



1924

BOOK REVIEWS

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

Recommended Citation

BOOK REVIEWS, 33 *YALE L.J.* (1924).

Available at: <https://digitalcommons.law.yale.edu/ylj/vol33/iss5/7>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

BOOK REVIEWS

Official German Documents Relating To The World War. Translated under the supervision of the Carnegie Endowment for International Peace. Two volumes. New York, Oxford University Press, American Branch, 1923. pp. 1360.

These two big books are not so formidable as they look, and if they were as well indexed as they are admirably printed, the student of the diplomatic history of the World War would find them as handy as they are bulky. Even with the imperfect indexing they will be welcomed—and cannot afford to be neglected—by every one who is seeking light upon the origin of the World War and the failure of the efforts to terminate it when a peace without victory was still possible.

Presumably this contribution of the Carnegie Endowment is only a beginning; for while the title is a general one, the two volumes contain only the publications of the first and second sub-committees of the Committee of Inquiry established by the German National Assembly on August 21, 1919, and of the work of the two committees only that of the second can be considered as a complete and satisfactory report.

The work of the first sub-committee, intrusted with the investigation of the preliminary history of the World War, in so far as it has been published in Germany and translated by the Carnegie Endowment, consists of forty written answers to a questionnaire sent out by the committee to men upon whom the responsibility for, or an influence in deciding upon, war could be imputed. Since Mr. von Tschirschky, German ambassador at Vienna, was dead, his testimony is given in the form of marginal annotations on his instructions from the Foreign Office in Berlin. These notes were evidently made by the Ambassador during the conferences at the Ministry of Foreign Affairs in Vienna, and their text was determined with the assistance of Princess Hatzfeldt, daughter of the Ambassador, and of Prince Stolberg, Counselor of the German Embassy at Vienna.

The majority of the statements are disconcertingly brief, limited to answering one or more specific points of the questionnaire by a general affirmative or negative, or declaring, as in the case of Dr. Muehlon, of Krupps, Hugo Stinnes, and Herr von Gwinner, of the Reichsbank, that they could give no information concerning the matters under investigation. Of the actual participants in pre-war negotiations, only Chancellor von Bethmann-Hollweg, Secretary of State von Jagow, and Secretary of State Zimmermann seemed able to give specific answers to all the points of the questionnaire. Dr. Victor Naumann put on the record the longest answer. Dr. Naumann did not follow the questionnaire, but attempted to treat the origin of the war in its general historical aspects.

The impression one gains from these written statements, taken as a whole, is that the testimony, while interesting in many particulars, cannot be regarded as of basic value. There was no cross-examination of the witnesses, and their testimony was given in the form of affirmations, denials, and explanations. Only in the addenda, the marginal annotations of Ambassador Tschirschky, do we have documents—and these are picked.

The historical value of the work of the second sub-committee, which takes up twelve hundred of the thirteen hundred odd pages, is of real importance. Instructed to investigate President Wilson's peace move of 1916-1917, the second sub-committee held fifteen public hearings, of which we are given the complete stenographic minutes. In the course of the inquiry 236 documents, almost all of them from government archives, were introduced, and these are printed in full. The second sub-committee secured the opinion of four experts, Professor Schaefer,

Baron von Romberg, Dr. Bonn, and Dr. Hoetzsch, which are also given in full. And then we have the majority and minority reports of the sub-committee.

Six of the seven members came to the conclusion that the Imperial Government did not avail itself of possibilities of peace parleys, which existed in the winter of 1916-17, by reason of the peace move of President Wilson; and found that the opportunities offered by President Wilson's peace move were not taken advantage of because the Imperial Government believed that the unrestricted U-boat warfare had a chance of success. Herr Schultz-Bromberg's minority report was a protest against the finding of the investigating committee, on the ground that it did not "represent the facts objectively nor limit itself to the reproduction of facts, but confused a one-sided and arbitrarily grouped selection of facts with individual judgments." The minority member put on record the charge that the opinion of the majority was "an assertion based on mere party politics and parading in the guise of a parliamentary announcement of the guilt of Germany."

It is something of an undertaking, of course, to go through 1200 pages of statements, arguments, and documents. But no student of the World War will shirk this duty. Thanks to the Carnegie Endowment, lack of a knowledge of German (or of good eyesight!) is not a barrier to forming an opinion, from a complete knowledge of the facts, concerning the responsibility for launching the unrestricted U-boat warfare and for the probable prolongation of the war when there was at least a possibility of peace negotiations. This study gives also an insight into the mentality of the leaders of the German nation in the third year of the World War.

But while a correct judgment, based upon a clear conception of the facts, is possible concerning the peace moves of President Wilson, as they affected Germany, the publication of these official German documents by the Carnegie Endowment only emphasizes still more the unsatisfactory result of any honest effort to fix the responsibility for the war from official documents or from the testimony of statesmen until we have access to the archives of Great Britain and France. With perspective we are compelled more and more to admit the impossibility of a positive verdict because the evidence is glaringly incomplete.

HERBERT ADAMS GIBBONS

Princeton University

The American Revolution: A Constitutional Interpretation. By Charles Howard McIlwain. New York, The Macmillan Company, 1923. pp. xvi, 198.

It is the thesis of Professor McIlwain's book that the leaders of the colonists in the American revolution were advocating, sincerely and without pretence, a constitutional doctrine concerning primarily the organization of the empire. The problem which they were attempting to solve had already at that time a considerable history behind it, and it was not solved until long afterwards, if indeed it has been solved even now. In simplest terms the problem may be stated thus: Are the colonies and outlying dominions a part of the realm of England and therefore subject in all respects to the legislative powers of parliament, or are they a part of the British Empire through their allegiance to the person of the sovereign and therefore free and independent of parliamentary legislation in all that concerns their local affairs? This problem Professor McIlwain calls "the central constitutional problem of British imperialism from 1640 to the present day." The question as a definite constitutional problem begins in the formulation of the English claim in the act of parliament of May 19, 1649, which says:

"Be it Declared and Enacted by this present Parliament and by the Authority of the same, That the People of England, and of all the Dominions and Territories thereunto belonging, are and shall be, and are hereby Constituted, Made, Established, and Confirmed to be a Commonwealth and Free-State: And shall from henceforth be Governed as a Commonwealth and Free-State, by the Supreme Authority of this Nation, The Representatives of the People in Parliament, and by such as they shall appoint and constitute as Officers and Ministers under them for the good of the People, and that without King or House of Lords."

In less definite and conscious form the question goes back into still earlier history.

To prove this thesis it is essential to show that this has been in truth "the central problem of British imperialism from 1640 to the present day"; that other dominions and colonies besides the American have faced the same problem and met it in the same way; and it would be of especial value to show to what extent, in the legislative arrangements by which the present "Dominions" have become independent units in the "British Commonwealth of Nations," this identical problem has been solved. To this attempt the main part of the book has been devoted. The economic, political and other causes of the American Revolution are disregarded, and the discussion is confined strictly to the constitutional question and incidentally to showing that the American leaders in their constitutional arguments were not endeavoring to avoid or conceal the real issues but were honestly advocating their side of an actual and most difficult problem of government. The only criticism which the present reviewer has to pass upon the book is that it is too brief. There are many places where the argument could have been developed in more detail not merely to its own advantage but to the advantage of clearness, and it should be, and can be, brought down to the present time by including more of the constitutional history of the present dominions. The argument of Ireland for legislative independence, as that was developed from the seventeenth century to the twentieth, is most fully discussed and is perhaps more effective and telling than any other could be because of the completeness of the parallel with the American argument. It is enough by itself to be convincing. Professor McIlwain does not attempt to show that the Irish arguments advanced before 1765 had any influence upon the contents or form of the American arguments, though he is conscious that the question may be raised. It is not necessary that he should show such a connection; in fact evidence of borrowing by the Americans would weaken rather than strengthen his case, which is strongest if similar conditions in different periods of history and in different portions of the empire lead, without knowledge of historical parallels, to similar constitutional claims. And enough is given to show that they do this, whatever may be true of American borrowing of Irish arguments. Professor McIlwain has certainly so far proved his case that it is no longer possible to say without qualification that "the colonists would have lost their case if the decision had turned upon an impartial consideration of the legal principles involved."

G. B. ADAMS

New Haven, Conn.

The Control of American Foreign Relations. By Quincy Wright. New York, The Macmillan Company, 1922. pp. xxvi, 412.

This book constitutes the essay which won the Henry M. Phillips Prize in 1921 on the subject:

"The Control of the Foreign Relations of the United States; The Relative Rights, Duties and Responsibilities of the President, of the Senate and the House, and of the Judiciary, in Theory and Practice."

The essay deals with that part of our constitutional law which has to do with the control of American foreign relations. The subject of the relation between international law and municipal law is one of interest in all countries—an interest promoted by the confusing and erroneous theories of analytical jurists, shared even by our Supreme Court, that international law is binding only by consent; or that the state's sovereignty can be limited only by its own consent. *Schooner Exchange v. McFaddon* (1812) 7 Cranch, 116. Cf. Wright, pp. 59, 159. Abroad, we have such works as those of Triepel, Anzilotti and Diena which examine the problem of the relation between international law and municipal law. For us, the subject has a special interest due to our constitutional system, which, while vesting full control over foreign relations in the federal Executive, sometimes in concurrence with a

branch of Congress—though Congress itself has certain defined powers—nevertheless leaves the enforcement of many obligations to the states, states which escape effective control by the Federal Government. The awkwardness of this defect has occasionally embarrassed the National Government not a little. President Harding did not help the solution of the problem when he unfortunately tied it up with the Herrin labor riots of 1922, and thereby prevented any early chance of giving federal courts jurisdiction when states fail to perform the nation's international obligations.

Nor is Congress apparently especially concerned about the observance of our treaty or other international obligations, throwing upon the Executive the duty of squaring the international delinquency, if admitted. Nor is the House yet altogether reconciled to the belief that the Executive and Senate can bind the nation by any treaty requiring an appropriation. (See speech of Representative Theodore E. Burton in the House, May 16, 1922.) Again, the question has occasionally been raised whether a treaty can violate the Constitution.

These constitutional problems and anachronisms, among others, together with an analysis of our well-known constitutional distribution of powers in dealing with foreign affairs, are the subjects with which Mr. Wright, now professor of international law at the University of Chicago, is primarily concerned. He would reconcile or avoid the conflicts and friction which occasionally arise among our constitutional organs in these matters by adopting certain unwritten "constitutional understandings," a term coined by Dicey to describe the peculiar constitutional situation in England.

Mr. Wright suggests (pp. 370-371) that such "understandings" might develop through:

"1. Declaration by Congress of permanent policies, not in any way restricting executive methods, but pointing the general ends toward which the President should direct his effort;

2. Development by treaty of international organization and arbitration so as to bring as large a portion of diplomacy as possible under the control of recognized principles of international law . . . ;

3. Observance by the independent departments of government of the understanding that toleration, consideration, and respect should grace the exercise of powers which may collide with the powers of other departments, which may need supplementing by the action of other departments, or which may be indispensable for the meeting of international responsibilities. Finally, as a necessary condition of such observance;

4. Maintenance of close informal relations between the agencies of the government having to do with foreign affairs."

How far these "understandings," by affirmative adoption, would prevent occasional friction among governmental organs, is hard to say. To some extent they are now practised. The fourth is undoubtedly useful; practice has already developed consultation, in advance of important action, between the Executive and the Chairmen of the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations. The Supreme Court, with its power of interpretation, has also prevented the assertion of any conflict between a treaty or international law and the Constitution. The recent treaty with Great Britain, though it permits the bringing of liquor under seal within territorial waters, will hardly, it is believed, be held unconstitutional. A more practical problem is involved in the effort to reconcile concentration of power in the Executive, constitutionally and historically accepted, with the desire for greater popular control of foreign relations. It may require more than "constitutional understandings" to effect this object; indeed, constitutional amendments are probably necessary. Not the least of these problems arises out of the assumed authority of the President, without Congressional assent, to use the armed forces of the United States abroad in the ostensible or actual protection of the lives or property of American citizens. The mere statement that

war is not thereby intended, does not alter the fact that the military occupation of foreign territory without permission constitutes an act of war. With respect to the Vera Cruz incident of 1914 (pp. 297, 299) it is now reported that in the proposed protocol for the Mixed Claims Commission with Mexico, we may be held liable in damages for the Presidential act of war in question.

A part of Mr. Wright's book has already become known to us through his valuable monograph on the "Enforcement of International Law through Municipal Law in the United States"; other parts have been published in the form of periodical articles. In the consideration of questions of foreign relations, in their constitutional aspects in the United States, the book should prove very useful, particularly as a summary of the precedents, with some critical comment, involving the interrelation of the three departments of our government in dealing with foreign relations.

EDWIN M. BORCHARD

Yale Law School

The Art of Cross-Examination. By Francis L. Wellman. Second Edition. New York, The Macmillan Company, 1923. pp. xiv, 371.

In his latest edition of *The Art of Cross-examination*, Mr. Wellman throws aside the cloak of anonymity and writes of his own experiences in court in the first person. This at once convinces the reader that "he speaks as one having authority" that here is a work, not of a theorist, but of a practical trial lawyer.

The present work differs from the former editions chiefly in that the author has disclosed additional matter from experience in his own practice and has augmented his former work by examples of the skill of many present day successful practitioners, such as John B. Stanchfield, DeLancey Nicoll, Max D. Steuer, Martin W. Littleton, Samuel Untermeyer, Herbert C. Smyth and William Rand.

The public may find the work merely one of great interest; but the law student who intends to engage in trial work will find the work not only a source of great interest but a source of great profit. Of course it is not contended that the art of cross-examination may be mastered by the reading of a text any more than it is contended that a man, without artistic ability, may become a great painter from reading about the methods pursued by great masters of painting.

The examples of cross-examination set out by Mr. Wellman are both interesting and instructive to a student of the law since they help him to visualize what actually occurs in the trial of a law suit and show him how a clever cross-examiner may break down a story which, at first blush, appears unassailable and thereby turn apparent certain defeat into victory.

The chief value of the work from a law student's standpoint is that it abounds in helpful suggestions of what to avoid as well as what to do. The first essential of the good trial lawyer is a knowledge of when to cross-examine and when not to, and if cross-examining, when to quit.

To the experienced trial lawyer the examples set forth showing the methods employed by some successful practitioners, while interesting, would add little if anything to the knowledge that he has acquired by his experience at the bar. But even the most experienced trial lawyer might derive considerable profit from a careful and thoughtful perusal of chapter II, "The Manner of Cross-examination"; chapter V, "Cross-examination of Experts"; and especially chapter VIII, "Cross-examination to the Fallacies of Testimony."

On the whole the work is one which is worthy of a place in the library of any lawyer, and one of great value to anyone who intends to employ his capacities as an advocate.

DANIEL D. MORGAN

Yale Law School