

equity is found.¹² There are a few testamentary causes including one where lands as well as chattels were distributed,¹³ but most routine matters relating to wills, administrations, and guardianships probably never came before the court and were handled by the clerk who served also as register.¹⁴ There are various administrative proceedings relative to such things as roads, ordinaries, and the indenting of servants. Indeed the record shows even legislation by the commissioners or justices who were the law-makers before the assembly was established. A law in 1680 forbidding the sale of rum to Indians was modified later in the same year so as merely to enjoin that those selling to Indians should take care that they speedily depart into the woods to drink the liquor so that people might not be disturbed by them.¹⁵ Thus did the Quaker ideal of decorum compromise with the Quaker instinct for trade.

The editors are to be congratulated upon their work of transcribing the two volumes of manuscript into readable form and still preserving the atmosphere of the time. There are a few identification notes to the body of the records and also other footnotes to indicate spelling discrepancies and changes of handwriting. A single index includes names of persons and places along with subject-matter. A map of West Jersey would have added to the usefulness of the book. There is an excellent historical introduction which treats legal matters to some extent but regrettably the legal introduction was not ready in time for publication. It is earnestly hoped that someone will do for this volume what Professor Chafee did along this line in his introduction to the *Records of the Suffolk County Courts*¹⁶ and in his lengthy review¹⁷ of Boorstin's *Delaware Cases*.

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WHEATON'S INTERNATIONAL LAW. Volume two. Seventh English edition by A. Berriedale Keith.¹ London: Stevens & Sons, Ltd. 1944. Pp. xxvii, 672. 50 /.

Wheaton's classic *Elements of International Law* first appeared in 1836, and the famous author made the final changes in 1847. The last American edition was the celebrated one of Dana, called the eighth, unless we except the combined edition of the *Elements* and Wheaton's *His-*

¹² P. 102 (specific performance tried by the court); p. 110; p. 124 (defense of drunkenness in common law action on bond); pp. 180-81 ("appeal to equity" allowed).

¹³ P. 162.

¹⁴ Pp. xxxix, I, n.1, 151.

¹⁵ Pp. 2, 3. However, Leaming and Spicer and subsequent entries in the volume under review show that the absolute prohibition was later restored.

¹⁶ (1933).

¹⁷ (1944) 57 HARV. L. REV. 399.

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tory of International Law, published by W. B. Lawrence in 1868-80 in four volumes. In 1878 the English took up the *Elements*. Boyd's three editions preserved Wheaton's original text, and this was done for the last time in the fourth edition by Atlay in 1904. By reason of the Hague Conventions and the many changes effected in the law and in practice since 1847, Coleman Philipson, the editor of the fifth English edition, 1916, merged Wheaton's text with his own comments and characterized himself properly as co-author. Wheaton's text is even less distinguishable in the two editions (the sixth and seventh), published in 1929 and 1944, by the present editor, Professor Keith, a scholar more especially known for his contributions to English constitutional law. Volume two, which alone is under review, is an exceedingly voluminous work, since it lays under contribution the cumulative efforts of past editors.

The work is a valuable commentary on the laws of land and maritime warfare, as built through three centuries of experience. Yet Mr. Keith labored under several handicaps: (1) He was writing in time of war, and could not fully detach his conclusions from the emotions of the times. (2) He is a British subject, and doubtless felt it incumbent upon himself to defend the Orders in Council and reprisals of his own government in the war of 1914, although he admits and proves that "All wars, and most notably that of 1914-19, have seen wholesale violations of the customary and conventional rules of warfare."² (3) He writes as if the League Covenant were still in force, presenting the changes effected in the law of nations by Articles 16 and others, and yet presenting also the law of nations as it prevailed down to 1919. It is hard to tell whether he considers one or both or neither to be in effect, since he also seems to approve the idea that the League of Nations has abolished both the freedom of the seas and the status of neutrality.³ The fact that there are now numerous neutrals, and that as late as 1911 another Englishman, Sir Thomas Barclay, pronounced "Neutrality . . . the most progressive branch of modern International Law," may account for the space devoted to the subject of neutrality. Nevertheless, Mr. Keith's belief that the distinction between combatants and noncombatants (which he calls "illusory and immoral") had been or should be abolished,⁴ seems hardly compatible with the doctrine of conditional contraband discussed at length⁵ or with the doctrine that neutrals have the right to live, if not to trade, other than by consent of the belligerents. He condemns retaliatory measures if too harsh on neutrals,⁶ but accepts as sound the view of the British prize courts in the *Stigstad*,⁷ and the *Leonora*,⁸ of the Orders in Council of 1915 and 1917, requiring neutrals engaged in inter-neutral trade to call at British ports, that it was for the belligerent to judge of the harshness of his own measures, and that the burdens im-

² P. 582.

³ See p. 558.

⁴ P. 171.

⁵ P. 488.

⁶ P. 553.

⁷ [1919] A. C. 279.

⁸ [1919] A. C. 974.

posed on neutrals were bearable. These cases were too much for a distinguished English authority on international law, Professor Brierly, who thought they represented the "vanishing point" of law in regulating the relations between belligerents and neutrals.⁹ If they are justified as reprisal orders, "anything may serve as an excuse for reprisals."¹⁰ Mr. Keith explains the payment made by the Foreign Office in the case of the *Kim*, in which Sir Samuel Evans could see no distinction between goods absolutely and conditionally contraband, as "in pursuance of the policy of securing neutrals from needless loss."¹¹ It would have been well to accept England's proposal of 1907 to abolish the conception of contraband. Professor Keith's view that "a blockade being thus an infringement of neutral rights, its operation is not to be extended further than the actual circumstances of the case render it necessary,"¹² seems to him not inconsistent with his approval of the "long-distance blockade," protested by the United States, and Asquith's famous remark that "We are not going to allow our efforts to be strangled in a network of juridical niceties."¹³ Mr. Keith seems to approve the unprecedented belligerent expansion of contraband lists, which reduced the Declaration of Paris of 1856 to meaninglessness. Either the so-called "blockade" or "contraband" sufficed to prohibit enemy trade,¹⁴ a prohibition which seemingly has become the aim of large belligerents, when neutrals are unable to defend the law.¹⁵ It is not adequately observed, as a perusal of Story will show, that prize procedure lost its whole legal function when Orders in Council changed the rules of evidence and the State compelled deviation and detention to permit examination in port and condemnation by statistics and collateral testimony.¹⁶

Mr. Keith's devotion to the law, even the more unstable and insecure public law, is or may be impaired by his political allegiance. Although it is inferable that he condemns the confiscation of enemy private property, he is rather vague and misleading as to what happened under Article 297 of the Treaty of Versailles, which witnessed wholesale confiscations and rendered precarious the whole institution of foreign investment. If national claims justified the confiscation of private property,¹⁷ there never would have been any sanctity to private property. He considers "defensively armed" merchant vessels free from unwarmed attack by

⁹ See Brierly, *International Law in England* (1935) 51 L. Q. REV. 26.

¹⁰ P. 586.

¹¹ P. 597.

¹² P. 529.

¹³ P. 556. Mr. Asquith is misquoted by Mr. Keith.

¹⁴ P. 490.

¹⁵ Modern extension of the blacklists and the recommendations of Article 7 of the Inter-American Conference on Systems of Economic and Financial Control of 1942, by which neutrals may be crippled and disfavored businesses wound up and confiscated, are ominous. The effects of economic warfare are not calculated to produce postwar tranquility.

¹⁶ Pp. 599, 604.

¹⁷ P. 121.

submarines,¹⁸ and would abolish the submarine as a commerce destroyer; ¹⁹ yet he seems unaware of the attack on the alleged distinction between "offensive" and "defensive" armament as to submarines — quite apart from Admiralty orders — the views expressed by Secretary Lansing in his note of January 18, 1916, and the current practice of sinking Japanese merchantmen by submarine and airplane on sight and with little regard for the lives involved. He is bitter in his denunciation of the way Holland allegedly abused its neutrality — "misdeeds," he calls it.²⁰ He resents the exclusion of armed British ships (except as warships) by that country in 1915. But Holland was astutely advised by the late Professor Struycken, one of the ablest of international lawyers, and the Havana Convention of 1928 on maritime neutrality seems to have approved the Dutch view. Holland's observance of its neutral duties seems to have been correct, as does that of Sweden, also adversely criticized.

The legal events of the war beginning 1939 seem to have received only perfunctory attention. The traditional view is generally taken. But in a new edition the following minor matters might be noticed: In the discussion of spies, espionage and saboteurs, Ex parte *Quirin*,²¹ might be included. The Bryan treaties really could deal only with disputed questions of fact, a rare occurrence.²² Wasn't the League's function "to preserve peace" inevitably identified with the preservation of the *status quo*?²³ "Sanctions" provoke hostility, war, and intervention, and are hardly constructive.²⁴ Isn't the work of the Hague Codification Conference of 1930 underestimated?²⁵ What is the distinction between an "aggressive" war and your opponent's war?²⁶ Baty's distinction between reprisals and acts of war merits consideration.²⁷ The mistaken current view of what was meant by "just war" might be amplified. Marshall's view on private property in *Brown v. United States*²⁸ was only an intermediate view.²⁹ On private property, Hamilton's views on Article X of the Jay Treaty, expressed in his Camillus Letters,³⁰ warrant consideration. Other topics deserving of more than passing notice are: the treatment of patents by the Alien Property Custodian, the "blacklists," the First War Powers Act (1941) and the term "foreign nationals," the nationality of claims,³¹ the ship's flag as the national pro-

¹⁸ P. 271.

¹⁹ Pp. 345, 578.

²⁰ P. 376 and *passim*.

²¹ 317 U. S. 1 (1942).

²² See p. 51.

²³ See p. 63.

²⁴ See p. 65.

²⁵ See p. 67.

²⁶ See p. 98.

²⁷ See p. 94.

²⁸ 8 Cranch 110 (U. S. 1814).

²⁹ See Moore, *John Marshall* (1901) 16 POL. SCI. Q. 393.

³⁰ Quoted in MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924)

15-32.

³¹ See p. 46.

tection of passengers and their assumption of the risk of the flag, the meaning of "consequences to which an enemy vessel is exposed," as recorded in Article 56 of the Declaration of London, and its construction in the *Dacia* case,³² the meaning of "capture"³³ on which some American courts went astray, the operation of munition factories on neutral soil, the requisition of refugee merchant ships by the United States, and the award of the War Claims Arbitrator, the decision or award in the case of the *Prometheus*, the fundamental change accomplished by the Order in Council of October 29, 1914, in throwing on the claimant in prize the burden of proving his innocence, the views of Admiral Consett expressed in his *The Triumph of the Unarmed Forces*,³⁴ whether neutrality can "disappear" among sovereign states unless world war or no war is to be humanity's future.³⁵

Mr. Keith realizes that in the contest between the considerations of humanitarianism and the destructive manifestations of science, science has won and will probably continue to win. He is discouraged about the futility of the attempts to improve the law. He therefore concludes that the only hope is the abolition of war. That is greatly to be wished. It may be doubted, however, whether serious progress in that direction has been made and whether any new Holy Alliance, though the natural outcome of recent tendencies, can achieve the desired goal.

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³² See p. 304.

³³ See p. 318.

³⁴ (1923).

³⁵ See p. 559.

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