formal exchange of diplomatic representatives.

The author might have said more about the de facto government (a constitutional term), whose acts within its own territory should be deemed judicially unchallengeable in foreign courts, regardless of recognition; the assumption of the Oetjen case as to the “retroactivity of recognition” places the admission of validity or the impropriety of foreign judicial challenge on the wrong ground. On the effect to be given to the laws of an unrecognized state or government the author severely attacks the decisions of the New York Court of Appeals, which seemed to conclude that political non-recognition warranted refusal to give the Soviet decrees or acts legal effect, even on property or corporations in Russia. Public policy in New York might well have warranted refusal to give extra-territorial effect to some of these decrees so far as they concern property in New York, but this doctrine applies equally to the laws of a recognized state or government. Courts need follow the Executive only where it would be politically awkward to differ; as in the determination of the political status or territorial boundaries of a foreign state or on the existence of a treaty; but in the administration of justice, the court should remain free from political control and hew close to the line of actual facts so as to promote legal order and protection. The author has taken pains to penetrate the underlying philosophical reasons for judicial independence and the justification for drawing the line where independence should begin. On the effect of war on treaties the case of Flensburger Dampfercompagnie v. United States has been overlooked. The author may be optimistic in estimating the opportunities “for the conquest of international politics by the judicial temperament”. A few typographical errors do not mar a book which may be ranked as a genuine contribution to its subject.

Edwin M. Borchard.


This book was announced for publication in the spring of 1933 just before the author was appointed a Federal Trade Commissioner, to become, a year later, an original member of the Securities and Exchange Commission. During these first months that Professor Landis was in Washington, new national legislation and a series of administrative decisions had so enriched the law of labor
relations that publication of the book was fortunately stayed. But as we have
not yet reached a station in this development, the book has a very definite date.
It includes some of the first decisions of the National Labor Relations Board
(established July 9, 1934) but not its most notable decision of August 30, 1934,
in the *Houde Engineering Corporation* case, which declares collective bargain-
ing to mean bargaining for all by the representatives of the majority.

While the text of the Norris-La Guardia Act (as well as the recent opin-
ion by the Second Circuit Court of Appeals applying it in *Levering & Garrigues
Co. v. Marrin*) and other statutes and executive orders are reprinted, Mr.
Landis has totally omitted the railroad labor legislation of 1920, 1926 and 1934.
To make no mention of the revision of the Railway Labor Act,\(^1\) accomplished
June 21, 1934, and to put a mere extract from *Texas & New Orleans R. R.
Co. v. Brotherhood of Railway & Steamship Clerks*,\(^2\) in a footnote, hides from
the student the pioneering quality which marks these most recent pronounce-
ments of Congress and Court, and which points the course for substantive pro-
visions of the more inclusive labor legislation which we may expect from the
present Congress.

There are other omissions, which some may feel to be defects. Thus, Mr.
Landis, while not avoiding constitutional cases—*Truax v. Corrigan* is given com-
plete—avowedly refrains from entering the vast field of protective labor legis-
lation. Material bearing on collective organization and activity principally con-
cerns him, for, as he says in his preface, "the element of concerted effort as
distinguished from individual action . . . finds practically no treatment in the
traditional legal curriculum," yet this phase of labor law "presses upon practice
and theory for consideration."

Having adjusted to this focus on the unfriendly labor relations of strike
and boycott, lockout and blacklisting, and on the status of their alternative, the
collective employment agreement, one cannot praise too highly the content of
the book. It will serve perfectly its primary purpose of source book and bibliog-
raphy for a law course, and it will prove a useful reference book for all who
need guidance in their march into the field of employer-employee relations. The
historical introduction, covering the law of labor combinations in England for
the last six hundred years and in America to the end of the nineteenth century,
is a masterpiece of terse and lucid exposition.\(^3\) Nor does it lack original
reappraisal of source material. With its excellent documentation and stimulat-
ing quotations from courts and textwriters in the notes, it dissipates, for in-
stance, any notion that eighteenth century English courts were agreeable to
labor combinations and undermines Edwin Witte's contention\(^4\) that a similar
atmosphere pervaded the early American common law. The rest of the book is
not less broadly and wisely annotated.

The chapters make a reasonable division of the subject. The longest chap-
ter entitled Federal Intervention in Labor Controversies perhaps lacks unity.
Divers cases under the Sherman and Clayton Acts and Section 7(a) of the
N. I. R. A. are there tossed together, though the federal aspect of the law of
these cases is nil, except in so far as a few deal with the range of Congressional
power under the interstate commerce clause. Legal principles are the same
whether monopolies and combinations in restraint of trade are prohibited by

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2. 281 U. S. 548 (1930).
3. The reviewer has noted some flaws of detail: (1) on page 6, a minor misquotation from
2 & 3 Edw. 6, c. 15, which should read "at a certain price or rate . . . that another hath
begun"; (2) in note 45, a confused misstatement concerning 5 Eliz., c. 4, § 7; (3) on page
27, an antiphrasing of 17 & 18 Geo. 5, c. 22, § 2 (for "engaging" read "refusing to engage");
as well as a few misprinted letters.
state or United States legislation and whether a national or a state recovery act requires an employer to engage in collective bargaining upon request of his employees. This chapter is logically divisible into three: (1) a chapter on the boundary between national and state regulation of labor combinations and labor controversies; (2) one on labor under anti-trust acts; and (3) one on the employer’s duty to bargain collectively. But reported opinions refuse to confine themselves to the single issues that an editor might prefer!

A book may be used, by the reviewer who is so inclined, as a text from which to preach a sermon on anything that is next his heart. But as I have nothing to preach worthier the reader’s eyes than the introduction to Cases on Labor Law, I yield to Mr. Landis.

William Gorham Rice, Jr.†


A lawyer at the age of twenty, declining to run for Congress against his father at thirty-one, President Judge of the Sixteenth Judicial District of Pennsylvania, at thirty-two, almost appointed to the Supreme Court of the United States by Polk, at thirty-five, elected to the Supreme Court of the State, at forty-one, and taking his place as Chief Justice, re-elected an Associate Justice, in turn suggested for United States Senator, Secretary of State and for Governor of the State; appointed Attorney General of the United States by Buchanan at forty-seven, and Secretary of State at fifty-one, such was the amazing public career of Jeremiah Sullivan Black.

Professor Brigance has written a readable biography of a remarkable and as some have characterized him an eccentric man, and yet affirmative as Black was he does not stand out in the book as the living, breathing, vital and dominating force that really he was. We see his actions and the cause and effect, but his voice and his gestures and his personality seem somehow to be lacking. He has been gone these fifty years and this work fails to reanimate him as one would wish, for the appeal of the man and his life are great.

Although he lived to be seventy-four never after the age of fifty-one did he hold public office and yet in the last score years of his life as a private citizen his influence exceeded that which he wielded as an officeholder.

His interest in politics was measured only by its relation to the law. A lawyer he was, a great, hardly a profound lawyer, and a lawyer he remained to the end. His schooling was meagre and formally ended at the age of sixteen, but his thirst for knowledge was insatiable. Through his omnivorous reading he acquired a literary style excelled by no man of his time. David Davis of the Supreme Court said he was the most magnificent orator at the American bar. As a rhetorician he was without a peer, as a phrase-maker, unexcelled. He was at all times clear and easy to follow— instructive, lively, thrilling and scorching in turn. As a pamphleteer he has been likened to Jonathan Swift; in diction richer than Macaulay and more brilliant than Junius.

“Mental inactivity is to me a great pain,” he said, “work for the mind is as essential to my health as food for the body.” His power of concentration was tremendous. “He plunders all he meets of all they know and then it is his forever” said a political opponent.

Learning his law in Somerset, Pennsylvania, he came to the bar in 1830 and was thrown immediately into an active and important practice, for his pre-

† Professor of Law, University of Wisconsin.

5. The duty to bargain collectively was imposed in Wisconsin even before recovery acts were heard of. Trustees of Wis. State F. of L. v. Simplex Shue Mfg. Co., 256 N. W. 56 (Wis. 1934) construing Wis. Stat. 268.18, enacted in 1931.
ceptor, as a Congressman, spent most of his time in Washington. The young Black was appalled at the amount of knowledge necessary to him. In fact it was not until middle life that the real doubt of his own powers wore away. While disliking the writings of Coke and Blackstone, he acquired a marked ability to animate lifeless legal principles, to make vivid what formerly had been obscure. Coupled with this he had great powers of invective and a high sense of humor. When Black was to speak court rooms were crowded.

At an early age he met James Buchanan, a Lancaster man, twenty years his senior. He admired him immensely as a great lawyer and once said, "He ought to have been Chief Justice of the United States. He would have made the greatest jurist that ever graced the bench."

The author passes lightly over his career as a Nisi Prius judge and as a member of the Supreme Court of Pennsylvania, a period of fifteen years and yet in that time he handed down some notable decisions. The case of McCandless v. McWha is the leading case in the country upon the civil responsibility of a doctor to his patient and the brief reference to it might well have been enlarged. In medical jurisprudence it plays a great part.

From the quiet of judicial office Black passed into a cabinet soon to be torn by dissension and harassed by doubts. "The future was not revealed to the anxious men who stood in those days at the helm. They saw only the beginning but not the end," says the author. When Black arose as Attorney General to address the Supreme Court he had never even been there, but before his career was over it was to become the scene of his greatest forensic utterances and of his greatest triumphs. The work he found to be done became the keystone of all his future greatness and of much of his future work—to champion minority causes, to lead forlorn hopes, all with marked success. He stood for the Constitution wherein it protected the personal and property rights of the individual and he stood for it when he sought to limit its scope whenever those rights might have been mangled and destroyed by interpretation. In this he was much misunderstood.

To him the question of secession was one to be solved judicially, not politically. In the days of abolition and secession and rumors of war, he stood firm for the liberties of the people as he understood the Constitution meant to define them. He never wavered and largely prevented President Buchanan from wavering. He was called treasonable by the South and a Copperhead by the North, when he was neither. His doctrine then and throughout the War was that states should not be punished but only those persons who had defied and destroyed the union of the states. In this he was opposed to Mr. Lincoln and to Stanton. He abhorred the Reconstruction Acts that shackled and humiliated and ruined the South and drafted two of President Johnson's veto messages on those Acts, and one of his messages to Congress. Professor Brigance is at his best in his chapters on these days in the Cabinet.

He went out of office in March of 1861 owing money to both Buchanan and Stanton. He doubted his power to practice law and accepted the humble position of Reporter to the Supreme Court at about three thousand dollars a year; he the great lawyer whose name Buchanan had sent to the Senate for confirmation to that very Court upon the death of Mr. Justice David Davis. The nomination was never acted on. But it is a curious and paradoxical result that this man in a few years should become the leader of the American Bar and leave a greater stamp upon political history than he had done in office. That he did not realize the prestige that the office from which he was retiring gave him is curious, but he was tired and ill and discouraged with the outlook. He tried to write Buchanan's life, but he refused to defend Buchanan's administra-

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1. 22 Pa. 261 (1853).
tion on the basis of Lincoln's prosecution of the war which Buchanan approved. Buchanan spoke of Black's "Constitutional timidity", while Black thought that if the South were crushed the Constitution was imperilled.

But Black did enter the practice of the law representing at first the claims of land holders in California as opposed to those whom Black sought to prove held titles under fraudulent Mexican grants. Black as Attorney General had sent Stanton to represent the government in similar cases and had learned the Spanish language and was thoroughly familiar with the intricacies of the questions involved. In four years he argued sixteen cases in the Supreme Court involving large sums of money, of which he won thirteen, was partially successful in one and lost two. It was said "Unquestionably was Black's handling of these California land cases one of the most remarkably successful series of litigations ever carried on by an American lawyer at any time."

Perhaps but one other such series can be thought of since that time, the oil cases conducted by Owen J. Roberts, now Mr. Justice Roberts, of the Supreme Court. Thus were Black's fortunes retrieved, for in the Quicksilver Mine case alone his fee was one hundred and eighty thousand dollars, the largest fee paid an American attorney in this period of history. From then until the end of his life his earnings were amazingly large but his bookkeeping methods were nil, and he was imposed on time and again. Simplicity indeed characterized his business affairs. Apparently he had no secretary and no office and his mail followed him about—Washington, York, California, Michigan, Texas, Baltimore, Philadelphia, New York—wherever it might find him. He never knew what he collected or what he lost, nor did he care. He had no desire for money and often found himself on a train with none at all. When he died his whole estate was a little over two hundred thousand dollars.

In Ex parte Milligan, the greatest conflict on personal liberty in America came before the Supreme Court and Black's presentation has been called the greatest forensic effort ever made there. Never before had that question from the days of Magna Charta been so thoroughly discussed. Black was then in his prime, a powerfully built man of six feet with immense eyebrows shadowing grey eyes that contained humor when he smiled and thunder when he frowned. When he spoke he used no notes of any kind. He loved a fight and his forensic oratory was the better for that love.

No man was the peer of Black in historical argument on the rights of man, and in Ex parte McCardle he was again magnificent. Of his argument in the Blyew case Attorney General Garland said "It was the finest combination of law, rhetoric and eloquence I ever listened to . . . He became not only his client, but his client's cause; he was wrapped up and lost in it; he lived and acted in it."

In court, on the platform and in writing Black was the boldest and ablest defender of the Constitution and of personal rights which the era produced. The lawyer always, he was indifferent to political office which meant compromise and conciliation which did not fit in with his peculiar nature. Out of office he enjoyed a freedom of speech and action that gave him an influence second to no man in the land. In his ability to think and talk and write he had few equals and his ability to dissect the proposition of his opponent was outstanding.

Here then is the life of a man whose personality made indelible marks upon the formative days of our era. He died rather suddenly at his country estate at York when his influence was still to be reckoned with and when his practice of the law was still of appalling size.

Joseph Carson.†

† Member of the Bar, Philadelphia, Pa.

This is a very interesting case book. It is an excellent product of sound legal scholarship. The authors are distinguished members of the faculty of the Harvard Law School whose writings on Evidence in recent years have won for them the praise and gratitude of that portion of the legal profession interested in difficult problems of Evidence. Their many essays are scholarly and stimulating and Professor Maguire’s Case Book on Evidence,¹ which this book will no doubt replace, has been tested by a widespread adoption and found to be a first-class case book by many teachers and students. The profession expected a good case book from Morgan and Maguire and that expectation has been fulfilled.

These and the following observations are made before subjecting the book to the class-room test and also without a careful reading and study of all the cases and other material in the book. Perhaps a case book should not be reviewed until it has been subjected to class-room test. Certainly the reader of a review should know whether the reviewer, if he is a law teacher, has used the book in his own classes.

First something will be said about the type of principal cases selected. The book opens with a rather long chapter on Judicial Notice. The first two cases are ancient indeed. One was decided in 1302, the other in 1612; ancient cases for the law of Evidence. However, they are not indicative of the type of cases that are to be found throughout the book. In fact, a striking feature of it is that the principal cases are modern to a high degree. There are about two hundred and fifty-five principal cases included and ninety-five of them (about thirty-seven per cent.) were decided in the period 1924-34, approximately the past ten years. The period 1919-23 contributed thirty-two cases. In other words, one hundred and twenty-seven (about fifty per cent.) of the two hundred and fifty-five cases were decided in the period 1919-34, approximately the past fifteen years. Twelve of the cases selected were decided in 1933-34. This fixes the character of the case book as a modern presentation of the subject.

Frequently the Evidence questions raised in these recent cases are new questions, for instance, the admissibility of police reports under the New York statute relating to business entries; the admission of moving pictures; talking pictures; lie detector tests; evidence procured by wire-tapping; the behavior of bloodhounds, etc. Many of the cases chosen recently aroused widespread public interest, such as Clark v. United States, ² a contempt proceeding against a juror in the Foshay prosecution; Shepard v. United States, ³ a prosecution of an army officer for the murder of his wife; Pan-American Petroleum Company v. United States, ⁴ the suit by the government to cancel the oil leases made by Secretary Fall. These new problems and well-known cases are certain to have an interest for law students much greater than cases that have been used in some of the older case books where the background was often lacking in interest for them. No inference should be drawn that these modern cases do not go deep into important Evidence problems. They do.

The book contains 1225 pages. It is made up of principal cases; problem cases (where usually the holding of the court is given); Supplementary Notes (e. g. the eleven page note in Interpretative Evidence, 950-960); extracts from opinions in cases; texts (e. g. Wigram’s Admission of Extrinsic Evidence, in Aid of the Interpretation of Wills; Through the Looking Glass by Lewis Car-

² 289 U. S. 1 (1933).
³ 290 U. S. 96 (1933).
⁴ 9 F. (2d) 761 (C. C. A. 9th, 1926).
ROLL; *Restatement of the Law of Contracts* by the American Law Institute) and quotations from law review articles. It also contains text materials prepared by the authors; for instance, the common law rule as to Competency of Witnesses as Affected by Interest. No principal case on that subject is printed. Again, by way of introduction to the subject of Burden of Proof and Presumptions the authors explain briefly something of the functions of the judge and the jury. Also in various sections statutes are included which the authors considered typical (e.g. Sections 1880-1881, California Code of Civil Procedure, relating to the Competency of Witnesses and certain privileges not to testify). Footnotes contain citations to other cases, extracts from some of them and citations to law review notes and articles. These citations are numerous and no doubt will prove of value to student and professor. Very often the authors indicate that the principal case has been noted in one or more law reviews.

The cases also show great pains have been taken in cutting and editing them; e.g., in a footnote to *Cohn v. Dunn*, it is pointed out the court's quotation of a portion of Williston on *Contracts* may be misleading, and in a footnote to *Dailey v. Grand Lodge*, information is given concerning certain church records that the opinion does not give.

Another feature of the book, and a good one too, is the selection of some cases in which the questions asked and the answers given in the trial court appear in the opinion. It is well for students to see precisely how questions of law, in this field, come before the courts.

The usual evidence topics are to be found in the Table of Contents. Generally, they have been treated uniformly, that is, there is consistency in the extent of the treatment. There are perhaps some variations; for instance, the chapter on Judicial Notice seems rather long. Thirteen principal cases are printed, which with the other material included covers forty pages. Many teachers may feel inclined not to use all this material. In fact, it may be prudent to assign only a few of these cases and require the student to read the remainder for himself. On the other hand, no case was included on Interest as Creating Incompetency. A modern case, for instance *Corbett v. Kingan*, construing the Arizona Dead Man's Statute which appeared in Maguire's Edition of Thayer's *Cases on Evidence* might well have been included. The section on Competency as Affected by the Marital Relation and Privilege Based upon This Relation is somewhat brief. Only four cases are included. No doubt *Wolfe v. United States* and *Funk v. United States*, which are included in this section are excellent cases and furnish a background for further elaboration if the teacher thinks it is necessary to present additional problems. In many of the sections there is revealed sound judgment on the part of the authors in presenting sufficient historical material by way of early cases to throw proper light upon the law today; for example, the section on Business Entries begins with *Price v. Earl of Torrington* and includes *Nicholls v. Webb*.

In the section on the Function of the Judge and the Jury, an exceedingly interesting and important topic, some teachers may begrudge the space given to *Hess v. Oregon Baking Co.* (dealing with the province of the judge and the jury in a suit for malicious prosecution) and *Fitzpatrick v. International Ry.* (dealing with the determination of what is the foreign law). Perhaps the space was taken in part to make room for *Fitzpatrick v. International Ry.*
could have been used to advantage by cases directly bearing upon the power of the judge to determine disputed questions of fact to rule upon the competency of a witness or the admissibility of testimony.

There appear in this modern book some of the old cases that are favorites of law teachers. They have been thoroughly tried and not found wanting; for examples the following are noted: *Pym v. Campbell*; 14 *Wright v. Doe d. Tat-ham*; 15 *Thompson v. Libby*; 16 *Winans v. Attorney General*; 17 *Higham v. Ridgeway*; 18 *Mutual Life Insurance Company of New York v. Hillman*. 19 Some old favorites are missing, as principal cases; *DuBost v. Beresford*, 20 and *United States v. Gooding*. 21 Each of these cases, however, is used as a problem case.

Many additional observations might well be made about this book. It should be emphatically stated that the cases selected are excellent. It is believed that experience will show that very few of them will prove unsuitable for teaching purposes or undeserving of a place in a group of cases of high merit.

The size of the book is somewhat alarming. It contains, as has been stated, 1225 pages. The authors in the Preface explain their decision to increase the length of the book beyond Maguire's Edition of Thayer's *Cases on Evidence*. The wisdom of their decision perhaps will best appear by a brief quotation from the Preface: "But we must speak more fundamentally to make a square issue with criticism on the score of length and elaboration. Serious and thoughtful assertions are heard that Evidence throughout its phases can be taught with a combination of brevity, simplicity and comprehensiveness. That this should be so, we enthusiastically agree. The rules of Evidence are mainly mere means to an end, and the ideal means is one easy to explain. That the probative rules of our courts have reached any such desirable condition, we gravely doubt. Scores of dreary columns in each year's digest point all the other way. . . . We think the choice is between teaching Evidence carefully, patiently, even somewhat elaborately on the one hand, and on the other sending to the bar neophytes whose fumblings will swell the dreary digest columns just made a subject of reference." They express the belief that legislative reform of the law of Evidence is not likely to come in the near future and that detailed and scholarly treatment of Evidence by the law schools may assist in bringing about much needed simplification in this field of law.

As one goes over the material in this interesting book, the thought constantly comes to mind, what can be done with it within the time ordinarily allotted to a course on Evidence? Two hours a week throughout the year is no doubt too short to cover the book in a class room. It now appears to the reviewer that teachers who use this book will be forced to confine the class room discussion for the most part to the principal cases. There will be not much time to turn aside and discuss the problem cases and the other excellent material included in the book. There is probably good reason to believe that students should be encouraged to do a good deal of work without professional assistance. This book places at their disposal ample material. If students will avail themselves of it, adequate discussion of the principal cases and brief excursions into the other material, here and there, should produce satisfactory results.

14. 6 E. & B. 370 (1856).
15. 5 Clark & Fin. 670 (1838).
16. 34 Minn. 374 (1885).
18. 10 East 109 (1808).
20. 2 Camp. 511 (1810).
21. 12 Wheat. 460 (1827).
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While this book is quite a different book from Thayer's *Cases on Evidence* which emanated from the Harvard Law School in 1892, it is a most worthy successor. There has been an evolution in case books and an interesting essay might be written on the subject taking the two books for comparison.

Finally, it may be said Morgan and Maguire's *Cases on Evidence* is the product of master workmen who set themselves to do no easy task and did it well.

J. P. McBaine.†


This book tells the story of the application of research methods already made famous by these authors 1 to a representative group of women who had served time on sentence to the Massachusetts Reformatory for Women at Framingham, Massachusetts. "We have traced the careers of five hundred delinquent women from childhood through a substantial time beyond the completion of their sentences to the Reformatory. We have shown what relationship their characteristics bear to their ultimate rehabilitation or relapse and have indicated how feasible it is to employ such information in a scientific attack upon the problems involved in the sentencing, treating, paroling, and pardoning of offenders against the law." 2

This elaborate investigation covered four periods in the lives of the women involved: (1) history and experience before commitment, with special attention to their circumstances during the year just preceding commitment; (2) analysis of their experience in the reformatory, both as to rehabilitation and the contrary; (3) a study of their life on parole, if parole was included in their treatment; (4) a careful scrutiny of their life and activity during a five year period following the expiration of their sentences (1925-1929), with special attention to their circumstances during the fifth year of this period. Facts and characteristics discovered in the earlier periods were then consistently compared with similar information for the post-sentence period. Back of the entire procedure was the attempt to give a factual answer to the crucial question of whether the women improve or regress after expiration of sentence.

By making this independent investigation, the authors were able to discover much information that was not in the official record, both as to conditions in general and as to misconduct and delinquency. Thus 99 per cent. were adjudged delinquent prior to the offense for which they were sent to the reformatory, but only 66.4 per cent. of this was "official" while 33.6 per cent. was determined as "unofficial misconduct". In the five year post-parole period 23.6 per cent. were found to be "non-delinquent" while 76.4 per cent. were adjudged "delinquent", but only 51.5 per cent. of these delinquencies were "official" while 48.5 per cent. were "unofficial misconduct". 3

Sexual misconduct was the predominant offense of these women before commitment and it remains their principal delinquency in the post-parole period. Thus 85.7 per cent. of the offenses before the reformatory sentence were due to sexual misconduct or to some combination of sex with other delinquency; 86.3 per cent. of the post-parole delinquency was similarly classified. 4

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1. See FIVE HUNDRED CRIMINAL CAREERS (1930); ONE THOUSAND JUVENILE DELINQUENTS (1934).
3. P. 539.
4. Ibid.
The group as a whole makes a pathetic picture. "When we consider the family background of our women, we should rather marvel that a sizable fraction of them, by one influence or another, abandoned their misbehavior, than that so many of them continued their delinquencies. . . . The women themselves are on the whole a sorry lot. Burdened with feeblemindedness, psychopathic personality, marked emotional instability, a large proportion of them found it difficult to survive by legitimate means. . . . This swarm of defective, diseased, antisocial misfits, then, comprises the human material which a reformatory and a parole system are required by society to transform into wholesome, decent, law-abiding citizens." 

The book makes a number of important contributions to criminology and penology quite aside from the wealth of factual materials presented. It is, for example, a good illustration of research methodology of an unusually high degree of excellence; it serves again to point to the need, already emphasized in the earlier works by these same authors, for factual information about the inmates of our penal institutions after their "treatment" has come to an end; it emphasizes, as the earlier studies did not, the special considerations applying in the small but nevertheless definite group which apparently may be rehabilitated; and it brings into sharp relief the extent to which the problem of the female offender is complicated by the hopeless muddle in which present society finds itself in regard to sexual codes and standards of approved and disapproved sexual behavior.

It has sometimes been charged that the earlier Glueck studies were purely negative, showing only the appalling fact that most criminals and delinquents were not rehabilitated or "reformed" by the treatment applied to them. The statistics of "failure" are high in the present group as well (76.4 per cent.), but the tone of the book throughout reflects an earnest effort to develop a critically constructive program of more intelligent treatment. The final chapter of Conclusions and Recommendations is a simple, well-balanced, yet compelling statement of the present problem of delinquency with a clear-cut outline of probably desirable future development. It is an effective answer to the complacent attitude of, "Well, it's too bad, but what can we do about it?" which on occasion crops up in the discussion of proposals for changes in penal methods.

From the standpoint of strict scientific methodology, it would be desirable to have the same information for a control group of non-delinquent women that was here so painstakingly collected for the group of delinquents. How many of such a representative group would have been guilty of "unofficial misconduct" of a sexual nature? No doubt the proportion would have been less than for the reformatory women. Nevertheless, it is probably inaccurate to compare the results found in this study with the theoretical limit of zero for the general population which is implied in percentage comparisons dealing only with delinquents. Perhaps this refinement of research technique will come in future studies.

There are, likewise, a number of problems of method and procedure in the handling of quantitative data which technical students would like to have discussed more fully. In reducing life-history information to set descriptive categories, there is always a considerable element of judgment exercised by the person who does the quantifying of the data. The problem of reliability involved in this procedure has not so far been discussed by these authors. Results are generally expressed in percentages, but the totals on which the percentages have been computed are not always the same, due to a variety of reasons. The disarming ease with which such percentage figures can be misunderstood is nowhere

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discussed and such misinterpretation is perhaps not always adequately guarded against.

The technique for predicting conduct is further developed in this study by utilizing an interesting device for the ready determination of the significance of factors in relation to post-parole conduct. It would have been interesting, however, to have had the authors make use of both the coefficient of mean square contingency and the method of "maximum percentage difference" for the factors which they decided to use. It is not certain that the two methods select the same factors as important and it seems that this theoretical problem would have been worth some attention.

These observations must in no sense be taken as detracting from the essential soundness of the method as a whole. The book is well worth careful reading by anyone interested in the problems of delinquency, or by anyone interested in methods of human behavior research.

George B. Vold.


This case book contains about one hundred and ninety cases. There are eleven chapters, seven of which are devoted to the development of the usual topics connected with the subject, such as the Nature of Municipal Corporations, their Creation, etc., Nature of Ordinances, Powers, Officers, Remedies and Torts. The author has created an innovation in that he has devoted three of his chapters to the modern subjects of Home Rule, Initiative, Referendum and Recall, and the Merit System. Another chapter on Legislative and Administrative Procedure follows somewhat the orthodox development of the subject. However, in its development the author has stressed the modern emphasis being placed on administration. It is noteworthy that close to three hundred pages are devoted to the important subject of Powers.

In the chronological selection of cases, the book is ultra-modern. About eight-five per cent. of the cases selected were decided since 1920. Of this large percentage for that period more than half fall in the years 1930 to the present time. This selection is to be commended.

The author has indulged in a rather remarkable geographical spread in this selection of cases. Including the federal cases in which state law is followed, every state but two is represented. There are about thirty federal cases, two-thirds of which are devoted to the question of constitutionality of municipal action. About fifty per cent. of the cases have been selected from the ten states having about half the population of the country. The author's own state, Ohio, has furnished twenty-five cases. All cases represent American decisions. Inasmuch as our American municipal problems are peculiar to us, the lack of foreign decisions is not to be condemned.

The author's notes are quite adequate. There are a total of about sixty pages devoted to notes and author's comments. About six hundred and fifty up-to-date cases are cited in these notes, following the plan in the principal cases in emphasizing modern trends. The author has also followed another modern tendency in that he refers quite liberally to law review articles and notes. Thirty-three pages given to the Index make it more complete and detailed than one usually finds in a case book.

The author states in his preface that the book is intended for a course of thirty hours. The writer's experience has found it rather difficult to cover the amount of material contained in this work in that time. However, the cases

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seem to be so arranged that this can be done by proper selection and combination. An excellent picture of the modern municipal problems is presented by the selection of cases. The author has selected a number of cases, for instance, which point out that Dillon’s three-fold division of powers not only is still to be applied but can be applied under modern municipal conditions. Emphasis is properly laid on such vital matters as airports and zoning. One misses such old landmarks as *People v. Hurlbut.* However, the author compensates the omission by including sixty-four pages in the development of the modern idea of Home Rule. One may question the selection of *City of Chicago v. Tribune Company* as an illustrative case if he wishes to place the emphasis on tort liability. Yet this case is an excellent selection to bring out the author’s essential point—the nature of the municipal corporation in its relation to the state creating it. The writer has been deeply impressed by the selection of a number of up-to-date cases which give a fine summary of whole topics within the one case. To illustrate, the author includes the case of *City of Stillwater v. Lowell,* which makes an excellent statement of the various rules as to allowing obstructions in public streets. This plan of selection makes for saving time and avoiding repetition.

The modern municipal corporation is a cross between a local agency of the state created to carry out state policies in the particular locality and a self-governing unit given power to pass laws which are binding on all those coming within its boundaries. It is a public body having governmental powers and yet it conducts many enterprises in which the state at large is not interested. Emphasis is being placed more and more on the city as an administrative unit. It is still bound by the rule of rather strict construction as to powers. However, statutes and judicial construction without statutes have recognized that the modern city must adapt itself to fast changing modern conditions. Thus, the exercise of certain activities has been upheld which probably would not have been upheld fifty years back. This has been done without changing most of the fundamental rules of law. This present legal picture of the modern municipal corporation the author has developed in his selection and arrangement of cases with considerable success.

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1. 24 Mich. 44 (1871).
2. 307 Ill. 595, 139 N. E. 86 (1923).
3. 159 Okla. 214, 15 P. (2d) 12 (1932).