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BOOK REVIEWS

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The Negotiable Instruments Law. Third Edition. By Joseph Doddridge Brannan. Cincinnati, The W. H. Anderson Co. 1920. pp. lxviii, 622.

The primary questions for any reviewer of a book are: *What is it?* and *What of it?* The second question is easy to answer in the instant case: no man who has to work with the law of negotiable instruments can afford to do without Professor Brannan's new edition. The other question presents greater difficulties.

Primarily, the book is a compendium of the decisions since the passage of the N. I. L. It differs from compendia in general in that it is accurate, practically complete, and above all, usable. The cases are grouped in uniform arrangement under the sections of the Law which, like the digests, are well set off typographically. Dicta and decisions, cases which cite and cases which do not consider the N. I. L., and, where important, the course of reasoning followed by a court, are clearly indicated. Cross-references are generous; the requisite tables of cases and corresponding sections, and an unusually adequate index, are provided. And the arrangement of the digests, while its reason has not always been apparent to the reviewer, is in the main such as to develop the digests themselves into something of a coherent comment on the sections under which they are grouped. Put in the hands of a law-school class, this material provides a teaching adjunct to the case-book of whose value the first trial will prove convincing.

So much of the book is easy to describe and estimate. But so far as the new edition is a commentary on the law of bills and notes, it is not so easy to discuss. The Ames-Brewster-McKeehan articles are, as before, (and very properly) reprinted in full and are also summarized under the appropriate sections. Scattered—with considerable frequency—through the book, are hints, comments, and discussions of the author, references to periodical material, and criticisms, at times exhaustive, of one or another set of decisions. All these are valuable. The author's grasp is firm, his insight keen, and his discussion lucid. The possibility of constituting a payee a holder in due course (pp. 50 ff., 162 ff.), for instance; the negotiability of instruments payable in "currency" (pp. 27); the procedural effect of possession of an unendorsed order note (pp. 154 ff.); the effect of selling accommodation paper after its maturity (pp. 122 ff.), and of defects in title under sec. 59 (pp. 217-222); the rights (p. 332) and the duties (pp. 240 ff.) of an anomalous endorser; the strange effect of sec. 119 on a surety-maker (pp. 313 ff.); the confusion of acceptance and promise to accept (pp. 362 ff.); these and a goodly number of other important questions are ably and helpfully treated. And the collections of cases—to instance a few—on the effect of a check as an assignment (pp. 403), on the extension of a bank credit as constituting value (pp. 100 ff., 171 ff.), on what constitutes "payment" (pp. 318 ff., 365, and especially 280 ff.), and on the relation of draft and bill of lading (especially pp. 227 ff.), are particularly valuable.

But the omissions are at times puzzling. Perhaps one should be sufficiently grateful to find periodical literature indicated at all, not to complain because the references are almost without exception to the single REVIEW with which Professor Brannan has of course been most closely in touch. And the book does not purport, as does that of MacLaren, to provide the common-law background of the act it annotates. But in dealing with holes in the codification, if common-law cases are inserted on payments made after maturity but without notice in pursuance of a purchase concluded before maturity (p. 179), surely

the omission of all discussion of the status of a post-dated check before its due-day is to be regretted; or, for that matter, of the effect, pending maturity, of making a note payable at a bank under sec. 87. A man of the author's proved ability and learning could do much to make clear the parol evidence rule in its effect on the contract of an endorser (*cf.* pp. 233 ff.) and, above all, its effect on conditional delivery (*cf.* pp. 59 ff.). Nor are the difficulties slight which are involved in notice of fiduciary relationship from the face of the instrument (*cf.* pp. 194 ff.); in the question of payment "in due course" under secs. 51, 88, 119; in the matter of the antecedent debt of a third person as constituting value or consideration. One looks with interest and expectation for Professor Brannan's views on such questions as these. It is a decided disappointment not to find them. And one may well hope that it will not be long before the profession is favored with a more thoroughly comprehensive treatment from his pen of the multitudinous difficulties of negotiable paper. Perhaps one may add a regret that the present book appeared too early to take notice of *Kelso & Co. v. Ellis* (1918, N. Y.) 121 N. E. 364, (1919) 28 YALE LAW JOURNAL, 692, which has gone far to bring New York in line, on the matter of a pledge for an antecedent debt as constituting value.

To sum up: as a compendium of decisions under the N. I. L., Professor Brannan's new edition is excellent—the best, on any subject, the reviewer has seen—and well nigh indispensable; but it contains too much of too good a text on bills and notes to be treated as a mere compendium, while not enough to satisfy the desires and expectations which it itself arouses.

K. N. L.

The Renovation of International Law. By D. Josephus Jitta. The Hague, Martinus Nyhoff. 1919. pp. xvi, 196.

This is a most remarkable book. Its author is well known in the juridical world by his earlier works—*La méthode de droit international privé* (1890); *La substance des obligations en droit international privé* (1906); and *International Privaatrecht* (1916)—all of which will remain landmarks in the science of private international law. In all of these, he has shown himself to be one of the most original thinkers of our times. Before him, the problem of the conflict of laws was deemed to be: which of several systems of law with which a legal relationship is connected, is to determine its solution. The differences of opinion related chiefly to the selection of the rule itself and to the ultimate basis upon which these rules rested. Some looked at the subject from a national point of view; others from an international viewpoint. Most of the internationalists, following Savigny, found in international law only the limits within which the legislation and jurisprudence of the individual states might move. Zitelmann contended, on the other hand, that the rules of the conflict of laws were to be derived directly from international law.

According to Professor Jitta, private international law is not the science relating to the conflict of laws or law-givers "but the science of the juridical relations between men in a community larger than a state" (p.119). The rules of the conflict of laws are not imposed by the law of a particular state, nor of the collectivity of states, i. e., international law, but by humanity itself, the states being only the organs by means of which those rules are enforced. "Every state, even when it is acting in isolation, is bound to recognize . . . every juridical relation established in conformity with the requirements of the reasonable order of international social life" (p. 91). The rule to be applied to a given juridical relationship is the one which will permit it to fulfill its social aim in humanity such as the state conceives it to be. Our author rejects, therefore, the traditional rules—the *lex loci contractus,* the *lex loci solutionis,*

etc., as too mechanical to answer the requirements of the complex international social order. Professor Jitta admits that to the extent that a particular relationship belongs, in accordance with its peculiar nature, to a local sphere, it will be subject to the law of such sphere of social life. If it does not belong to such local sphere, the juridical relationship is submitted "to the international-common rules of law if these are to be found, and when they are not, to the reasonable principles of international social life, as a subsidiary source of positive law" (p. 91).

These reasonable principles are outlined in the second part of the work under consideration, with respect to the different problems in the conflict of laws. Our author freely concedes that the reasonable principles are quite subordinate to the positive law, but he aims to prove that they possess "not only a subsidiary force and a large significance for the construction of the positive law, but that they are the touchstone of the righteousness of the positive law and the final aim of its evolution" (p. 2). Professor Jitta is conscious of the fact that the "international-common" rules, as he calls them, and the reasonable principles as subsidiary positive law, do not produce certainty in the decisions, but he is convinced that the way out of the difficulty is not by means of the establishment of mechanical rules for the solution of the so-called conflict of laws, but in the establishment of uniform rules through international conventions. He has made his view clear in (1920) 29 YALE LAW JOURNAL, 497.

While the views expressed in this part of the work are only a development of the ideas originally formulated by Professor Jitta in his work *The Method of Private International Law,* he takes a step forward when he points out in the first part of the work that the juridical community of mankind is also the basis of public international law, provided that the positive law of war, the rules of which, according to our author, cannot be deduced from reasonable principles of social life, be separated from public international law. Both public and private international law thus appear as a unity, having the same legal basis, and in which the reasonable principles have the same significance: "Public international law is not exclusively a complex of relations between nations, it is the public law, considered from the point of view of a community larger than a State, a community embracing, in its extreme extension, all mankind; private international law is not exclusively the science of the conflicts of laws, it is the private law considered from the same point of view" (p. 4).

The community of mankind in contrast with the community of states, is, in the eyes of our author, a juridical and not merely a *de facto* community. Its juridical character is predicated upon the existence of an enforcing power consisting of (1) the State as the local representative of the public power of mankind; (2) the union of several States representing mankind as a unity larger than a State; (3) the collectivity of the States. To persons accustomed to the Austinian theory of sovereignty, the views expressed by Professor Jitta may appear to be those of a visionary; yet no assumption could be further from the truth. There is probably no living writer who is more fully cognizant of the realities of life than is Professor Jitta, or who understands better the actual requirements of international intercourse. His mind rebels, however, against the mechanical application of rules of law. Law to him is not a collection of abstract rules, but a vital force arising directly from the social conditions under which men live. So far as the intercourse among men has become cosmopolitan, and it is becoming more and more so every day, it is necessary, therefore, that a cosmopolitan law, a *jus gentium* as it were, be created,

It is the distinct merit of the work here discussed that it points out clearly what is the present status of international law, both public and private, as compared with its ultimate goal, and that it shows us the progress that has been made, the obstacles that lie in its way, and the reasonable hopes for its

development in the future. Professor Jitta is a true cosmopolitan himself. He has a thorough acquaintance with English, French, German and other systems of law, and a perfect command of the English, French and German languages besides his native, Dutch, tongue. Whatever the language in which he expresses himself, his style is always vivacious and full of force. The present work is addressed especially to the English speaking world and is written, therefore, by the author in English.

We are grateful to Professor Jitta for having communicated his timely message to us in our own tongue. The presentation in such an attractive manner of an idealistic world order will help us all to lay aside our own prejudices and to become more earnestly desirous of participating in any movement that will bring mankind nearer to this goal.

ERNEST G. LORENZEN.

International Law. By Sir Frederick Smith. Fifth Edition. By Coleman Phillipson. New York, E. P. Dutton & Co. 1918. pp. 456.

Any English treatise on international law encounters the severe test of comparison with Westlake and Hall. Measured by that standard, the book under review suffers. That is perhaps not unnatural in view of the method of its evolution into its present form. Its first edition appeared in 1899 as a brief manual. The second and third editions gradually enlarged it. The fourth edition (1912) and the fifth edition, now under review, were not prepared by the original author, but by independent editors. A work which thus began as an unpretentious primer now challenges judgment by scientific standards. The wonder is that it meets the test as well as it does, a merit principally due to the excellent contributions of its present editor, Dr. Phillipson. The latter had already published some valuable treatises and extracts from these, together with much new matter of his, are found widely represented in the present text. Aside from its heterogeneous construction, the book suffers the additional handicap of having been prepared in time of war, a defect apparent throughout and at times seemingly justifying Lord Salisbury's remark, quoted indeed by the author, that "international law . . . depends generally on the prejudices of the writers of text-books."

The author who, since the publication of the book under review, has become the British Lord Chancellor under the title of Baron Birkenhead of Birkenhead, has contributed a preface which consists principally of a vigorous denunciation of Germany and a demand for the trial of her war culprits and of praise of the late Sir Samuel Evans, based largely on the latter's "profound intuition of the foundations upon which (British) maritime greatness depends"; and he compares Evans with Lord Stowell, "whose patriotism he equalled, and whose ingenuity he excelled."

With respect to the main body of the work, it may be said that the historical and informational treatment of international law is above the average. In a compendium of less than five hundred pages it is not easy to discuss the many topics within the vast field of international law, covering both their diplomatic and their legal development, without a distribution of emphasis requiring a good sense of proportion. The book meets this requirement as well as could be expected, for while retaining its character as an elementary work, it does frequently discuss at length controversial problems for which a specialist might consult a general treatise.

And yet it is because some of these problems, such as the nature of international law as law, are well discussed, that the failure to discuss others and the absence of any critical attitude toward some of the recent phenomena in international practice—it is difficult to call it "law"—excites attention and criticism.

The explanation doubtless is to be found in the fact that the book has been written from a national point of view. Its attitude toward British practice is either uncritical, apologetic, sympathetic, approving or laudatory, whereas in its consideration of the practice of foreign countries it is quite critical. It is interesting, for example, to contrast the respective descriptions of the absorption by Great Britain of Egypt (p. 57) and the annexation by Austria of Bosnia and Herzegovina (pp. 36, 147). Its condemnation of German violations of international law during the war is justly and deservedly severe. The editor points out that "the use of new weapons in warfare is not permissible unless provided for by the rules of international law; and no single nation, as an American court said, may change the law of the sea" (p. 423). Yet he seems to be nearly oblivious to the fact that the British Orders in Council changing, by municipal legislation, long established rules of international maritime law and restricting to a degree hitherto unknown the rights and privileges of neutrals, even affecting trade by neutrals between neutral countries, constitute a serious infringement upon international law, as the United States Government as a neutral clearly and repeatedly asserted. The fact that a British Prize Court sustained these Orders in Council, many of which were denominated "Reprisal Orders"—a tacit admission of their illegality—seems to justify their validity in the eyes of the editor (p. 253). Only once, in referring to that section of the Order in Council of March 11, 1915, which required every vessel bound to any neutral port carrying goods suspected of German destination or ownership to discharge them in a British port, does the editor admit that it "would not be justified otherwise than as a retaliatory measure" (p. 320). Great Britain maintained during the late war that if one belligerent "is allowed to make an attack upon the other regardless of neutral rights, his opponent must be allowed similar latitude in prosecuting the struggle" and is not "limited to the adoption of measures precisely identical with those of his opponent." This seems to be the only point on which all belligerents appeared to be agreed.

No reference has been found to the important change effected by the Order in Council shifting the burden of proof of enemy destination from the captor to the shipper, who was required to sustain the most difficult burden of proving that his goods would in human probability never reach the enemy country. Of the blacklist, no mention whatever is apparently made, and yet no measure was more potent in controlling the trade of neutrals in every part of the world. In the editor's explanation of the Orders in Council changing the rules of blockade—changes not altogether without justification—he overlooks several of the grounds of neutral protest. He might have added Sir Samuel Evans' comment in the *Hakan* that the "blockade was not a blockade at all, except for journalistic and political purposes." The reviewer might go on indefinitely pointing out what he deems lapses in the correct appreciation and evaluation by the editor of British war measures and their operation; he contents himself with expressing regret that war conditions and the editor's patriotism necessarily deprive him of the calm critical point of view which the writer of a scientific treatise ought reasonably to be expected to possess.

Perhaps it is proper to call attention to a few obvious and important inaccuracies. The editor states the effect of the decision of the Privy Council in *The Zamora* (P. C.) [1916] 2 A. C. 77, to be that "the Prize Court administers international and not municipal law, is not bound by Orders in Council," etc. (pp. 50, 192). This would be important, if true, and the contemporary popular press took pains to emphasize this independence of British Prize Courts from municipal legislation. As a matter of fact, the learned editor must be aware that the *Zamora* decision applied not to legislation or even to executive Orders in Council in execution of legislation, which always control a prize court, but solely to *prerogative* Orders in Council and even as to them the proclaimed

mitigation of Crown rights in favor of the captured vessel has been considerably impaired by the decision in *The Proton* (P. C.) [1918] A. C. 578, which in this connection is not mentioned. See (1919) 28 YALE LAW JOURNAL, 585. The effect of the decision of Point 1 in the Fisheries Arbitration is not accurately described (p. 171). While Newfoundland can enact fishing legislation for certain waters independently, its reasonableness is open to question by the United States and (should the United States request) must be passed upon by an arbitrator before it can come into force. Although the editor calls attention to the French Admiral Aube's suggestions as to bombardment of coast towns (p. 215) he does not mention the Admiral's epoch-making suggestion in the same article (*Revue des Deux Mondes,* 1882) of the attack and sinking by submarine torpedo of passenger vessels as an effective war measure. The explanation of the sinking of the German cruiser *Dresden* in Chilean territorial waters (p. 294) differs considerably from the Chilean view. The editor's apparent belief that armed merchant ships are entitled to the same immunities as unarmed ships (p. 424) is no longer entertained by many leading authorities. While a merchant vessel undoubtedly has the privilege of arming, contrary to the German view, she does thereby, it is believed, forfeit her immunity from unwarned attack by enemy war vessels. To conclude otherwise would be to give the armed ship a position of remarkable security, not attainable or to be expected in war, and to overlook the effect of numerous decisions.

Since 1918, when the book was published, many changes or additions have been engrafted on the fabric of international practice, notably by the Treaty of Versailles, and by the high sanction thereof, doubtless characterizable as "law." Many of these innovations constitute such serious departures from what we have conceived to be well settled principles, for example, those relating to the treatment of private property, or such astonishing reversions to long obsolete practice, that one's confidence in the stability of any "rule" of international law is badly shaken. The harm in this practice is more than immediate. International law like all law has been observed because mankind has by experience learned that in the long run it is better to have as nearly as possible a guide of consistency and principle in the conduct of human relations, rather than to permit expediency and passing advantage to dictate conduct and policy. Law is itself a restraint upon the strong and a protection to the weak, a guide to the doubtful and an insurer of general safety. Its ministers always have then a standard to uphold. Notwithstanding the frequency of wars, international law had in the past century grown stronger from generation to generation. That was because at the end of each war there was a renewed dedication to legal principles and a steady gain in certainty was to be noted. Now, however, some of the elemental props of the legal structure have been loosed. It has been apparently deemed profitable to throw off the restraints of law for what seems a momentary advantage of self-interest. Experience will test the wisdom of the step. When force or expediency, and not law, becomes the arbiter of human destiny, civilized society has lost its standards and the precedent is likely to be exploited.

E. M. B.