

REVIEWS

THE MYSTERIOUS SCIENCE OF THE LAW. By Daniel J. Boorstin. Cambridge: Harvard University Press, 1941. Pp. xviii, 257. \$3.00.

THERE is a great temptation in reviewing Mr. Boorstin's book to go off the deep end about it in a burst of eulogy. It is subtle, ingenious, witty and learned. It presents Blackstone against the intellectual background of the eighteenth century and focusses on him so many lights of different color and intensity that we are astonished to see that somewhat pompous and stodgy gentleman gleam and glow in a strange phosphorescence.

Blackstone was, in Mr. Boorstin's view, a typical child of the eighteenth century and eager to show that the English law was indeed a science, that is to say, a rationally coherent body of facts. It became, further, the "mysterious science" of the book's title, because this rational coherence resulted in a perfection of beauty that was its own justification.

Mr. Boorstin makes a triple division of his book and names his three divisions "Nature", "Reason" and "Values". The English law had to be shown to be a "natural" growth under the eighteenth century special concept of "nature": it had to be displayed as "rational" or it would not be acceptable to an age of reason. And finally it secured three values: "life"—taken by Mr. Boorstin as equivalent to "humanity"—"liberty" and "property."

I think Mr. Boorstin is right about the character and purpose of the Commentaries, but he need not have been quite so mysterious or scientific himself. Blackstone was engaged in the special task of justifying the way of lawyers to English gentlemen, who were also students or fellows of Oxford and had therefore had the most nearly complete education England could give. It is true that Oxford was in the days of the Commentaries at the lowest intellectual depths of its long history, but none the less the audience could be supposed to be supplied with Latin and some Greek and with a fairly extensive knowledge of ancient history and the Bible. Besides they read the new books of poetry and history as they came out—there were not too many—and had a gentlemanly detached interest in the philosophic controversies of the day, which included the physical and biological sciences.

That Blackstone would be more intent to make the law seem rational and good to this audience than he would have had to be if he were talking to the apprentices of the Inn or the Temple we can quite understand. He says clearly what he meant to do and why, in his introductory lecture. (1, 5, 6) "A competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education." It was the strange fate of a book intended to enable gentlemen to use law as a subject of polite conversation, that it became, as Mr. Boorstin rightly points out, the chief source of the law itself for lawyers, judges and administrators in the outer regions successively occupied by the common law. Indeed it served

this latter purpose better than the former. In spite of the successful effort to turn the language of the law into cultivated eighteenth century English, laymen in England were not beguiled into reading the book or talking about it. The University of California possesses a copy of the first edition, subscribed to and doubtless paid for by Mr. Edward Gibbon. It is in mint condition. There is not a fingermark on the broad expanse of margin. The evidence is strong that it had never been opened by the subscriber.

But it was widely read and discussed by laymen in the Colonies and in France and these persons were interested neither in the quaint lore of incorporeal hereditaments nor even in the rational beauty and perfection of a system devised by the noble, if rude, Anglo-Saxon ancestors of the English people. They leaped with avidity upon it as an authoritative statement of the fundamental rights of men and Englishmen — rights which no King or Parliament could take away. The "Liberty Boys" of the Colonies, who took the place of modern Anarchists and Communists in the eyes of most respectable persons, paraded the streets with placards proclaiming the rights of "Life, Liberty and Property" just as Blackstone had enumerated them. And many of the *cahiers* sent to the Legislative Assembly of France in 1789 and 1790 began with passages taken from the great work of Monsieur Blackstone, which was translated into French almost at once and had a wide circulation among the men who made the Revolution.

It was generally admitted that to have couched the law in "elegant" language — Jefferson's word for Blackstone — was quite a feat; but it did the law little good with the public, and did Blackstone little good with lawyers. Elegance could not overcome the ancient grudge the laity nourished against the law. Bentham was willing to admit that Blackstone had turned the "jargon" of lawyers into English, but it remained a jargon of ideas nonetheless, thought Bentham, and with him all the English rationalists and moralists.

For Mr. Boorstin neglects to note that Blackstone's book is essentially an apology, as, in a way, Bracton's book was in the heyday of the rediscovery of Roman law and Fortescue's book undisguisedly was in the flood of the Reception. Bracton solved his problem by incorporating huge masses of undigested Glossator doctrine into his statement of English law, and Fortescue by an argument point by point and institution by institution. Blackstone had a more difficult task. Educated English lawyers had been restive since the early seventeenth century over the difficulties presented by fitting their feudal legal heritage into the new methods of thought initiated by Descartes. Coke had prepared "Institutes" which were an agglutination of materials rather than an organization of them. But Finch and Cowell had attempted a more systematic arrangement, and Hale had at least contemplated one. It was in the seventeenth century that "text books" on special subject matters first appear in English law. The Commentaries were the culmination of these attempts, the most successful, partly because it was a culmination and also because, by a curious paradox, the Tory and Royalist judge who disdained enthusiasts, furnished the catchwords for rebels and doctrinaires.

Mr. Boorstin points out — indeed, he notes it in the citation from Franklin facing his first page — that Blackstone is at pains to rationalize the discord-

ances of the English law and to gloze over its barbarities. I doubt that Blackstone or his contemporaries would have denied it. He was speaking somewhat as an advocate. But that he was so deliberate in his efforts and so self-deceived as Mr. Boorstin supposes, is, I think, an error.

There is a slight air of sardonic banter—almost of derision—in Mr. Boorstin's tone, which Blackstone does not deserve. It was Coke, not Blackstone, who thought the common law—not the statute law—the “perfection of reason”, and he meant that phrase as a criterion by which to reject statements of law of which he did not approve. Blackstone was far from thinking the common law perfect. He thought it was better in many important respects than the existing law of the Continent—in which he was quite right—and its marked inferiority to the Roman law in order and system he believed he had himself partly remedied by introducing the very elegance which Thomas Jefferson made a reproach to him.

Certainly Blackstone was neither a profound thinker nor a keen analyst. And to catch him up on confusion of terms or on solemn tautologies is not difficult. Unfortunately our ingrained dislike of analysis has betrayed many writers much keener than Blackstone and more learned. But not all illustrations that Mr. Boorstin uses show as fuddled a mind as he makes Blackstone's seem. The maxim or rule or principle that the law will not suffer a right to be without a remedy, doubtless appears to be a pure tautology, if we remember that unless there is a remedy, there is no way of recognizing a right. But in *Ashby v. White*¹ it was given a practical meaning. Again, if one of the inseparable incidents in the creation of a tenancy at sufferance is the neglect of the landlord to oust the hold-over tenant, and if the Crown cannot be guilty of neglect it follows that there can be no tenancy by sufferance from the Crown. The fact that the word “because” is used does not make this conclusion meaningless. “Because” does not imply philosophical causation. And the objection Mr. Boorstin raises to the statement is the regrettable fact that in all logical arguments, the conclusion must have been contained in the premises. That happens to be the way men think. It is still true in the words cited from Locke² that “God has not been so sparing to men to make them barely two-legged creatures and left it to Aristotle to make them rational.” If we dared credit Locke with a witticism, we might call this one.

Many other of the special characteristics Mr. Boorstin assigns to the Commentaries are much less forced on Blackstone by his need to make law a science and a mystic experience, than taken over from accepted tradition. The distinction between the “law of persons” and the “law of things” is a Roman Law distinction at least as old as Gaius and already a commonplace even in English law. Mr. Boorstin makes the entertaining suggestion, enforced by an especially apt illustration,³ that Blackstone regarded the unresolved vestiges of barbarism in the law somewhat as one might regard ancient ruins left in a formal garden, not without value as decoration. That

1. 2 Ld. Raymond 938 (K. B. 1704).

2. P. 120.

3. P. 104.

seems true enough, but so did most of the eighteenth century lawyers to whom legal history was "antiquities" and all the better for a little savagery.

Mr. Boorstin does some justice to Blackstone's place as a historian. He was really a better historian than Reeves who followed him. Compared to the infantile credulity of Coke, his method was a model of critical acumen. Certainly he was not the equal of Madox or Spelman, but he came to grip with texts and he attempted to balance traditions, somewhat as his great contemporaries Gibbon and Robertson did. It is not altogether strange that he still clung to the Saxon origin of Magna Carta. It took another century to shake that venerable fable. It may also be said that his interest in comparative law was more than part of a studied plan to prove the "natural" character of English law. Comparisons were in the air, doubtless in the effort to find what was natural in human institutions, but at least in part because of the general stimulus given the inquiring mind since the creation of the modern world by Galileo and Descartes. Barrington on the Statutes had gone into comparisons largely, and Sir William, a Doctor of the Civil Law and a Fellow of All Souls, would be at great fault if he omitted Roman, Greek and Hebrew analogues.

I find myself quite at odds with Mr. Boorstin in his last section on Blackstone's "values". It is wrong to call "life, liberty and property", a "trichotomy", because it was not meant to be exhaustive. And Blackstone's references to the "humanity" of the English law was not merely an expansion of the notion of life as a protected "value". "Humanity" was an additional value. Nor was he wrong in ascribing it to a penal system, which with all its faults, had no torture — the *piene forte et dure* was obsolescent and soon abolished — no *crimes d'état*, no *lettres de cachet* and did have habeas corpus and public trials.

Mr. Boorstin is hard to satisfy. Is "common sense" always obscurantism? And is "authority" always a mystic justification and "equity" merely a glandular reaction? The trouble is that we cannot get premises for our legal syllogism except from common sense or equity or authority and while future Blackstones may be less naive than Mr. Boorstin thinks Blackstone was, they will have to work much on his lines.

Where Mr. Boorstin is, I should say, most seriously wrong in his presentation is in his constant assumption that Blackstone took all the law to have the beauty and perfection he assigns to much of it. Blackstone does not think he is describing the community of angels to which the judicious Hooker devoted a chapter. He is conscious indeed of the English law's deficiencies and of the fact that there are moral rights of unquestioned validity which the law does not protect. The relations of parents and children, as he describes them, furnishes several illustrations. And his protest against capital punishment for trivial offenses is both dignified and sincere. Finally, to declare that Blackstone regarded life and liberty as subordinate to the acquisition of property by commerce is without justification in the text or in the society of the time. Many of the gentlemen landowners who heard Blackstone and sent their younger sons to the bar had less interest than Mr. Boorstin imagines in what became in the American Revolution the struggle against the fetters of commerce.

Mr. Boorstin has opened up new vistas. I wish he would continue and explore one vista that opens out on Giambattista Vico and the *nuova scienza*. Or another that dealt exhaustively with the controversies the Commentaries excited. That the book as it stands is a notable achievement is unquestionable.

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MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS.

Published under the direction of the Julius Rosenthal Foundation, Northwestern University. Boston: Boston Law Book Co., 1941. Pp. xii, 321. \$5.00.

WHEN I read the publisher's blurb, that the sixteen contributors to this volume were the foremost legal minds of America, and found listed, fourteen professors of law,¹ and two of philosophy, and not a single one of those "naïf and simple minded men," the judges, I for a while repented of my promise to review it. But only for a while, for I remembered my brief metempsychosis some years ago, when, for a moment of glory, I had felt the soul of the judge moving out, the soul of the professor moving in. I remembered too what I had then found out and publicly announced,² that, their philosophical pretensions notwithstanding, our learned men of the law are subject to the same influences making for error, are engaged in the same kind of synthetic thinking, as the rest of us, and that with most of them as with us, it is in a large sense more than metaphorically true, "that a fact is nothing except in relation to desire."³

What Hobbes had had to say of wisdom,⁴ of pedantry,⁵ and of philosophy,⁶ came to mind to fortify me and remembering that I myself had written some-

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1. One of them, John Dickinson, whose fine paper breathes the spirit and exhibits the skill of the proverbial Philadelphia lawyer, is indeed given a secondary listing as one.

2. *The Worm Turns, or a Judge Tries Teaching* (1932) 27 ILL. L. REV. 355.

3. "From the same it proceedeth that men give different names to one and the same thing, from the difference of their own passions; as they that approve a private opinion call it opinion, but they that mislike it, heresy; and yet heresy signifieth no more than private opinion but has only a greater tincture of choler." HOBBS, *LEVIATHAN* (Morley's ed. 1886) 54.

4. "That words are wise men's counters, they do but reckon by them. But they are the money of fools that value them by the authority of an Aristotle, a Cicero, or a Thomas, or by any other doctor whatsoever, if but a man." *Id.* at 25.

5. "For a man to forsake his own natural judgment and be guided by general sentences read in authors and subject to many exceptions, is a sign of folly and generally scorned in the name of pedantry." *Id.* at 31.

6. "That no living creature but man only is subject to absurdity, and of men those are of all most subject to it that profess philosophy, that there can be nothing so absurd but may be found in the books of philosophers." *Id.* at 29.

thing about this same law,⁷ and had even been invited to contribute to the volume under review, I threw off doubt and diffidence and entered boldly upon my task.

Keeping in mind the purpose of the sponsors, to produce not a mere collection of papers lacking in definite unity but a symposium, exhibiting variety and diversity indeed, but yet forming a coherent whole, I have read each paper not once but many times, to find whether and to what extent, there is a common thread on which each is strung, or whether each stands a thing apart, wrapped in the solitude of its own originality. Originality I do find in angle of approach, method of treatment, placing of emphasis, and above all, in style. Otherwise, each contributor, with a few exceptions, instead of laying claim to a philosophy of law peculiar to himself, has broken free of the embarrassingly personal and limiting connotations of the title, to take a more general view. Viewing law abstractly and ideally, in its timeless, contentless and universal aspects, as controller, as binding force, abstracted from the institutions it sanctions, the results it brings about, the things on, and the means by, which its force is exerted, each has made his contribution, some far more effectively than others, to the discussion and the understanding of law so viewed. Though each presents a different aspect of it, the papers as a whole present this thing men call law, as it has manifested itself in the never-ending conflict between rule and discretion, the absolute and the relative, the fixed and the changing, the predictable and the unpredictable, as it affects or is affected by the establishment of law as order, the struggle for laws as means, the development of law as purpose.

Asking and answering the age old question, "Why seek ye the living among the dead?", the papers, as a whole, make it clear, I think, that as life is always in flux, so law, that explanation of its social implications and consequences which lawyers and judges as life's spokesmen in that field are forever making and remaking, must also be; that law is a living thing and like all living things, modifies and grows, and growing, lives; and that though the understandardized and unscientific because very human sense of justice, which these views enshrine, is a high price to pay for liberty, it is not too high.

They make it clear too, that we may look ever confidently to the life which we see evolving all around us, to continue to release forces and set in motion agencies to make and keep the law we live by less rigidly standardized, more responsively humanistic, and therefore the social order in which it operates, less mechanized, less standardized, less hopelessly despairing. But clear as they make it, that the glory point of the law is a kind of "glorious uncertainty", they make it clearer still that this uncertainty is the result not of caprice, but of the application of broad but not over-generalized principles which, subjected to a more or less inconstant process of examination and re-examination, operate within more or less defined

7. *This Thing Men Call Law* (1934) 2 U. OF CHI. L. REV. 1; *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision* (1929) 14 CORN. L. Q. 274; *LAW AS LIBERATOR* (1937); *The Glorious Uncertainty of Our Lady of the Law* (August 1939) 23 AM. JUD. SOC. J. 73.

limits under the restraining influence of understood and received rules and practices.

Reading what they have written, a discerning student of the law will understand why it is that finite justice, which has its seat in the enlightened conscience of mankind, has been the nearest attained and the best administered when the actual law has struck the best balance the times admit of between sympathy and a strong and enlightened common sense, when, in short, the pure claim of a particular demandant is examined and disposed of, in the light not merely of its own appeal, but of those social considerations, out of which wisdom and prudence and a strong common sense, from time to time, extract principles for the guidance of human affairs.

Now this is not, of course, to say that in each paper taken by itself, all of this appears, nor that each contributes its due part to the whole. It is to say though, that—differing as each does in assumptions, in point of view, and in emphasis—taken together, they treat of this iridescent thing men call law in its most illusive and entrancing phases, its ever changing content under the steady pressure of the changing life it serves and rules. It is to say too, that no single one of them, not even the super-realist, the “never yet clearly apprehended” Bingham, with his passion for telling us not what law is but what it is not, as though he believed of it as the farmer did of the giraffe, “There ain’t no such animal”, with his demand, “that we banish from our professional tenets, the absurd dogma, ‘A government of laws and not of men’”, would want to see the law a whirling kaleidoscope of change, the administrators of law entirely free of its control. No single one of them, not even Kennedy, with his loyalty to “scholasticism, the old”, his enmity to “realism, the new” jurisprudence, his unquestioning belief in natural law, would want to see law rendered impervious to change. All are in agreement with Locke that law is, in its essence, not the restrainer of men’s liberties but the giver of them. The real point of difference between the extreme “realists” self styled and all the rest, comes in the emphasis on who and what is to be restrained, who and what is to be liberated, how and by whom the restraints are to be applied.

A brief individual word about some of the papers and I have done. Wigmore, by confining himself rigidly in manner and substance to what he correctly calls a classification of legal thinking, deprives us, I think, of a contribution which, if written in his charming, free style, and from the fullness of his living and thinking, might well have been the sparkplug of the book. Upon Powell, the subject has had a quieting and gentling effect. Bullfighter extraordinary in the constitutional field, he seems in this broader one, as ox-eyed and tender as any Ferdinand of ours. Cook, Kocourek, and Moore, seem to me too much concerned with certain highly technical prepossessions, Cook with his socio-scientific, Kocourek with his mathematico-physical, Moore with his behaviouristic point of view. Moore’s effort is particularly Beamish-Boyish. To me, Bible Belt Born, and a legally accredited representative of the rough element in our profession, that is, those who went neither to Harvard nor to Yale, it seems a perfect illustration of what might be produced by one who, for too long has devoted

himself to too much about too little and too little about too much until he has come to know everything about nothing and nothing about everything, and is just ripe for a Deanship. Reading it almost reconciled me to not having gone to Yale. Cohen, with his forthright challenge of the sweeping claims of the inductionists, his downright defense of deduction, his brushing away the cobwebs that have prevented some of us from thinking clearly on this matter of the place of induction and deduction in the law, has made a real contribution. Dewey's paper, while brief and to the point and good enough in its way, is, I think, a little academic, a little primerish. Fuller, Patterson, and Greene, each in his own characteristic fashion, makes a distinctive contribution to the whole. But to me, the outstanding papers are those of Dickinson, Pound, Llewelyn, and Radin. Dickinson's is perhaps the best modern paper I have read on the eternal truth of Madison's statement, that in forming a government of men over men, the first difficulty is this, to enable the government to control the governed, the next, "to oblige the government to control itself." Llewelyn, while still, to an extent, style bound and realism haunted, shows in the deepening maturity of the all around view he takes in this paper, how true it is that knowledge comes but wisdom lingers. While Pound, in his thorough and ineluctable way, and Radin, less severely logical but equally satisfying, at once pose and dispose of the essential questions law-men meet, when they think and write about this thing called law.

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THE QUEST FOR LAW. By William Seagle. New York: Alfred A. Knopf, 1941. Pp. xv, 439. \$5.00.

For many years now in the field of medicine there have been available to the practitioner, student, and layman valuable introductory texts tracing the history and describing the techniques of the discipline. But in the field of law such works have been few in number, and these few antiquated and inadequate. An attempt is being made, however, to eliminate this cultural lag; and in the last several years we have seen published more what-you-should-know-about-the-law books than in decades before. This phenomenon can perhaps be explained as a by-product of the President's attempt to reorganize the Supreme Court, which focused public attention on the rationale of judicial review, the nature of the judicial process, and the character of the work of the legal profession. Of the recent books of this *genre* Max Radin's *The Law and Mr. Smith*, published in 1938, deserved much more notice than the others, and more notice than it has received, for it was by far the most adequate answer to the need for a descriptive and critical guide. Now Radin's book must share honors with *The Quest for Law*. Since the orientation of the former is mainly philosophical, and of the latter mainly

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historical, the books complement each other, and taken together constitute a balanced study.

The history of law is presented by Mr. Seagle from the point of view of increasing complexity. Apart from survivals he finds three types of law that reveal distinguishable aspects, namely, primitive, archaic, and mature law. Primitive law is customary law, and is to be found among hunters and herdsmen who have not yet developed courts. Archaic law obtains among peoples who have adjudicating officials or courts, which constitute "the basic institution of every legal system." This is the law of almost all ancient peoples, African tribes, and the Germans at the time of the decline of the Roman Empire. It is the law of feudalism and slavery. Mature law is found wherever lawyers (not simply courts) have appeared. "All the complex characteristics of mature legal systems are conditioned by the dominance of professional lawyers." It is the law of Greece, Rome, and modern capitalism.

Mr. Seagle employs this classification to orient his survey of the origin and development of legal institutions, which takes about two-thirds of the book. In the last third of the book this classification is disregarded to afford the author leeway to discuss such topics as the higher-law doctrine, judicial supremacy, administrative law, international law and the nature of justice.

Unless the reader is cautious he is likely to be misled by the structure of the book: Book II is called "Primitive Law", Book III is called "Archaic Law", and Book IV "The Maturity of Law". This creates the impression that there is such a thing as universal law which has gone through these three stages of development. For what else can the author intend by this structure, this "Gestalt", especially when one bears in mind his purpose to present law from the point of view of increasing complexity? The fact, however, is that the author does not envision a universal history of law, a continuous stream having its source in a spring in the Garden of Eden, because, if there were such a continuous stream, such a universal history, how could mature law be the law of both the Roman Empire and modern capitalism? What Mr. Seagle means is that the legal system of each people shows the three stages in its development, so that *at the same time* primitive law may exist in one place, archaic law in a second place, and mature law in a third place. It would have led to greater clarity had Mr. Seagle followed a plan which would have permitted him to trace the legal development of specific peoples and to leave for summary chapters the formulation of inductive generalizations.

Another source of misunderstanding, unless the reader is very cautious, is the author's emphasis on the definition of mature law in terms of its professional character, which creates the impression that Mr. Seagle conceives mature law to be fundamentally lawyer-made. While Mr. Seagle occasionally attempts to keep in sight the property and social relations which are the matrix of law, the occasional mention of these relations is insufficient to mark their transcendent importance. Marx and Engels, it will be recalled, by over-emphasizing the property relations and by paying insufficient atten-

tion to the traditions, techniques and interests of the legal profession, committed the converse of Mr. Seagle's sin, a fact which Engels acknowledged in a letter to Conrad Schmidt. Mr. Seagle was probably aware of the lack of balance in Marxist writings and tried to avoid it; but instead of steering a middle course, which is difficult but not impossible, he creates the impression of having avoided Scylla only to run into Charybdis.

The book here and there unfortunately shows the evolutionary stages of the authors' thought without revision in the light of conclusions finally accepted. For instance, in discussing the theory that adjudication arose out of arbitration, on page 60, Mr. Seagle says that the theory "for all its plausibility probably has no foundation in fact." On page 61 he says that the process of arbitration or mediation "is no more the origin of the judicial function than the singing encounter of the Eskimo. . . . The appearance of courts represents an independent evolution." On page 62 he speaks of "the falseness of the arbitral theory of the court"; and on page 64 he says: "It must be apparent now why the first courts did not evolve from arbitrators, but destroyed them." Also, now and then Mr. Seagle brings in a fact which, for all its spiciness, is totally irrelevant and discordant; *e.g.*, in speaking of Livy in connection with the Twelve Tables, Mr. Seagle reminds us that Livy is also the author of a mythical sex scandal involving Appius Claudius; in speaking of Bartolus, the author tells us that the jurist would scatter money to the populace "as he rode along the streets of Bologna on a horse with gorgeous trappings"; in telling us that Blackstone did not go beyond the description of English law as it existed in his time, he calls attention to the fact that Blackstone was a Tory with a great fondness for port. But despite its flaws the book is an important contribution to legal literature, and can be read (and even studied) with great profit.

MILTON R. KONVITZ†

INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY. By James A. Gathings. With an introduction by Edwin Borchard. Washington, D. C.: American Council on Public Affairs. 1940. P. xiv, 143. \$3.00.

WHILE not yet a formal belligerent, the United States registered and fingerprinted aliens,¹ announced a Black List,² "froze" credits owned by the nationals of disfavored states,³ imposed export controls,⁴ and seized ships.⁵ These measures have been hailed abroad as stopping leaks in the "blockade"

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1. ALIEN REGISTRATION ACT, 54 STAT. 673 (1940), 8 U. S. C. A. §§ 451-52 (Supp. 1940).

2. First proclaimed July 17, 1941; see 5 DEP'T STATE BULL. 41 (July 19, 1941).

3. See, *e.g.*, summary given in 4 DEP'T STATE BULL. 718 (June 14, 1931).

4. See, *e.g.*, 4 DEP'T STATE BULL. 91-92 (June 18, 1941).

5. See, *e.g.*, Executive Order 8771 under the Act of June 6, 1941, 4 DEP'T STATE BULL. 531.

imposed by the democratic powers as part of the war of attrition in which they are engaged.⁶ On the other side of the ledger, the Axis Powers are engaged in forcing in occupied countries new industrial combinations and new stock issues,⁷ in order to secure the economic control to which they aspire. The pattern is reminiscent of that of twenty-five years ago. Mr. Gathings efficiently and briefly refreshes the memory of what the world has done before, what has gone before in the United States, and points what may be expected in the months to come.

With careful and objective craftsmanship, he opens the discussion with a concise summary of the background of the position of enemy property in treaties, in judicial decisions, in executive practice, and in technical comment, and develops the rule of international law which had grown up under this fused practice. He then turns to the practice in the United States during the Revolution. To a public already conditioned by popular novels to find mistreatment of the Loyalist faction, Mr. Gathings' incisive documentation of state and federal action should present no shock, but rather re-enforcing evidence. In fifteen pages, he gives the legislative and judicial record, whose arbitral counterpart in primary materials has been set forth by Judge John Bassett Moore.⁸ Then, analyzing the treaty patterns, the executive policy and judicial decisions, he shows the cleavage between the courts and the executive in subsequent years and establishes the dominant policy of the United States up to the period of the last war—respect for alien enemy property. Up to this point, he has concerned himself with conventional issues, already well known to international lawyers.

When, however, he turns to the period of the last war, he opens up a new field. It is strangely significant that, while there is an expansive French and German literature on the treatment of enemy property in the last war, there is a dearth of Anglo-American material. Whether the lack is born of indifference to its fate or to a Bostonian sense of rectitude, or whether it comes from an administrative refusal to report or to open the archives, hitherto more characteristic of the continent, is immaterial. The fact remains that primary materials on the Anglo-American treatment of alien property are hard-come by; and that there is only slight discussion of it in secondary sources. The burden of proof which Mr. Gathings has had to shoulder is a heavy one but, by and large, he has sustained it.

The chapter on European practice, so important for comparative purposes, is carefully done so far as the statute and case record is concerned, but makes one wish that Mr. Gathings had pressed his investigation further. The administrative side of the picture is largely lacking. His thesis would have added force, it is submitted, and his discussion of American practice been thrown into higher relief, had he shown evidence such as that even in war-wrecked Belgium there were grave doubts as to the wisdom of liquida-

6. See, *e.g.*, (Sept. 13, 1941) 141 *BRITISH ECONOMIST* 314.

7. See, *e.g.*, Olson, *Norway under German Occupation* (August 2, 1941) 4 *FOREIGN COMMERCE WEEKLY* 3.

8. 3 *INTERNATIONAL ADJUDICATION: PRE-WAR DEBTS: ARBITRATION UNDER JAY TREATY* (1794), ARTICLE 6. (Modern ser. 1931).

tion,⁹ that there was abuse of the sale power given the custodian in many countries,¹⁰ that petitions charging confiscation of enemy property were heard before the Mandates Commission of the League of Nations,¹¹ and many other issues of a like nature.

In his discussion of the American treatment of enemy property, both during and after the war, Mr. Gathings has used the interesting device of examining legislative and administrative policy, both in terms of its own expression and in its interpretation by the courts. He points again to a cleavage — the legislature avoiding confiscation and avowing respect for enemy property and the courts sustaining liquidation when such issues were presented to them. He stresses a point, particularly pertinent in our present situation, namely, the custodian's sale practices and decision to nationalize enemy property, made at a time when Congress was affirming its intention not to confiscate but to return this property. His precise marshalling of primary materials, congressional and executive, is a contribution, for which those who have a concern for the future of private property owe him a debt of gratitude, as do those who in the months ahead will compare the impact of the new legislation upon foreign investment in the United States. It is an accurate chart of American sequestration practices.

The final chapter on the future treatment of enemy property in the United States is already meeting the test of practice. The bitterness of the last war with its consequent economic competition never faded enough to produce either the codification of international law on this point or a new treaty pattern, which in Mr. Gathings' opinion might have helped cure the problem. The bitter fruits of sequestration and of nationalization of enemy property are again maturing in the political orchard. How full of gall and wormwood they may be, Mr. Gathings has shown in impartial detail. His hope that there may be sequestration followed by return of the property after the war seems built on shifting sands, in view of the custodian's policies in the United States and abroad during the last war. In the background of what is now being done under the guise of war legislation, and in view of the tendency in domestic practice to nationalize essential industries without adequate compensation, Mr. Gathings' book makes grim reading for those who hope to see safety for private enterprise and for foreign investment in the future. Perhaps his chart of past actions will help avoid the pitfalls of past experience. At least it will clarify the record for future historians.

PHOEBE MORRISON†

9. See, *e.g.*, the discussion which is recorded in (1921) *JOURNAL DES TRIBUNAUX passim*, and the answer to the confiscation charge, made in *Projet de lois sur le séquestre et la liquidation des biens ennemis* no. 67, *DOC. PARL. (CHAMBRE)* No. 350, pp. 1060-63 (1919-20).

10. See, *e.g.*, the intimation that the Administration of New Guinea had made "a very bad bargain" in the sale of plantations, *League of Nations Document*, C.341.-M.99.1928.VI.27; 1928.VI.A.9.27 (June 13, 1928).

11. See, *e.g.*, the petition of the Kaoko Land-und Minen Gesellschaft, a Berlin corporation doing business in Southwest Africa, *League of Nations Document*, C.568.-M.179.1928.VI.255 *et seq.*; 1928.VI.A.14.255 *et seq.*

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THE VOTING TRUST. By John Anton Leavitt. New York: Columbia University Press, 1941. Pp. 216. \$2.50.

THIS volume covers in a general way the various ramifications of the voting trust device and seeks to evaluate its desirability in the corporate world of today. Not written by a lawyer nor solely for the legal profession, it necessarily intrudes upon the lawyer's province as the author himself recognizes by his chapter entitled *The Law of Voting Trusts*. As such the volume may properly be assayed from the lawyer's viewpoint.

Commencing with chapters on the nature and history of voting trusts, the book goes on to take up in separate chapters the voting trust agreement, uses of voting trusts, voting trustees, and security holders under voting trusts. After the legal chapter referred to above, it concludes with an analysis of *The Case for and against Voting Trusts*. The author's final recommendation is the prohibition of voting trusts in some instances and their severe restriction in others. Specific reforms are suggested, with the desirability in principle with which few would quarrel. From the practical standpoint, however, several of them are of so general a nature as to be meaningless.

One cannot refrain from speculating on why a volume of this kind was undertaken and carried through to publication. Perhaps the explanation is that the voting trust is a very simple and remarkably effective device for corporate control which has the additional appealing quality of tangibility. As a consequence it has caught the attention of many writers and has received more notice than it deserves. The author here seems to have unfortunately succumbed to this sort of fatal lure.

The subject of voting trusts is simply too sterile to merit the lengthy treatment accorded it in the present volume. There is nothing difficult about the voting trust device which requires extended explanation, except possibly intricate questions of draftsmanship — a matter with which this volume does not attempt to deal. The desirability of the voting trust as a matter of policy has been fully debated and it is clear that the ultimate issue is the use to which a particular voting trust has been put. It can obviously be utilized in an improper manner and legislative as well as judicial controls are needed. But all this could be dealt with in considerably less than two hundred pages.

The book itself is needlessly repetitious and includes much unnecessary material which could more wisely have been omitted. Aside from the chapters on the history of voting trusts and on voting trustees (who they are, their financial interests, and whom they represent), the book fails to hold the reader's interest, especially that of a lawyer. While a thorough study was made of innumerable voting trust agreements, the results of such research inevitably tend to appear as a deadening recital of technical provisions. In other respects the work relies heavily on secondary authorities, particularly to provide a basis for discussion. At times this reliance is so marked that the book becomes nothing but a compendium of existing literature on voting trusts. An up-to-date touch is given by frequent reference to the work of the Securities and Exchange Commission, but the tedious outline in the text of relevant provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 is neither enlivening nor is it in a form to be of use

to the practitioner. Reference is appropriately made to the Commission's attitude toward voting trusts under Chapter X of the Bankruptcy Act, but its administration of the Public Utility Holding Company Act of 1935 is strangely neglected. The inclusion as Appendix II of the now out-moded Federal Trade Commission's Form F-1 for registration of voting trust certificates under the 1933 Act is an unscholarly dereliction.

From another point of view the foregoing comments may perhaps do the book an injustice. Policy matters aside, the author's deductions are invariably sound. The non-lawyer will find the volume an easily understandable exposition and even the lawyer seeking the general arguments pro and con on various points will find it a convenient source of information. He may also find the bibliography and the collection of voting trust provisions distinctly helpful.

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CASES AND MATERIALS ON THE LAW OF BILLS AND NOTES. By Howard L. Smith and Underhill Moore. St. Paul: West Publishing Co., 1941. Fourth Edition. Pp. lxiv, 1070. \$6.00.

SMITH AND MOORE's first casebook on Bills and Notes was published more than thirty years ago. A second edition was published in 1922, and a third edition in 1932. During these thirty years this work has become a standard law school casebook in the field of negotiable instruments, and deservedly so.

This outstanding work is now ready in a new and improved fourth edition by Professor Underhill Moore of the Yale Law School. In its scope and arrangement, this edition does not differ materially from the earlier ones. But several important problems are raised for the first time. Thus, cases on Travelers' checks, such as *American Express Company v. Anadarco Bank & Trust Company*,¹ are introduced. Certain aspects of the relation between drawer and drawee—which may seem to have no recognized place in the negotiable instruments law—are also initially treated. For example, the duty of a depositor to examine periodic statements of his account and his cancelled checks and to notify the bank if his name has been forged on any returned check is considered in *McCormick v. Rapid City National Bank*.² Again, the chapter on Acceptance begins with the excellent illustrative case of *First National Bank of Jackson v. Hargis Commercial Bank & Trust Co.*,³ which deals with a question, only indirectly covered in prior editions, of whether a check operates as an assignment of any part of the funds to the credit of the drawer with the bank. One feature of the problem involved

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1. 179 Okla. 606, 67 P. (2d) 55 (1937).

2. 293 N. W. 819 (S. D. 1940).

3. 170 Ky. 690, 186 S. W. 471 (1916).

in instruments which do not satisfy the formal requisites prescribed by the statute for negotiable instruments but which are, nevertheless, in view of some of their stipulations, held negotiable by contract or estoppel is illustrated by the English case of *Hibernian Bank, Ltd. v. Gyson and Hanson*.⁴ The effect of a provision for renewals in a note is presented by the Canadian case of *Ross v. Empire Construction & Investment Co., Ltd.*,⁵ and the problem of the "imposter-payee" is treated in a new aspect in *Halsey v. Bank of New York & Trust Company*.⁶

The chapters on Acceptance and Value have been greatly expanded and numerous modern cases have been inserted to raise the new problems in these fields. The general scheme of the cases, which is especially apparent in the Acceptance chapter, is designed to present the problems from the standpoint of the practicing lawyer. For example, there are numerous cases dealing with the liability of a drawee as a constructive acceptor by conduct or by negligence in effecting collection.⁷ Furthermore, problems underlying the issuance of irrevocable letters of credit are more fully treated.⁸ Questions of current account and set off between bank and customer are presented through an excellent series of selected cases.⁹ And the material on the liability to a bank or to its receiver of a person, who for the accommodation of the bank, executes an instrument which is in form a binding obligation, is expanded.¹⁰

Many new cases, decided during the last ten years, have been included in this fourth edition to illustrate various legal propositions in lieu of earlier cases that had been utilized in the prior editions. Instead of the earlier South Carolina case of *Putnam v. Crymcs*¹¹ to illustrate words of negotiability, this new edition begins with the Texas case of *City National Bank & Trust Co. of Corpus Christi v. Pyramid Asbestos & Roofing Co.*¹² Instead of using such cases as *Josselyn v. Lacier*¹³ and *Carlos v. Fancourt*¹⁴ to present

4. 2 K. B. 384 (1938).

5. 1 W. W. R. 714 (1932).

6. 270 N. Y. 134, 200 N. E. 671 (1936).

7. Pp. 238-49. *Mitchell Live Stock Auction Co. v. Bryant State Bank*, 65 S. D. 488, 275 N. W. 262 (1937); *Robert v. School District No. 1*, 99 Colo. 484, 63 P. (2d) 1232 (1936); *First Nat. Bank of Portage v. Wisconsin Nat. Bank of Watertown*, 210 Wis. 533, 246 N. W. 593 (1933); *Canal Bank & Trust Co. v. Denny*, 172 La. 840, 135 So. 376 (1931); *Decatur Creamery Co. v. West Side Trust & Sav. Bank*, 213 Ill. App. 220 (1919).

8. *Continental Nat. Bank v. National City Bank of New York*, 69 F. (2d) 312 (C. C. A. 9th, 1934).

9. Pp. 464-76. *Raymond Concrete Pile Co. v. Federation Bank & Trust Co.*, 174 Misc. 206, 20 N. Y. (2d) 575 (Sup. Ct. 1940); *Bank of Metropolis v. New England Bank*, 1 How. 234 (U. S. 1843); *Gonsalves v. Bank of America Nat. Trust & Sav. Ass'n*, 16 Col. (2d) 169, 105 P. (2d) 118 (1940); *Kardon v. Willing*, 102 F. (2d) 957 (C. C. A. 3d, 1938).

10. P. 340 *et seq.*

11. 1 M. C. Mul. 9 (1940).

12. 39 S. W. (2d) 1101 (1931).

13. 10 Mod. 294, 317 (K. B. 1715).

14. 5 T. R. 482 (K. B. 1794).

problems of payment out of a particular fund, the new edition uses the recent Louisiana case of *Continental Bank & Trust Co. v. Miller*.¹⁵ Instead of the venerable *Cooke v. Colehan*,¹⁶ dealing with the negotiability of an instrument payable at a specified period after death, this edition includes the recent Kentucky case of *Murrell v. Gibbs' Administrator*.¹⁷ And on the theft of an incomplete negotiable instrument and its negotiation by a holder in due course, instead of the familiar *Baxendale v. Bennett*,¹⁸ the recent cases of *Heimberg v. Lincoln National Bank*¹⁹ and *Thomas v. Standard Accident & Insurance Co.*²⁰ are used.

On the other hand, this reviewer misses some of the old familiar faces. *Miller v. Race*²¹ always seemed an excellent case to present the problem of negotiability. *Canal Bank v. Bank of Albany*²² is reduced to a footnote. This reviewer also regrets, if for none other than pedagogical reasons, the elimination from the new edition of the cases dealing with the fictitious payee doctrine.²³ Again, on the subject of the negotiability of trade acceptances, although the Massachusetts case of *State Trading Corporation v. Toepfert*²⁴ which is used in the new edition reviews the authorities, the inclusion, as in the third edition, of the two Texas cases of *Lanc Co. v. Crum*²⁵ and *Arrington v. Mercantile Protection Bureau*²⁶ seemed preferable. But after all, these are only details in which individual instructor preferences are bound to play a determining part.

A new feature of this fourth edition is the introductory section which contains forty pages of facsimile forms of typical documents and credit instruments that are used in business for the creation and transfer of deposit currency. These forms are arranged in such a way as to take the student through a standard transaction from start to finish. The appendix of the fourth edition contains not only the Uniform Negotiable Instruments Act but also the Bank Collection Code. The Uniform Fiduciary's Act might well have been included too.

It has been suggested that law curricula do not offer the prospective lawyer a sufficient acquaintance with the law of banking transactions. Professor Aigler's casebook, for example, presents a selection of cases on the law of

15. 172 So. 557 (1937).

16. 2 Strange 1217 (K. B. 1744).

17. 275 Ky. 124, 120 S. W. (2d) 1018 (1938).

18. 3 Q. B. D. 525 (1878).

19. 113 N. J. Laws 76, 176 Atl. 528 (Sup. Ct. 1934).

20. 7 F. Supp. 205 (1934).

21. 1 Burr. 452 (K. B. 1758).

22. P. 667, n. 17.

23. *Coggill v. American Exchange Bank*, 1 N. Y. 113 (1847); *Seaboard Nat. Bank v. Bank of America*, 51 Misc. 103, 100 N. Y. Supp. 740 (Sup. Ct. 1900); *Trust Co. of America v. Hamilton Bank of New York City*, 127 App. Div. 515, 112 N. Y. Supp. 84 (1st Dep't 1908).

24. 304 Mass. 473, 23 N. E. (2d) 1008 (1939).

25. 291 S. W. 1084 (1927).

26. 24 S. W. (2d) 383 (1930).

"Negotiable Paper and Banking." But if cases on banking are to be included it would seem that they should be integrated with the bills and notes cases as a unified whole and not merely presented as an independent part of a casebook. In any event, some aspects of the collection problem presented by such cases as *City of Douglas v. Federal Reserve Bank of Dallas*,²⁷ *Federal Reserve Bank of Richmond v. Malloy*,²⁸ and *Jennings v. United States Fidelity & Guaranty Co.*,²⁹ might well be included in any case book on Bills and Notes in order to familiarize the student with the problems involved.

But the difficulty of suggesting treatment of omitted material and more detailed treatment of other matters is that casebooks already contain too much material for the time ordinarily allotted. For example, the first edition of Smith and Moore's casebook on Bills and Notes contained 709 pages and 332 cases, the second edition contained 799 pages and 337 cases, the third edition contained 918 pages and 365 cases, and the fourth edition contains 1012 pages and 401 cases. But reviewers are rarely consistent. They "view with alarm" the ever increasing number of pages and cases, yet suggest new material that should have been included without indicating what material should have been omitted in lieu thereof.

On the general problem of arrangement, some workers in the field of Bills and Notes and related subjects prefer that the liability of the parties should be treated before cases on formal requisites of the concept of negotiability. As a practical matter, the instructor must take up both together, without regard to which subjects appear first in the casebook. Other teachers believe there should be more emphasis on the economic aspects of commercial paper, including corporate bonds, interim certificates and security receipts,³⁰ and that bills and notes should be incorporated in a larger course devoted to commercial and investment paper and to bank credit. But to argue the pros and cons on both of these questions would convert this from a book review into a controversial treatise.

This reviewer was a student in Professor Underhill Moore's Bills and Notes class at Columbia Law School more than twenty years ago. Largely through the inspiration of that student experience he has retained, as a practicing lawyer, an undiminished interest in the subject. "First-rateness" characterizes everything Professor Moore has done, both in and out of the classroom. The new edition of this excellent work provides a most teachable collection of available materials and there is little doubt that it will enjoy the wide use and general approval that was accorded to its worthy predecessors.

LESTER A. JAFFE†

27. 271 U. S. 489 (1926).

28. 264 U. S. 160 (1924).

29. 294 U. S. 216 (1935).

30. See *President & Directors of Manhattan Co. v. Morgan*, 242 N. Y. 38, 150 N. E. 594 (1926).

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DECLARATORY JUDGMENTS. By Edwin Borchard. Cleveland: Banks-Baldwin Law Publishing Co., 1941. Second Edition. Pp. xxxvii, 1152. \$22.50.

HAVING reviewed the first edition of this book in this *Journal* in 1935,¹ it would probably now be sufficient to say that the second edition maintains the high standard of the first, and that the new edition fully covers all decisions rendered and statutes enacted since 1934. The preface to the second edition correctly indicates the thorough revision of the first edition by the statement that:

"Some 400 pages have had to be added to the text of the old edition. Entirely new chapters on Jurisdiction, Parties, Taxation, Public Officers, Insurance Policies, Patents, the Civil Adjudication of 'Penal' Legislation and Forms have been added and most of the old chapters have been greatly revised."

When the first edition appeared the declaratory judgment was relatively new in many of the states which had authorized it, and had just been authorized in the federal courts. The first edition has done much to aid in the initiation of declaratory judgment procedure. It is fortunate that the first treatise upon the subject should have been prepared by an author who was most influential in obtaining its adoption, and that this author may now by a new edition steer correctly the use of the declaratory judgment. The value of the second edition for this purpose is increased by the inclusion of forms which did not appear in the first edition.

Professor Borchard's volume is not merely a practitioner's handbook, but also a scholarly treatise which presents the historical background of the declaratory judgment, and a thorough analysis of its place in judicial procedure. He correctly points out the danger which presents itself through a tendency of the courts to give a narrow and technical construction to statutes providing new methods of procedure.

Throughout his book the author points out the defects of judicial procedure and the advantages of declaratory judgments. Much may be accomplished through the declaratory judgment, and the new edition of Professor Borchard's book should have an influence in obtaining its adoption by the nine states which have not already provided for its use. But the author properly recognizes that the declaratory judgment alone will not solve the problems of judicial procedure. The adoption of a more simplified procedure and of more uniform standards, which has been accomplished recently in the federal courts, contributes much, but the lawyers and the courts must unite in bringing about a better judicial organization, with simpler and prompter methods of administering justice. Worship of technicalities necessarily characterizes those who have spent their lives in the application of technicalities, but the lawyers must awake to the primary problems of administering justice, or else the layman must seek to reform judicial organization and judicial procedure.

WALTER F. DODD †

1. (1935) 44 YALE L. J. 715.

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