REVIEWS


The first edition of this work was published in 1940. Within six years a new edition, "three times as large as the first," has been made desirable, partly by the developments caused by the recent war, partly by a number of decisions in the House of Lords reversing some views that had generally prevailed, and partly because of the author's desire to make a more thorough and critical review of the field. This edition well deserves a full review on its own merits.

In a foreword by Sir David Maxwell Fyfe, this work is described as "essentially a practitioner's book"; but there is no less reason for describing it as a book for law students, law professors, and judges. They will find here a thorough and critical review of great numbers of court decisions, with a full statement of the facts and a full and fair exposition of the reasoning of the judges; they will find also a presentation of the theories of legal scholars as well as the author's original analysis of problems and matured views on questions of policy.

The book is especially useful to American lawyers because nowhere else is so complete a picture of English case law available and because to a very considerable extent American case law and theory are stated for comparison. The fact that British statutes and administrative orders are continually referred to is not a defect from the American standpoint; for the same problems are dealt with in our own statutes and orders, and comparison is profitable. Not many decisions of our state courts are cited.

The book is divided into four Parts. Of these, Part I contains chapters on the Duration and Termination of War, Emergency Powers, Who is an Enemy, Contracts with an Enemy, and Procedural Capacity of Enemy Aliens. With all of these our courts have been and will continue to be frequently concerned. Part II deals with the effect of war on specific kinds of Commercial Contracts, including Agency, Corporate Shareholders, Sales, Negotiable Instruments, Insurance, Freight, and Service.

Parts III and IV fill much more than half of the book and deal with the subject of Frustration of Contract. It is here that the greatest contribution of the author is found; and it is to this that the reviewer will direct his specific comment.

When a court holds that a contractor's duty is discharged by impossibility of performance or by frustration of object, the explanation commonly made has been that the contractor's duty is impliedly conditioned on the continued possibility of performance and of attainment of the purpose for which the contract was made. This implied condition is supposed to be such by reason of the actual intention of the parties, to be discovered by a process of
interpretation and factual inference from the language of the agreement. The starting point has been that "the courts cannot make a contract for the parties" and that impossibility is no excuse unless the parties have themselves agreed that it shall be one.

In many cases, however, this doctrine has been disregarded, even though the court has been forced to admit that the supervening event that has caused impossibility or frustration is one that the parties did not in fact foresee and as to which their contract is silent. Sometimes it is said that the court should not "imply" a condition except such as the parties themselves would have agreed on if they had foreseen the events that subsequently occurred. What they might have agreed, had they thought about it, is a very doubtful speculation.

It has long been observed by the more analytically inclined judges that the asserted "intention of the parties" is often in fact the intention of the judges. The process is one of judicial "construction" even though expressed in terms of mere "interpretation." While it is literally true that the courts do not make a contract for the parties, it is also literally true that it is the courts and not the parties who determine the legal operation of any contract that the parties have made. And this legal operation varies with the facts and events occurring after its making. In making its determination, the court starts with the process of interpretation of the words and other expressions of the parties; by this process it attempts to discover the intention and the understanding of each of the parties. The meaning given by each party to his own expressions and to those of the other party may be far from identical with that given to them by the other party. The court must determine whose meaning should prevail, a matter dependent on substantive contract law and not upon agreement of the parties.

After interpretation and the adoption of a judicially accepted meaning, comes the process of judicial construction, using this phrase to describe the process of adjudging the legal relations of the parties: their rights and duties, and it may be, their powers, privileges and immunities. These legal relations do not spring into being, complete and immutable, at the instant of contracting. They vary with the march of time and with subsequent events. If the parties have foreseen and provided for these subsequent events, as interpretation may show, the legal relations will be adjudged consistently with that interpretation. Thus, the terms of the contract may include a provision with respect to strikes, or war, or delay, or non-performances great or small. With some very important and extensive limitations, men still have a very broadly inclusive "liberty of contract." But the provisions that they insert may be very loose and indecisive; and many events occur that are not foreseen or provided for in any way.

More often than not, an event that causes "impossibility of performance" or "frustration of object" is not actually provided for. The parties have no thought that the hired music hall may be destroyed by fire; and there is not the slightest expression as to whether the hirer must still pay the rent, or
whether the owner must pay damages for not having the hall ready for the exhibition ¹ or must make restitution of rental that was paid in advance.

In joyful anticipation of the coronation of the king, contracts are made for the rental of roofs and windows along the announced course of the coronation pageant, without a thought that the king's illness may cause the pageant to be abandoned. On the prescribed day, the owner has his roof and his window ready. Must the tenant pay the agreed rental though no gilded procession will pass by? ² Must the owner make restitution of rental that was paid in advance?³

In 1939 a contract was made by Fairbairn, a British manufacturer, and Fibrosa, a Polish company, for the manufacture of certain machinery and its delivery at Gdynia. Fibrosa paid £1,000 in advance. The contract expressly provided for a "reasonable extension of time" if delivery should be "hindered or delayed . . . by strikes, war," and other named events. Two months later England was at war with Germany and the Germans occupied Poland. In 1940, Fibrosa sued for damages for nondelivery, or alternatively for restitution of the £1,000. The trial court and the Court of Appeal held that Fibrosa had no right to either damages or restitution. The House of Lords agreed with respect to damages, but reversed the lower courts as to restitution. The contract was held to be "frustrated" by war and the Trading with the Enemy Act, and that Fairbairn's duty to deliver was discharged, not merely postponed; but the House of Lords held, overruling Chandler v. Webster, that there was a quasi contractual right to restitution of the money paid in advance.⁴ This decision agrees with the American law as expressed in the Restatement of Restitution.

The author of the present volume presents these cases, and many others in the same field, with great fulness and critical insight. He indicates the increasing tendency for the judges to hold that a promisor's duty is conditional on continued possibility, not because such was the intention of the parties as found by inferential interpretation but because in the opinion of the court justice so requires. This is most notably expressed in the opinions of Lord Wright. There is no "implied term"; the promisor's duty is "constructively" conditional. Some of the judges adhere to the older forms of expression. The author himself agrees with Lord Wright, saying: "This, it

¹. In Taylor v. Caldwell, 3 B. & S. 826 (1863), the court held that the owner was not liable in damages, because his duty was "impliedly conditional" on the continued existence of the hall.

². In Krell v. Henry [1903] 2 K. B. 740, the court held that the contract, so far as executory, was "frustrated" and the rent not yet due at time of abandonment never became due.

³. In Chandler v. Webster [1904] 1 K. B. 493, the court held that the hirer had no right to restitution of rental paid in advance and that he must still pay instalments of rent that fell due before abandonment of the pageant. Forty years later, the House of Lords has expressly overruled this decision in Fibrosa Sp. Ak. v. Fairbairn L.C.B. Ltd. [1943] A.C. 32. To this case the author devotes many pages.

⁴. The Fibrosa case, supra.
is submitted, is the true basis of the modern doctrine of frustration of the adventure; the 'implied condition' is, in the last analysis, a 'constructive condition' read into the contract by the court and imputed to the parties." 5

The author follows the English judges in treating "frustration of contract" as a kind of impossibility of performance. This is fully justified where the facts are like those in the Fibrosa case. The performance promised by Fairbairn was made impossible by war and Act of Parliament; and the purpose for which Fibrosa promised to make payment of the price was wholly frustrated. In many cases of "frustration" this is not true. In Chandler v. Webster and the other "Coronation cases," no performance promised by either party became "impossible" in any sense of that word. The roofs and windows could still be occupied and the rental could still be paid. Nor was the "object" of the contract frustrated; a "contract" has no object. In any contract each of the two parties has a purpose for which he makes it; but these two purposes are never identical. The abandonment of the coronation pageant "frustrated" the purpose of the one who hired the roof or the windows, a purpose that was known to the owner though not embodied in any way in the words of the contract, and a purpose but for which the roof and the windows would have had little rental value. This purpose would be "frustrated" even though the promised performances were fully rendered. The purpose of the owner was not frustrated in any respect by the king's illness. His purpose was the getting of the promised money. This purpose is indeed frustrated by the latest decision of the House of Lords; it required no court decision to frustrate the purpose of the hirer. 6

It is not every frustration of one contractor's purpose that should be held to discharge him from his promissory duty. There is such a frustration in every instance of a blasted hope. Undoubtedly the cases will multiply in which a disappointed contractor asserts his frustration as a defense or as a reason for restitution. Witness the many conflicting tenancy cases in our State courts where the purpose of one who rents a building for a saloon is frustrated by a prohibition law. A solving principle may be something like this: A contractor is not discharged by frustration of his purpose unless that purpose was known to the other party and the possibility of its attainment was an essential factor in giving to the consideration furnished by that other party the value that enabled him to induce the advantageous bargain. In

5. Again, he says on page 414: "The time has come to shed the fiction of 'implied contract' and to regard the doctrine as a mode by which, upon the facts of a case, the court itself does justice in circumstances for which the parties never provided."

6. This reviewer therefore agrees with Dr. Cecil A. Wright, quoted by the author on page 443, to the effect that, when an event frustrates the purpose of one of the parties without frustrating the purpose of the other, the duty of the one may be partly or wholly discharged and the duty of the other not discharged at all. The duty of the hirer of the Coronation windows was constructively conditional on continued possibility of the pageant; but he could waive the condition, tender the full agreed payment, and enforce the owner's promise to permit occupancy. The author is quite right in saying that this analysis is not that of the English judges. They may yet adopt it when the proper case arises.
the *Fibrosa* case there was a total "failure of the consideration" for the buyer's money, both that which was paid in advance and that which was merely promised. In the Coronation cases there was merely a depreciation in the value of the consideration. Nevertheless, that depreciation was so great that the overruling of *Chandler v. Webster* must be approved. The owner is not justified by the existing social and business mores in demanding payment of the fortuitously high rent for his worthless window seats or in retaining that rent if already received. If he had been put to expense in preparing the windows for occupancy, the courts may still find it desirable to allow compensation or to divide the loss.

When, for the purpose of avoiding obvious injustice, the court holds that a promise is constructively conditional on some fact or event not actually provided for by the parties, the judicial process is essentially the same as when the court finds a promise by making an "implication" that is not true interpretation. The difference between an implied condition and a constructive condition is the same in character as that between an implied promise and a constructive promise. The author was logically correct when in his first edition he declared that constructive conditions and constructive promises are alike quasi contractual. Both are based on court action and not on actual expressions of assent. His present acknowledgment of error in his former statement is quite unnecessary; but it may be sound diplomacy in avoiding attacks by those who like to adhere to old fictions in forms of expression.7

It took the Fibrosa case to re-establish the law of Quasi Contract in England and to restore to good standing the views that Lord Mansfield expressed in *Moses v. Macferlan* in 1760. The present reviewer expressed the view in the pages of this *Journal* in 1912 that "Quasi Contract," as thus far in judicial use, is applicable only to non-contractual obligations for the payment of money, usually measured by value received and created to avoid an unjust enrichment.8 As so used, the term denotes a constructive promise but not a constructive condition of a promissory duty. A constructive or "quasi" contract creates a legally enforceable duty; a constructive or "quasi" condition is a fact or event without which a legally enforceable duty does not exist. The first creates duty; the second limits duty. But nothing will be gained by fighting for a particular definition of the term "quasi contract."

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7. The author, making liberal use of italics, quotes Lord Wright, *Legal Essays and Addresses*, 259, as follows: "The truth is that the court, or jury, as a judge of fact, decides this question in accordance with what seems to be just and reasonable in its eyes. The judge finds in himself the criterion of what is just and reasonable. *The court is in this sense making a contract for the parties—though it is almost blasphemy to say so. But the power of the court to do this is most beneficial, and indeed even essential.*"


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Federal jurisdiction and practice still remains the lawyer's dream world. As the editors here point out, before the 1934 Act authorizing new rules of civil procedure, federal practice was "a comparatively placid pool," with the votaries thereof accepting with equanimity the complexities of conformity and the dominion of "general" law, "peculiarities which however strange to the tyro possessed a pleasurable element of the esoteric." 1 How true this was! The pleasures and the mysteries of the federal field were distinctly matters for the expert with the knowledge as well as the kind of mind to know and to enjoy these problems. Then came the persistent and successful reform of the procedure itself, but it was accompanied by a drastic revulsion against general law in favor of the substantive law of the several states. 2 That kept the balance of indecision about the same as before. Moreover, in spite of some appeals for reform, nothing substantial has been done to make clear such mysteries as the confines and the boundaries of federal jurisdiction, removal of cases from state courts, the separable controversy, the jurisdictional amount, venue, service of process, and the federal question. Indeed, these seem to increase in complexity as the spate of federal regulatory legislation brings more and more cases to the federal courts. It is a field of law both fascinating and important—a proper subject for a law course. That clients may suffer from unneeded complexities perhaps should not overdistress us; we should remember Baron Surrebutler's famous answer to Crogate's inquiry as to how the suitors liked the new sort of changes afforded by rules of special pleading in 1834: "Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adapted to suit the tastes and capacities of the ignorant." 3

Hence a course and a casebook on the federal courts is a desirable, indeed a necessary, part of a law school curriculum. The present volume appears to be a very useful teaching tool. The editors have had extensive experience and can be relied upon to select the best materials in the field for pedagogical purposes. The book is modern and up to date, an outstanding requirement in view of the constant changes occurring each term of court. And so far as I can tell from my examination without actual use of the materials, the editors have covered all the essential topics of outstanding interest to federal practitioners.

Of course, each of us is likely to have some special favorite topic which he

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may like to expand or embroider. I can note several that I would have been inclined to develop somewhat more extensively. Thus the editors do give attention to the rule of *Hum v. Oursler*, that an entire cause of action, of which a part is federal, is wholly within federal jurisdiction; but they give only a limited view of some of the difficulties which have appeared in its application. They cite the opposing opinions of a distinguished district judge, but avoid the questions which have arisen in the Second Circuit Court of Appeals as to this problem and the allied one of "final" judgments and appealability thereof. But when I suggest topics of this sort, I am bound to recognize that my view very probably is a restricted one, based on the problems which appear to have come to my court more than to other courts. Or is it that other courts have been more successful in avoiding the difficulties which have worried us?

The book treats compactly eleven different general subjects, including the usual grounds of federal jurisdiction, removal procedure, conflicts between state and national judicial systems, and with a very interesting section dealing with the *Tompkins* case and the developing rules thereunder. The chapter on procedure, dealing with the new federal civil rules, is properly limited to the peculiar matters governing federal jurisdiction and practice, rather than to general principles of pleading. The subjects of appellate jurisdiction and procedure, in both the Circuit Courts of Appeals and the Supreme Court, and the original jurisdiction of the Supreme Court seem adequately treated. The casebook ends quite properly with the already famous case of *Georgia v. Pennsylvania Railroad* which opens new vistas of original jurisdiction for our highest court.

There is one matter which the editors stress and which I wish could have been more definitely brought out in the body of material, although I realize the difficulties. That is the need, as the editors put it, "for simplifying and rationalizing the Federal practice as the new Rules have done." They say that a beginning is made by the teacher who leads his class to consider the jurisdictional barriers and obstacles resulting from the constitutional division of powers between state and nation. But they also urge that "an ordered reconsideration of the whole structure seems overdue." I know that it is difficult in a casebook to work out suggestions for definite reforms beyond the queries stated in footnotes. But possibly something more might have been done by liberal quotations from the proposed drafts of the revision of the Judicial Code. These drafts show most interesting attempts at im-

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4. 289 U. S. 238 (1933).
6. Cases are collected in 1 Moore, Federal Practice (1945 Cum. Supp.) 90-94; 3 id. 141-152; and see (1940) 49 Yale L. J. 1476.
7. See note 2 supra.
10. See Revision of Federal Judicial Code, Preliminary Draft and Third Draft, both 1945.
improvement, but suggest the query why, if these are proposed, a more complete revamping of the entire structure is not also in order.\textsuperscript{11} It is to be hoped that teachers using this admirable casebook will follow the urging of the editors and both stress the need of the ordered reconsideration they call for, and develop proposals of detailed reform to achieve that end.

\textbf{CHARLES E. CLARK\textsuperscript{\dagger}}


Among the adjustments which the rise of American civilization has forced upon us, and indeed upon the world, none is more important than the revaluation of what might be called the American way of thought. This is true even of our contributions to world culture. Colonial peoples and provincial communities, like children, are expected to be seen but not heard; and when they do speak up their juvenile pipings are liable to be ignored. European economists visiting in this country have often expressed astonishment not only at the prodigious number of professors they encountered but still more at the "fact," as one of them remarked to me some years ago, that in spite of our vast numbers we had somehow failed to produce any such germinal minds as those of Max Weber and Werner Sombart. Since I am not an admirer of either, I refrained from suggesting that their position in the world of letters may have been due quite as much to their being German as to their being germinal. I also refrained from even murmuring the names of Henry George and Thorstein Veblen. For if \textit{Progress and Poverty} and \textit{The Theory of the Leisure Class} appear on future lists of the world's great books, no doubt that also will be due not only to their intrinsic merits but also to their American origin.

But more important than the discovery of occasional outcroppings of genius is the mapping of the whole landscape of the American mentality. In the past, the world has paid very little attention even to main currents in American thought, since it has never seemed to matter very much what Americans thought. It does matter today, and that circumstance lends unique importance to the work of scholars such as Beard and Parrington.

This is true in even greater degree of Professor Dorfman's work. The American way of life has other aspects, but its economic aspect has certainly been paramount throughout our history and is so still. Why Americans think as they do about industry and business, about property and money-making, about the thrift of private citizens and the profligacy of govern-

\textsuperscript{11} Thus note the extensive revision of the venue provisions, and the addition of power to transfer cases from one district to another, \textit{Drafts}, note 10 \textit{supra}, §§ 1391(a), 1404. See also § 1360, an attempt to state the \textit{Hurn} rule, note 4 \textit{supra}.

\textsuperscript{\dagger} United States Circuit Judge, Second Circuit Court of Appeals.
ments, these are matters which nobody can afford any longer to ignore—at least of all votaries of the law.

In scope and coverage *The Economic Mind in American Civilization* is a truly monumental book. Professor Dorfman's task was a prodigiously difficult one. For the pattern and direction of our economic ideas and attitudes has been determined not so much by main currents as by the confluence of an immense number of tiny rivulets distributed over a continental watershed and all flowing in pretty much the same direction because of geographical circumstances common to them all. This is not to say that the record reveals no outstanding personalities, nor is Professor Dorfman disposed to minimize real greatness. On the contrary, it is our good fortune that such a study as this should have been undertaken by the author of *Thorstein Veblen and His America*. But great as they were, men such as Hamilton and Jefferson were founders not so much of schools of thought as of a nation; while Francis Wayland and Henry C. Carey, though they were pre-eminent in the field of economic authorship, were expounders rather than creators—McGuffeys rather than Adam Smiths.

Professor Dorfman is careful not to dogmatize. But on his showing the American economic landscape seems to have been shaped by two major forces. One of these is the institution and ideology of property, feudal in substance though commercial in form, which America received as its chief institutional heritage from European civilization. As Professor Dorfman shows, this theme runs as a constant through the most diverse variations of expression. It was the ground base of Jeffersonian and Jacksonian democracy, never to be forgotten however salutary may be the emphasis on other aspects of those movements. It provided the ballast of tradition to the defense of slavery as it had to the earliest attacks on Puritan theocracy. Cotton Mather might denounce Roger Williams as a rebel. He may have "lived and dreamed," as Parrington has said, "in a future he was not to see"; but it was a future in which Locke would have worsted Sir Robert Filmer, one in which divine right would have given way to natural right and dynasty to property.

The other major influence upon the American economic mind during the first two and a half centuries of our development was commerce. Throughout the colonial period and half way through the nineteenth century the relationship of the American community to Europe and especially to Great Britain was of paramount importance. Thus, as Professor Dorfman points out in his Preface,

> The most potent determinant of economic action and thought was world commerce—the commerce that gave us treasure, the commerce that brought foreign goods and took our exports, that profited shipper, middleman, and speculator; the commerce, in short, that created the rich urban community and enlarged the money economy. Domestic trade and industrial production were important, but in the eyes of the articulate actors, they were merely
adjuncts to the expanding and profitable activity in world trade. The domestic economy was animated by the larger economy embracing the old world and the new.

After the war between the states the picture changes and domestic business becomes "the principal concern of thought and policy." Professor Dorfman promises additional volumes which "will, I hope, soon follow these," dealing with the economic mind of the empire of American business. But during the earlier period the mind's eye was continually fixed upon trade; and that is why Adam Smith and Ricardo found such eager readers, and the commercial philosophy of the nation of shopkeepers such ready acceptance, on this side of the Atlantic.

As his publishers foresaw and noted on the jacket, Professor Dorfman's work will inevitably be compared with that of Beard and Parrington. One difference is obvious. Both Beard and Parrington are interpreters, and of course distinguished interpreters. In each case the reader sees American thought and civilization through the eyes and words of a great historian who is also a great writer. Beard's interpretations and Parrington's characterizations have themselves become a part of the record of American civilization. It is impossible to compare Dorfman's performance with theirs, since Dorfman is not a performer at all in their sense.

What Dorfman does is to let the record speak for itself. In the most literal sense the reader is left to make his own interpretations. Three pages of preface contain virtually all the author has to say by way of comment, and I have therefore run some risk of misrepresenting the book by quoting from its most unrepresentative part. But I must also avoid giving the impression that the book is just a compendium of quotations or a barren catalogue of ideas and opinions. On the contrary, the prodigious industry which went into the gathering of this immense mass of material (over a period of twelve years) is fully matched by the skill with which Professor Dorfman has reduced it to manageable proportions and intelligible form, often by judicious quotation, but still more by indirect discourse in which the spirit as well as the substance of the original survives the reducing process.

It is for this that, as Professor Wesley Mitchell says, "the nation owes a debt of gratitude to Joseph Dorfman" for a book which "will become one of the classics studied by our children's children." For scope and inclusiveness no other record is even comparable. Here is a faithful rendering of the economic prepossessions of our men of destiny and of all the well-known contributors to American economic literature; but here also are a host of figures, representative of their times and their localities, whose names even are unknown to most of us: obscure "Loco-Focos" like Henry Vathale; Louisa C. McCord, "the Harriet Martineau of the South"; "the Ricardo of the South," Thomas Roderick Dew; and many others no less picturesque.

Even so, Professor Dorfman has necessarily practiced the art of selection.
His coverage of the explicitly economic outpourings of the American mind is, I think, complete. But every task must have its limits, and he has set the explicitly economic as his limit. He has made no effort to supplement Parrington's interpretation of the social and economic currents that run through our general Literature (with a capital L), nor as he tried to embrace the law. The Economic Mind in American Civilization contributes no ammunition of precedents to the legal arsenal. But lawyers who seek to understand the law as an embodiment of American mentality will find this book invaluable.

C. E. Ayres†


In sixty-nine pages, Mr. Borchard seeks to outline the course of American foreign policy from 1776 to the preparation of the United Nations Charter. The first two parts are dominantly factual and national in nature, having a minimum of theoretical and critical comment; but the third part injects a greater amount of the international problem, legal theory and analysis, probably because it avowedly looks to the future, not only of the United States, but of international relations.

Part one, which consists of thirty-seven pages, is devoted to the period up to 1914, and touches briefly the familiar points of non-intervention, neutrality, recognition, the Monroe Doctrine, freedom of the seas, arbitration, Pan Americanism and similar issues. Part two, which consists of eighteen pages, takes the discussion up to 1945, with summary reference to the American problems of World War I, the struggle of the thirties over intervention and neutrality, and World War II. The development of the American issues in World War II is built around brief discussion of the Atlantic Charter, the Four Freedoms, Lend-Lease, the declaration of 5 January 1943, and the London and Potsdam conferences of 1945.

Part three raises five problems on an international level, and poses the issues for the future. Those five problems, almost self-defining for the specialist, are, according to Mr. Borchard, the realities of international politics, sovereign states, the machinery of international negotiation, international law and its effect on the United States, and international organization. Through all of them run the practical political problems of the position of small states, the advisability of defending the status quo, and possible power politics. For the future, Mr. Borchard sees four alternatives confronting the United States—participation within the United Nations with defensive preparation against possible power action, complete withdrawal from the

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international field and action on the basis of nationalistic motives, implementation of the Chapultepec agreement and hemisphere action, and an exclusively American policy. Mr. Borchard makes no prediction as to the election among these four alternatives, considering the future unpredictable, because of the lack of a clear-cut policy.

The reader who has no technical background may find this all too brief analysis of American foreign policy hard, and even unfruitful, reading, when taken alone. Requirements of brevity have forced the use of some technical phrases and some undeveloped references to historical materials which may seem obscure to the uninitiated. However, they could not remain so for a truly inquiring reader. For this reason it is perhaps unfortunate that neither Mr. Borchard nor his sponsors saw fit to include a bibliography which could be used to supplement the skeletal outline so admirably done in this work.

The person who brings some equipment in American diplomatic history or in international law to the reading of these sixty-nine pages will find in them a provocative attempt to reduce the statement of issues to an absolute minimum. Inevitably his personal political convictions and his special professional interests will evoke some criticism of the treatment of some of the issues. For example, one might wish for more than six and a half lines on expatriation in Part one, and a slight reference to the treatment of aliens, in view of the present day problems of displaced persons and persons refusing repatriation. The same might be raised as to American relations with the League of Nations. But, notwithstanding such elements for possible difference, such a reader cannot fail to pay homage to an expert’s effort to give lay readers a concise and deeply etched picture of the problem.

It is perhaps this effort of the expert to write briefly and clearly for a lay audience which constitutes the major contribution of this book. Too often given to excessive class consciousness, the expert—and particularly the legal expert,—is prone to center his attention on a single facet of a problem and to express himself in the jargon of the inner sanctum of his trade, as incomprehensible to the American taxpayer as ancient Greek. In these days of demand for open diplomacy openly arrived at the taxpayer has a right to look to his fellow citizen who is an expert for assistance. Until the expert tries to give a comprehensive summary of major problems and the benefit of his professional training, he has little right to quarrel if his fellow citizens seem ill informed. These sixty-nine pages represent the expert’s effort to meet that need,—an effort which merits serious attention and emulation.

PHOEBE MORRISON†

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The title of this book, written by a well known international lawyer, itself presents problems of interest. Is there something like an American international law, as differing from the international law of all nations? Political and legal questions are interwoven in this field. Latin America is tied in political questions to North America, in legal ones to Europe. In politics the American continent is the home of electoral monarchies in which the head of state is at the same time the head of the administrative power. In Europe these two functions have carefully separated, in the absence of dictatorship. In the legal field both the European continent and Latin America are ruled by deductive law; the Anglo-American countries are ruled by inductive law. These political and legal variations have to be taken into account in any attempt to decide whether there is a distinctive American international law; whether it may be in formation, and whether that may be an advantage for this continent or a curse for the whole world, of which this continent is a part.

Only a small number of the 360 pages of this work are dedicated to these questions. The book is restricted to a very careful, very scholarly, sometimes brilliant discussion of seven of the Inter-American conventions of Havana, namely on 1) Aliens; 2) Treaties; 3) Diplomatic Officers; 4) Consular Agents; 5) Maritime Neutrality; 6) Asylum; and 7) Rights and Duties in event of Civil Strife. The four other conventions on Commercial Aviation, Copyright, Private International Law and Pan American Union are not included. Even “Le Droit Américain Codifié” would be a title much too wide for the content of the book.

But this is no reproach. “Qui peu embrasse, mieux étreint,” a slight variation of a French maxim, would be well fitting this work. The author discusses the history of these treaties, the origin and the aspects of their provisions with a profound knowledge and with a sound feeling for the essential problems.

He rightly calls the position of foreigners the gauge of the civilization of a country. In quite a number of the contracting states this situation has not improved since the signature of the treaties. It has not hitherto been sufficiently emphasized that Article 5 of the Convention on the Status of Aliens grants to foreigners more than equal rights with the nationals. It “guarantees to foreigners a certain minimum of rights, independently of the legal conditions accorded to nationals.” This destroys the theory that the right of the national is the ceiling of the foreigner’s rights.1 Article 5 grants foreigners “all individual guarantees extended to nationals and the enjoyment of essential civil rights.” In other words, municipal law may deprive na-

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1. Hofmannsthal, La igualdad del extranjero con el nacional (1938) 2 Rev. Argentina de Derecho Internacional 278.
tionals, but not foreigners, of essential civil rights. This is not more than the codification of a rule of international law which is valid everywhere, but not always accepted.

Moreover, the real situation in countries which have ratified the convention, is frequently at variance with this rule. The right to work is one of the most important civil rights. It surpasses in importance the right to property. Many Latin American countries impair this right to foreigners. In the United States, which is more liberal in this respect than most other countries, four states exclude foreigners from such professions as plumber and barber, twelve from the profession of embalmer, six from the profession of architect, etc. Every contracting state, and also non-contracting states under general principles of international law, could object to measures impairing the right to work. Not one does it, because each government wants to retain the right to similar measures. This situation provides a persuasive argument for the necessity of allowing the individual affected by a breach of conventions or of international law a right of action independent of that of his government.

With regard to the Convention on Maritime Neutrality it may be worth observing that many of its rules become senseless without a clear and uniform limit of territorial waters. In modern times endeavors to change the three-mile rule have been frequent. There are good arguments to change this "outmoded" rule, originating from a time when three miles had a relation to the range of cannon. But a change, which may alter the legal conditions of a maritime space larger than the territory of the United States, must be uniform. If every state were allowed to legislate arbitrarily on the extent of its sovereignty over the surface of the sea, the result would be chaos and many provisions of maritime conventions would become senseless.

2. Inter-American Juridical Committee, Pan American Union, Draft Declaration of the International Rights and Duties of Man (Mar. 1946) Art. XIV.

3. Id. at Art. VIII.


5. "As late as 1930 at the Hague Conference . . . 13 states, including the Scandinavian and Mediterranean, denied the international validity of the three-mile rule and insisted either on their four, six or twelve-mile rule, respectively, or on a rule which would vary for different purposes, namely, control of fisheries, innocent passage, revenue protection, and neutrality, or on a zone of jurisdiction contiguous to the territorial marginal sea." Borchard, Resources of the Continental Shelf (1946) 40 Am. J. Int'l L. 53, 56–7.


7. In opposition to the subsoil and sea bed, see Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (1946) 40 Am. J. Int'l L. Supp. 45; Borchard, loc. cit. supra note 5.

8. "Within what are generally recognized as the territorial limits of the state by the
less. Imagine the impossible task of the captains fighting the battle of the
Graf Spee near the shores of Uruguay and Argentina, if at every moment of
their action they had to consider autonomous and different rules of the two
states on the extension of their territorial waters, in order to avoid a viola-
tion of their neutrality.

At the end of his book the author embarks on an interesting experiment.
He drafts a change of the seven Inter-American conventions into inter-
national conventions. In doing so, he draws a line between what he con-
siders existing international law and what he considers desirable changes of
international law. But this line is sometimes a little hazy. For instance,
the author drafts an international right of asylum. Although he charac-
terized this right as a special feature of Inter-American law which has not
been recognized by European countries with the exception of Spain, he ex-
presses the opinion, that the recent experiences of the Spanish Civil War have
changed the situation, because some European countries (Belgium, Holland,
Norway, Poland, Roumania) and two Asiatic countries (China and Turkey)
granted an asylum to political refugees in their legations in Spain. The
author's opinion might better be based on the practice of European coun-
tries in former times, which merely fell into oblivion in Europe because of
stabilized conditions, than on this isolated occurrence. The situation
created by Bolshevism, Fascism, Nazism between the two wars, and the
situation in Eastern European countries after the last war would have
justified the revival of this right, which in the last few decades has been
practiced only in Latin America. In any international formulation of this
right it should be extended to the property of the refugees. The Argentine
Embassy in Madrid, by refusing to do that and by applying local Spanish
law, practically revealed such property to the persecuting authorities.

The last page of the book contains an useful annex showing the signatures

law of nations, a State may define its boundaries on the sea and the boundaries of its coun-
9. In the sense of "Internal Asylum" after the terminology used by the Argentine
Ministry of Foreign Affairs and Worship in its PROJECT OF A CONVENTION ON THE RIGHT
OF ASYLUM comprising the right of asylum in legations, military installations and on men of
war, in contrast to "External Asylum" comprising the right of political refugees to enter a
foreign country (1937) 1, 5. See CONGRESS ON INTERNATIONAL PRIVATE LAW OF MONTE-
VIDEO (1889) Art. XVI.
10. Great Britain 1726 in Spain (Duke of Ripperda), 1867 in Greece (Jews), 1870 in
Guatemala, 1873 in S. Domingo and Spain (Marshal Serrano), 1895 in Turkey (Said Pacha);
France 1858, 1865 in Peru; Germany 1830 in Guatemala; Denmark 1841 in Spain (Duke of
Sotomayor); Spain 1891 in Chile (Balmaceda), 1933 (Alessandri), 1935 in Venezuela; United
States 1859 in Ecuador, 1868 in Paraguay, 1874, 1875, 1898 in Bolivia, 1876 in Spain, 1877
in Mexico, 1891 in Chile.
11. The right was officially acknowledged by the Duke of Sotomayor when he became
Spanish Minister of Foreign Affairs in 1848, after having been saved by the right of asylum
accorded to him seven years before in the legation of Denmark. See note 10 supra.
12. (1943) 6 REV. ARGENTINA DE DERECHO INTERNACIONAL 4.
and ratifications of the seven conventions up to August 1940. Later developments were not available to the author and, indeed, not very much has since happened in this respect. Colombia deposited the ratification of the Treaty on Maritime Neutrality, the United States signed the Treaty on Asylum with reservations,¹³ Haiti ratified the Treaty on Diplomatic Agents, Honduras that on Civil Strife, Peru ratified all treaties with the exception of that on Maritime Neutrality. This shows no very great progress in the last five and a half years. After eighteen years Argentina and Paraguay still have not ratified a single one of the treaties, Bolivia, Honduras and Venezuela only one, Chile, Salvador, Guatemala, Honduras only two of them. It should be observed, however, that since the signature of the Convention on Asylum by the United States only one convention, that on Treaties, remains unsigned by a single state, Salvador.

Being written in French, the book is addressed principally to European lawyers with the intention of familiarizing them with Inter-American concepts of international law. But its contents are so instructive that it would be worth while to consider an English and a Spanish translation.

E. von Hofmannsthal†


For three score years and four, seldom has a year passed without a contribution from the skillful pen of John Bassett Moore. The materials included in these seven volumes require a twenty-page bibliography merely to list them. Not included in the Collected Papers are his six-volume History and Digest of the International Arbitrations to which the United States has been a Party, his eight-volume Digest of International Law, his six-volume International Adjudications, his twelve-volume edition of The Works of James Buchanan, or half a dozen other volumes on extraterritorial crime, extradition, and kindred topics. Omitted also are his separate opinions as Judge of the Permanent Court of International Justice. When it is considered that Judge Moore has spent many busy years as a professor, as a practicing lawyer, as legal adviser in the Department of State, as Assistant Secretary and Acting Secretary of State, as Judge on the Permanent Court of International Justice, and as a plenipotentiary to numerous international conferences, his productivity as a scholar is all the more remarkable.

This is not the place for an appraisal of his influence on American diplomacy or of his extensive contributions to the development and application

¹³. The United States delegation declared at Havana "that it does not recognize the right of asylum as part of international law," in spite of the cases mentioned in note 10 supra.

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of the principles of international law. Let it suffice to say that no serious student of international law and diplomacy can afford to neglect the contributions of Judge Moore.

The papers reprinted in these volumes include two entire books previously published by Judge Moore, and now out of print: his Principles of American Diplomacy, published in 1918, and his International Law and Some Current Illusions, first published in 1924. The Collected Papers include over 150 articles, more than one hundred book reviews, and numerous occasional addresses, tributes, letters to the editor, as well as several jingles composed by the learned Judge in his lighter moments. Several papers are here published for the first time. Of these, mention should be made of "Peace, Law, and Hysteria" (Vol. VII, pp. 220–349), chiefly written prior to 1936, but completed in 1943. In the first half of this dissertation, Judge Moore sagely discusses the fundamental causes of war and castigates exponents of panaceas which, he believes, neglect those fundamentals. The latter half deals with the growth and reception of international law; reason, justice and equity; morality and law; judicial discretion; and international arbitration; and its mellow wisdom is the distillation of years of study and participation in public affairs.

The writings of John Bassett Moore are characterized by an unhurried, flowing, and powerful style, frequently pierced with shafts of wit, occasionally studded with invaluable personal reminiscences of men and events, and are noteworthy for their grasp, insight, and maturity. The gathering of these scattered papers into accessible form is of inestimable value to students of international law and diplomacy.

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