BOOK REVIEWS

Cases on Federal Jurisdiction and Procedure. By Harold R. Medina, assisted by Bernard E. Kuhn. St. Paul, West Publishing Co., 1926. pp. x, 674.

This is an addition to the American Casebook System, designed to instruct students in the jurisdiction and procedure of the Federal Courts. Wisely enough, the authors have emphasized questions of jurisdiction, and left the details of procedure to be picked up as occasion may require. Nor have they meddled with Admiralty or Criminal Procedure. The cases are well selected to illustrate the subject-matter, and if the result be not always clear, the compilers are not to be charged with that. The whole subject-matter is a palimpsest, over-written by Congress and the courts so often as to be beyond measure confused and troublesome. Such a question as Removal, for example, would tax the subtlety of the schoolmen, and in some of its applications has about as much reference to any avowable interests of the parties as a schoolman's forgotten dissertation.

The book opens with cases on the foundations and limitations of substantive jurisdiction of the Federal courts under the Constitution, and perhaps it might have been better to expand this chapter at the expense of later parts. Then follow three chapters, the only ones touching procedure, if they can be called such at all, designed to illustrate first, the extent to which State decisions on substantive law control, second, the effect of the Conformity Act, and third, the development of the doctrine by which the distinction between law and equity was imbedded in the Constitution. In the first, it might have been useful to add to *Swift v. Tyson* those recent cases which show a disposition to back away from that much abused doctrine. This movement, it is true, is as yet little acknowledged, but a careful scrutiny of the present work of the court shows that it must be reckoned with, and it is of much importance, especially as indicating a reversion towards a new doctrine of States' Rights. The rule in *Gelpeke v. Dubuque* and its later developments is illustrated possibly beyond its importance, great though that be. The last two-thirds of the book is devoted to the jurisdiction of the District Courts, the Circuit Court of Appeals and the Supreme Court. It is doubtful whether the concluding chapter on the original jurisdiction of the Supreme Court was necessary, except for symmetry.

Nobody looking over this collection can fail to realize that the whole law of Federal jurisdiction badly needs radical revision. We are proceeding in substance under the original Judiciary Act, which has been fundamentally changed only by the Reconstruction legislation, and the creation of the Circuit Courts of Appeal in 1891. The late sixties, the period of our extreme nationalism, were scarcely a time to hold the balance equal between the Nation and the States. So far as it changed the original Ellsworth design, it is open to doubt whether it remains suited to present needs. True, there was some retreat in 1875, but nobody has ventured, I think, to argue that the result embodies any plan for the apportionment of Federal and State jurisdiction, based upon a presently valid policy. Besides, the community groans and travails because of the confused form, if it does not from the substance, of the final outcome. How much the delay, expense and uncertainty arising from so much obscurity, in the end costs suitors, it is impossible to know, but that it furnishes its share towards the existing discontent with our whole administration of law, is not a reckless conclusion.

Probably everyone would to-day agree that it is the duty of any nation to assure to its citizens, so far as possible, an impartial trial, no matter

where they may chance to be. The Constitution in granting them that right, showed sound statecraft, but it by no means follows that every suit between citizens of different States justifies its exercise. That there are difficulties in showing that a non-resident will suffer from local bias, is quite true, but it requires some hardihood to assume that the conclusion necessarily follows from his non-residence alone. Nevertheless, that we have assumed for more than a hundred and thirty years.

Yet we are likely to continue to jolt and creak along as we have, whatever the cost. Harmless as they seem on their face, these statutes carry in them explosive material, which nobody likes to handle. Many powerful interests believe that their right of access to the Federal courts is vital, though their preference is at times merely for the tribunal, and does not depend upon any genuine fear of partial justice. As things usually go, it is probable that nobody will stir until the political atmosphere becomes charged with high potential, just the time when revision ought not to take place. We may pray for some Justinian *in petto*, vested at once with authority and wisdom, to take over this little empire, but we shall pray in vain. Meanwhile, let us thank the authors of this work that they have at least succeeded within manageable compass in informing students of such a vexed subject. How they have managed to do so, is a source of wonder to one who for not a few years has battled in the smoke.

LEARNED HAND.

Prize Law During the World War. A Study of the Jurisprudence of the Prize Courts, 1914-1924. By James Wilford Garner. New York, The Macmillan Co., 1927. pp. xlviii, 712.

A Treatise on the Law of Prize. By C. John Colombos. With an Introductory Chapter by A. Pearce Higgins. London, Sweet & Maxwell, Ltd., 1926. pp. xxx, 384.

Students of international law will find both these books very valuable as reference books to which they can readily turn and find the holding of the Prize Courts during the World War on almost any point of prize law. Professor Garner's book is especially valuable because it contains a detailed analysis of the court decisions and to some extent of the arguments of the belligerent governments in their correspondence with neutrals on matters relating to prize. The author quotes often and sometimes at length from the decisions themselves.

The first four chapters deal with the function, organization, procedure, and jurisdiction of Prize Courts, and of the law applied by them. The remaining thirteen chapters are devoted to such topics as right of capture in maritime matters, what enemy vessels are exempt from capture, capture of enemy private property at sea, determination of national character of ships and goods captured at sea, passing of property, contraband, blockade, and indemnities and damages. These chapters are divided into sections under which the different points involved in the cases are considered.

The book represents a tremendous amount of work because the cases were numerous and the facts usually quite complicated. The author has practically exhausted the literature on the subject and the task which he set for himself—that of analyzing the cases and setting forth their holdings on the points involved—he has performed creditably.

Dr. Colombos' book covers practically the same subject matter, but not nearly so much in detail, as that of Professor Garner except that he adds a timely chapter on the need and opportunity for an International Prize Court. Dr. Colombos has not quoted so much from decisions but has con-

tented himself with a brief statement of the holdings of the court. He has, usually, begun his chapters by stating what the law on a point was prior to 1914 so that the reader gets some idea of the extent to which the law was "expanded" during the World War.

There are a few errors and inaccuracies in both books. Some were inevitable where there were so many quotations and citations to be dealt with. The quotation on page 550 of Professor Garner's book does not seem to have been taken from the case mentioned. In another place (p. 606) he quotes the argument of the Attorney-General for the opinion of the Court. There are other errors of minor importance in the citations of cases. He is also not strictly accurate when he says (p. 31) that the United States government maintained in the controversy with the British government over the necessity of American claimants exhausting their local remedies, that it had a "right to espouse and prosecute [the] claims [of its citizens] for damages through the diplomatic channel without regard to the decisions of the Prize Courts." The American Government maintained only that its citizens did not have to exhaust their local remedies in cases where it considered that, as a practical matter, there were no local remedies to exhaust; because, it contended, the very Orders in Council the legality of which was under dispute were binding on the Courts.

Again in discussing the case of *The Zamora* (p. 188), in which the court held that a prerogative Order in Council was not binding on it, he does not discriminate between prerogative Orders and those based on parliamentary statutes. It was only the former, not the latter, that were held not binding on the court.

Dr. Colombos, in his chapter on prize procedure, cites *The Walsingham Packet* as proof that Lord Stowell considered the burden of proof in a prize case to rest on the claimant. This case was one dealing with a British subject violating local law and can hardly be said to apply equally to a neutral subject alleged to be dealing in contraband.

Again in discussing contraband he cites *The Ringende Jacob* and *The Neutralitet* as proof that Stowell introduced the rule that forfeiture of a vessel could follow on proof of knowledge by the shipowner of the contraband nature of the cargo. Here also the cases do not clearly establish the point and it is doubted whether Lord Stowell considered knowledge as sufficient for condemnation of the vessel.

Both books are almost wholly lacking in critical or constructive suggestions and there is a tendency on the part of both authors to excuse the serious extension of the hitherto established law, on the ground of "changed conditions."

Thus the new rules of procedure in prize trials issued by the belligerent governments in 1914 are justified by both authors as necessary under modern conditions in order to get at the facts in contraband cases. These rules changed the evidence permissible in a prize trial from that found on the vessel to any extraneous matter that the Court saw fit to admit; they placed the burden of proof of innocent destination on the claimants under conditions which often made it impossible to discharge; and they permitted the court to issue orders of discovery requiring a claimant to submit all of its private books for examination in court. Presumptions of enemy destination were also created by the Rules and inferences were drawn often by the court from surrounding circumstances which threw the onus of proof on claimants. This new procedure practically reversed the old and the neutral claimant who formerly occupied a privileged position in a Prize Court was now placed in a more disadvantageous position than a defendant in a common law court. New conditions will no doubt effect some changes in the procedure but it is inconceivable that nations will agree to a proce-

dure which places a neutral claimant at such disadvantage as that imposed on him during the World War.

Regarding the abolition by the belligerent governments by Orders in Council, of all difference between absolute and conditional contraband, Professor Garner asserts (p. 511) that the difference had "largely disappeared." Dr. Colombos, after pointing out the ease with which a belligerent can by the use of steam get supplies through its neutral neighbors, says, "It is, therefore, impossible to demand from any belligerent that he should refrain from interferring with such trade simply because it is consigned to a neutral port." He does admit that contraband lists serve no useful purpose if they can be added to at will by a belligerent, so he concludes that either all trade by a neutral with a belligerent even through another neutral must be permitted to be stopped or none of it. Further he says, "If it be admitted that a belligerent is entitled to prevent goods reaching his enemy which are susceptible of aiding the prosecution of the war he must be given the right to distinguish between goods intended for consumption in the neutral country . . . and those articles ultimately destined for the enemy territory."

With this reasoning many will disagree. The idea of relativity must be kept in mind. Will the supplies that a belligerent can get through its neutral neighbors have any greater influence "relatively" on the course of a war than previously? Belligerents have always got supplies by land transportation and those supplies have always had an important bearing on the war. The last quotation seems to be based on a fundamental fallacy. Belligerents have never been given the privilege of stopping all trade with the enemy in articles "susceptible of aiding the prosecution of the war." That would include practically all trade, certainly trade in conditional contraband. It is only within certain limits and under specific conditions that they could stop it.

In the matter of changed conditions as bearing on blockade, Professor Garner makes (p. 636) this surprising statement: "If it be admitted that a belligerent has a legitimate right to prevent by means of blockade the transportation by sea of supplies direct to the ports of his enemy, it would seem that his right to intercept the same supplies from reaching the enemy indirectly through neighboring neutral ports will have to be admitted, otherwise the belligerent right of blockade under modern conditions will be of little value except where applied to a purely insular state." Then further on he says, the application of continuous voyage to contraband but not to blockade is "lacking in reason and logic." From the standpoint of logic Professor Garner may be correct, but logic has had little place in working out those compromises between irreconcilable and conflicting claims which are reflected both in municipal and in international law. This is especially true of conflicting neutral and belligerent claims. Is the fact that a blockade will be ineffective because of land transportation conclusive proof that the rules of blockade ought to be changed so as to give the belligerent greater privileges at the expense of neutrals? The British blockade of Holland in 1807 was not altogether effective because of the nearby port of Embden and because of inland navigation, and these arguments were urged on Lord Stowell; yet he did not for that reason change the rules of blockade. Why could not the compromise—that is the law—be maintained after 1914?

Dr. Colombos has a very good chapter on blockade. He declares the Allies' so-called blockade measures of 1915 and 1917 illegal and argues for the maintenance of the immunity of neutral ports. While he admits that inventions may make impossible the old "close" blockade, he points out that

inventions have also in many ways benefitted the belligerent blockader. The only ground of justification that he finds for the Allies' measures is that of retaliation. The right of retaliation he rests on the old doctrine of "absolute necessity," however, which, of course, furnishes no safeguard for neutrals, since any nation in a severe war will find extreme measures "necessary." He admits, however, that the test of the legality of the retaliatory measures of the Allies as adopted by the British Prize Court—that is that they shall not inconvenience neutrals unreasonably—is illusory.

The policies of the belligerent governments mentioned above were upheld in the British Prize Court under the late Sir Samuel Evans whose decisions Professor Garner states in his introduction will rank with those of Lord Stowell and who he feels proved himself a worthy successor to Stowell. With this appraisal of his work the reviewer is again forced to disagree. On the contrary he feels that Sir Samuel went far toward undermining the just principles of prize law which Lord Stowell laid down. No one could read Evans' decisions without feeling that he made an honest effort to make them just, but he had not the breadth of vision nor the statesmanship nor legal training that characterized Lord Stowell. He often reached conclusions of the most serious consequence to neutrals by methods of reasoning and on evidence which left much to be desired. Consequently he gave decisions which from the standpoint of public policy cannot stand unless neutrals are willing to surrender much of the progress of centuries.

One closes the books with the regret that two such scholars did not do more penetrating and critical work, and did not appreciate the public and legal necessity for protesting belligerent policies and court decisions which, it is believed, constitute a serious step backward in the development of international law and relations. The first consequence has already been the breakdown of the Geneva Conference of 1927 on limitation of naval armament. The books are, nevertheless, valuable contributions to the literature on the subject and students are indebted to their authors.

ERNEST GREENE TRIMBLE.

Transactions of the Grotius Society, Vol. 12. Problems of Peace and War, Papers before the Society, 1926. London, Sweet & Maxwell, Ltd., 1927. pp. xliv, 123.

The twelfth volume (1927) of the transactions of the Grotius Society maintains the standards of its predecessors. Among the papers of greatest interest to lawyers are those on the effect of war on treaties (Keeley), on codification of international law (Cole) and on renvoi (Altemes). It is so commonly assumed that codification is merely a matter of goodwill and organization, that someone ought to point out the almost insuperable difficulties, if not indeed the dangers, of the effort at general codification.

The Grotius Society has not only published substantial monographs on various topics, but has also undertaken the publication of a series of texts of peace projects which have acquired a universal reputation. The 1927 additions to the series are "Quakers and Peace" (No. 4), the "Project" of the Abbé de Saint Pierre (No. 5), the "Plan" of Jeremy Bentham (No. 6) and Kant's "Perpetual Peace" (No. 7). Each pamphlet is supplied with an introduction by some qualified scholar and a bibliography.

Cases on Suretyship and Guaranty. By Herschel W. Arant. Chicago, Callaghan & Co., 1926. pp. xiv, 1074.

It would no doubt be enough to say that of all the existing casebooks on the law of suretyship the reviewer recommends this one as the best for

law school use. Prior to this one, the best by long odds was the casebook by Dean Ames. For some years there has been a need for a new book, presenting recent case material, prepared by a scholar who has used and profited by the work of Ames. This new book has now appeared. Dean Arant has in general followed the analysis of Ames, but has made a few variations. About half of his cases are taken from the recent period since 1900—certainly a proper proportion. About one fifth of his cases are also to be found in Ames' casebook; about forty are English cases and the remainder are well scattered through the United States. This looks well balanced and sufficient to relate the past to the present.

Realizing that he has presented more material than can be discussed with a class in the time usually allowed to the subject, Dean Arant has suggested in an appendix a number of cases that may be omitted. This is probably helpful to new teachers of the subject. An examination of some of these cases indicates that the reviewer would not always follow the suggestion of the author. At any rate, it is far better to have too much case material than just barely enough. No casebook can ever contain enough material for an instructor who has any ambition as a scholar.

In a recent number of the COLUMBIA LAW REVIEW, a learned writer criticises very justly the current reviews of casebooks; and he describes the very high standard that they ought to attain. The present reviewer cannot reach that standard; besides he believes that half a loaf is better than no bread and that the readers of book reviews have some share of responsibility. Only part of the cases in the present volume have been read by the reviewer; those are well selected and afford plenty of opportunity for analytical and constructive work. Footnotes are not fattened up with long lists of cases; and it is not necessary that they should be. There are nearly two hundred references to casenotes in a dozen of the leading law school reviews.

The volume makes a handsome appearance as to type, paper, and binding.

ARTHUR L. CORBIN.

International Law. By L. Oppenheim. Volume 2, International Disputes, War and Neutrality. Fourth Edition, by Arnold D. McNair. New York, Longmans, Green & Co., 1926. pp. lv, 752.

Perhaps it is unnecessary to do more than notice the appearance of a new edition of a book which before 1914 had earned for itself so high a reputation as that of Oppenheim. So much has happened since 1914 that a rather complete revision of many of the topics covered was justified, otherwise a 1926 edition would be misleading. The splendid contributions made by Dr. McNair in periodicals might have justified the hope of such thorough revision. The expectation is not met. Although Oppenheim's and McNair's material is to some extent thrown together indistinguishably, apart from certain paragraphs of Dr. McNair cited in the Preface, many of the pre-war statements appear without addenda or criticism, leading possibly to the conclusion that nothing has occurred with respect to these topics justifying comment. See, e. g. "articles conditionally contraband" (pp. 636 ff.). While the reviewer is not among those who believe that belligerent violations of law alter the law, and is of the opinion that the pre-war rules of maritime warfare have with minor exceptions, not experienced any lawful change, still it is surprizing to find little or no mention of the numerous extentions and distortions of established rules which belligerents sought, with some actual though not legally recognized success, to impose upon neutrals. The ostensible uncertainty into which the law has been placed by preferring to regard violations as "modifications" or "growth" can lead to no happy results in international relations. A new

Declaration of London, that will obtain ratification, is much needed. Many of the new paragraphs of Dr. McNair have material of value. Limitations of space forbid extended comment. On the other hand, section 269a, seeking to point out an alleged distinction between indemnities and reparations is positively misleading. Some propagandist invented the distinction, until now it finds its way into standard text-books. One is reminded of Mr. Mencken's fantasy as to the origin of bathtubs. Mr. Vizetelly, Editor of the Literary Digest, troubled by a statement of the editor of the Wall Street Journal that there was a well-known distinction in international law between "reparations" and "indemnities" submitted the question to John Bassett Moore. With his usual perspicacity and humor, Judge Moore scouted the idea in a letter published in the Literary Digest, June 27, 1925, at 63.

EDWIN M. BORCHARD.

Constitutional Limitations. By Thomas M. Cooley. Eighth Edition, by Walter Carrington. Boston, Little, Brown & Co., 1927. Vol. I. pp. cciii, 1-730. Vol. II, pp. xix, 731-1565.

The seventh edition of this work appeared in 1903, and required something over a thousand pages of text. Although the editor of the new edition has wisely not sought to include all new cases, the increased bulk is largely due to notes of such cases. The editor has made some additions to the text, and has carefully distinguished such additions. The editorial work has been competently done, and the new edition will serve a useful purpose. But there is a limit to what an editor can do to make effective for present use a legal classic originally published nearly sixty years ago.

Judge Cooley's text is in the main a reflection of conditions and problems of 1868. To a large extent he crystalized and strengthened legal movements of that day. His work had a great influence on the law, particularly on the expansion of the protection of "due process of law." New editions, even when prepared by the author, usually retain the point of view of the first edition. And when an independent editor appears, the text and point of view remain unchanged, unless, as is the case with some English books, the editor writes a new book on the basis of the old.

Occasional additions to the text, as in this edition, cannot make a treatise adequate to the needs of the present day. With respect to evidence obtained by illegal searches and seizures (pp. 631-636), zoning (1315-1318), blue sky laws (1339), and numerous other matters, the editor has valiantly sought to make a modern treatise, but he has largely failed, not because of absence of competent effort, but because of the futility of the task. The notes and additions to chapter VII, dealing with the circumstances under which a legislative enactment may be declared unconstitutional, show the editor's familiarity with modern developments, but it would have required a new chapter rather than a re-edition of Cooley to present the present law. The reader will get from pages 382-384 a highly inaccurate conception of present developments in the law as to "consequences if a statute is void." In spite of its new dress, Cooley remains an old book. The legal profession needs a volume that will do for 1927 what Cooley did for 1868.

W. F. D.

REVIEWERS IN THIS ISSUE

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