Cornell Law Review

Volume 29
Issue 2 *November 1943*

Article 10

Book Reviews

BOOK REVIEWS

Annual Digest and Reports of Public International Law Cases, 1938-1940. By H. LAUTERPACHT. London: Butterworth and Company, 1942. Pp. xxxiv, 607.

A comparison of this ninth volume in the series of *Annual Digest and Reports of Public International Law Cases* with the first volume, published in 1929, shows that the present editor, Dr. Lauterpacht, has come a long way way in transforming the *Digest* into international law *Reports*. The statement of the editors of the volume for 1919-1922 that a *"Digest* is not and cannot be either a reprint in full of reports, or a case-book," and the similar statement in the volume for 1927-1928 that these volumes, being digests and not case-books, "are intended to stimulate and facilitate recourse to actual decisions, and not to render that unnecessary," were apparently based upon the assumption that the law reports of the courts of some several score states were as readily available as, for example, the reports of the Permanent Court of International Justice.

Quite aside from the difficulty involved in using decisions printed in many and various tongues, there exist few places in which a student can obtain access to the actual decisions. The inestimable value of the *Annual Digest and Reports* is in the gathering and translating of these materials. The earlier volumes were tantalizingly inadequate in their summaries of "relevant" facts and paraphrases of the *ipsissima verba* of the courts. The indication, first expressed in the volume for 1933-1934, that "whenever possible, the paraphrasing of decisions has given place to a literal reproduction of the relevant parts of judgments and awards" was most welcome, but one may take issue with the statement found in the present volume that, with the "system of verbatim reports—suitably abridged, edited and preceded by a statement of the relevant facts," little now remains to be done in transforming the *Digest* into "international law reports proper." Granting the necessity for careful English translations there is still need for an *International Law Reporter,* perhaps along the lines of *American Maritime Cases,* containing unabridged texts. The sometimes strained division of the cases presented in the *Annual Digest and Reports* into "The Facts" and "The Law" probably accounts for the criticism of some American lawyers that the volumes are "unusable" and the comment of others that they are valuable only as an "index."

As regards the scope and content of the present volume, there are reported 223 cases involving questions of international law, and decided, with few exceptions, in the years 1938, 1939 or 1940. Only five of these were decisions of international tribunals, four being decisions of the Permanent Court of International Justice, and the fifth, the Trail Smelter Arbitration between the United States and Canada. The other cases reported were decided in the courts of some thirty states, sixty-two being decisions of American courts, thirty-eight being English decisions, twenty-six French, twenty-one Italian,

and twenty-two Argentinian. Certain countries such as China, Japan, Turkey, Sweden, Denmark, and the U. S. S. R. are unrepresented in this volume, but the editor promises to report cases now unobtainable because of the war in a subsequent volume.

Sixty-three pages of cases deal with war, enemy aliens, and trading with the enemy; cases involving treaties occupy fifty-six pages; nationality, aliens, and extradition cases account for twenty-four, thirty and eighteen pages respectively. As the editor points out, "the decisions upon jurisdictional immunities of foreign states and their agents cover more than one-fifth of the volume," but international administration and international organization are entirely unrepresented. He adds: "In a healthy international society the proportion should be different."

The decision of the editor to continue publication despite the limitations on content and scope imposed by the war is to be commended, and has resulted in a volume larger, in fact, than any of its predecessors. The suspicion voiced by the editors of the first published volume in this series "that there is more international law already in existence and daily accumulating" than is generally supposed, has indeed been ripened into a certainty by the unique contributions of this invaluable series.

*Herbert W. Briggs**

Ithaca, New York

Trading with the Enemy in World War II. By MARTIN DOMKE. New York: Central Book Co., 1943. Pp. xv, 640.

There can be few lawyers who do not have some clients directly or indirectly affected by the provisions of the Trading with the Enemy Acts and the foreign funds control regulations. In the maze of administrative regulations and conflicts of authority between different departments, some guide was urgently needed by the practitioner. Dr. Domke has aptly furnished it in this work, which gives abundant evidence of exhaustive research and thorough indexing.

The title does not give a fair idea of the extensive scope of the book. Probably no better short title is available. Its scope is partially indicated by the chapter headings which are as follows:

1. Introduction. 2. The Enemy Character of Governments and of Their Agencies. 3. Enemies Under the Trading with the Enemy Acts—Nationals of Enemy Countries under Foreign Funds Control. 4. Resident Aliens of Enemy Nationality. 5. Alien Enemies Under Other Regulations and at Common Law. 6. Stateless Persons Formerly of Enemy Nationality. 7. Internees, Evacuees, and Prisoners of War. 8. Enemy Character of Corporations. 9. Enemy Controlled Corporations. 10. Blacklisted Individuals and Corporations. 11. Acting "For the Benefit

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of the Enemy." 12. Loss of Enemy Character. 13. Transfer of Business Places of Corporations. 14. Occupied Territory. 15. Suits by Enemies. 16. Suits against Enemies. 17. Remedies Against Seizures Under the Trading with the Enemy Act. 18. Patents, Trademarks, and Copyrights. 19. The Licensing System. 20. Foreign Exchange Control. 21. Administration of National Assets Abroad by Governments-in-Exile. The appendices include statutes and regulations of the United States and the British Commonwealth, a table of statutes and regulations of eighteen countries and an eight page bibliography.

The book is factual, practical, not theoretical or argumentative. Unlike some other alien scholars who have taken refuge in the United States, Dr. Domke has deemed it prudent not to indulge in any criticisms whatsoever of our policies, or in some instances lack of policy, but the discerning reader may read between the lines that all is not well, even though the author is at constant pains to point out that modern economic warfare requires new methods and wider scope of administrative discretion. There is no hint in the book that many of the measures that have been taken, if not unconstitutional, may be at least abuses of bureaucratic authority for ulterior motives not connected with the war effort. There is no direct hint of the unfortunate conflicts of authority between the State, Treasury and Justice departments, not yet entirely resolved. His implied criticisms (except of two or three lower court decisions) are veiled in the most discreet language, such as the "need to clarify the development of the law." This reviewer for one would not have been displeased to see a discussion of constitutional questions and an analysis of whether certain administrative practices are authorized by the statutes or otherwise abusive. Assuredly some of the forms and procedure are unnecessarily complex, and the restriction of judicial review constitutes a menace to our fundamental concepts. Wholehearted condemnation of confiscation, implicit in some of the enactments, but so contrary to our well settled traditions and in the long run inevitably harmful to our interests abroad, is called for. (See resolutions of the American Bar Association, House Delegates, March 1943).

The author seems to justify the confusion of terms in the legislation as "perhaps inevitable in these times of emergency legislation", but elsewhere (p. 63) he points out that the archaic terminology, "alien enemy," with its indiscriminate implication of disloyalty is an unfortunate survival from early common-law dogma. Emergency furnishes no excuse for muddy or lazy mental processes.

Ample consideration is given to the host of new law, not present in World War I, that has arisen because of the increasing importance of economic warfare, the hordes of refugees and the larger expanse of enemy-occupied territory. There is a tendency to shift away from old views to the test of "loyalty", so that today anyone's assets in this country, even those of American citizens living here, may be seized if the Alien Property Custodian makes a determination that such seizure is in the interest of the United States, and such determination is not reviewable in the courts (p. 266). It is submitted

that the decisions in habeas corpus proceedings cited by the author do not warrant his implied conclusion that property rights need not be given judicial protection because the menace is less. The author in another connection aptly quotes (p. 259) from an outstanding English authority, Howard's *The Defense (Finance) Regulations*: " 'This may be in the interest of the country at large, but it leads to a sense of injustice and increases the difficulties confronting the lawyer, especially as there is a complete dearth of judicial interpretation' "—a dearth due to the fact that recourse to the courts has been so restricted.

Many of the chapters deal with entirely new law still in the incipient stage, *e.g.*, governments in exile. He defends, probably with good reason, the necessity of the action of these governments in vesting in themselves the assets of their nationals. But is it not assuming too much to say, with the author and some of the decisions, that because these vesting decrees are intended to conserve the assets abroad of their nationals in occupied countries against looting, they are not confiscatory? The assumption is contradicted by later statements or quotations (pp. 367, 379) that the return of the property or the payment of compensation is a matter of grace and not a right of the national against his own sovereign. Our courts should maintain the principle that confiscation in any form or guise, present or probable, is against our public policy.

The book contains copious studies of comparative law for which the author is eminently qualified. Some of the chapters are useful little treatises in themselves apart from the general topic, as, for example, "Stateless Refugees and Governments in Exile"; and many interesting points of public and private international law are incidentally dealt with. There will be no quarrel with the closing paragraph that World War II calls for new forms and new systems of legal and economic settlement; that the peace treaty must create its own code for the purpose; and that meanwhile the adequate development of the law of Trading with the Enemy is a prerequisite to any final international settlement of the questions involved.

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New York, New York

Outlines of Lectures on Jurisprudence. By ROSCOE POUND. Fifth Edition. Cambridge: Harvard University Press, 1943. Pp. viii, 244.

A multitude of students, friends and admirers of Roscoe Pound will welcome this little volume, the Fifth Edition of his *Outlines of Lectures on Jurisprudence*. These Outlines have held a unique place in the study of the subject which Pound has done so much to advance. They have been invaluable not only in collecting the representative material of the field but in organizing and unifying them to give to the student a constantly clarifying

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perspective of the progress of legal thinking. The Preface reveals that these Outlines are the product of forty-three years of teaching of Jurisprudence and over fifty years of the study of that fascinating subject. Indeed, a survey of these materials readily induces the conviction that every student of the law should have a critical appreciation of them. He who would achieve in any science must first view its problems from the shoulders of those men of genius who have pointed the way.

The Fifth Edition has been greatly amplified.[1] It is nearly three times as large as the Second. It is not quite twice as large as the Third. In the Fifth Edition the well classified bibliography has expanded over the Fourth in about the same proportions.

The notable additions which are likely to attract the most attention are the materials to be found dealing with the Realist Schools.[2] Psychological realism is illustrated by the expository material found in Frank's *Law and the Modern Mind* (1930), Robinson's *Law and Lawyers* (1935) and Arnold's *Symbols of Government* (1935). Skeptical neo-realism is expounded in Llewellyn's *The Bramble Bush* (1930), *A Realistic Jurisprudence—The Next Step* and *Some Realism about Realism.*[3] In the General Bibliography, listed among the realists, with the contributions of Frank, Arnold and Robinson, are Rodell's *Woe Unto You, Lawyers!* and Seagle's *The Quest for Law.*[4] And conspicuous among the materials on positive logical realism ranks Cook's *Scientific Method and the Law.*[5] Among the theories of the realists, immediately preceding psychological realism, is the doctrine of economic determinism as expounded by Beard's pioneer work, *An Economic Interpretation of the Constitution of the United States.*[6] It has been a notable stimulus to many later writers on realism, some of whom have been superficially imitative.

The Fourth Edition appeared in 1928. Since that time Sociological Jurisprudence has attained an increasing vitality through judicial decision and legislation.[7] The considerable legal literature since that time merely reflects the success of the sociological program[8] which was formulated by Pound a generation ago. Of necessity its future achievement will bear the imprint of its origin; the theoretical genesis will always be readily accessible and finely embodied in this Fifth Edition.

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[1]Second edition, pp. 99; third edition, pp. 136; fourth edition, pp. 156; fifth edition, pp. 244.
[2]P. 27, subsection 3.
[3]P. 27, subsection 4.
[4]P. 205.
[5]P. 28, subsection 5. *Cf.* MY PHILOSOPHY OF LAW, p. 56 ff.
[6]P. 26, subsection 2.
[7]P. 28, Part I, Chap. VI.
[8]P. 32.
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The American Patent System. By WILLIAM B. BENNETT, PH.D. Baton Rouge: Louisiana State University Press, 1943. Pp. 259.

The American patent system has been a storm center of discussion for some years—much talked about, but little understood. Apostles of regimentation have sought to mold it along European lines, and even such well-informed people as the editors of the New York Times periodically assure us that the day of the individual inventor has passed, and that great inventions come primarily from big laboratories. Such fallacies of the press-agent type have grown up through superficial investigations; and as most patent books touch only the legal side, there has been no adequate literature covering the broad economic questions.

Mr. Bennett has made an important contribution by presenting in readable form his economic interpretation of the American patent system. With his own clear observations, he has combined a wealth of material not hitherto accessible to the general reader. The book contains an extraordinary amount of new and interesting material. When one considers that the constitutional provision for protection of authors and inventors has developed industries in every city in the land, with a production never previously approached in the history of the world, and that this real economic wealth sprang from that intangible and fathomless reality, the human mind, the work of Mr. Bennett takes on an added interest to the general reader, as well as to students, inventors, lawyers, manufacturers, and all men of initiative.

*Robert V. Morse**

Ithaca, New York

The International Economic Law of Belligerent Occupation. By ERNST FEILCHENFELD. Washington, D. C.: Columbia University Press, 1942. Pp. xii, 181.

The Carnegie Endowment for International Peace, Division of International Law, has been for some time publishing monographs on international topics, of which several are on subjects directly or indirectly connected with war. The present work, the sixth in the series, is supplemented by English translations of three French, German and Japanese authors—*Des occupations militaires en dehors des occupations de guerre,* by Raymond Robin; *La guerre russo-japonaise,* by Nagao Ariga; and Ludwig von Kohler's *Administration of the Occupied Territories.* The sales agent, Columbia University Press, offers all four at the price of $5.00 for the set.

Feilchenfeld's preface states that the general subject has been neglected. His present work, however, makes his remark no longer true. The book is a painstaking job centered around The Hague Regulations Respecting the Laws and Customs on Land, 1907, Section III, "Military authority over the territory of the hostile state." Since these regulations have been cited and relied

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upon by the present belligerents, Feilchenfeld presumed them to be of sufficient relevance to justify framing his book upon them. In this he is amply borne out so far as our own country is concerned, since our Basic Field Manual, *Rules of land warfare,* 1940, incorporates the Hague Rules in its chapter headed "Military Occupation and Government of Enemy Territory" (Ch. 4, Section 10, paragraphs 271-344). Our Basic Field Manual, *Military Government* deals with them also in respect to policy and administration. The newspapers carry reports that they are guiding our men in their dealings with the countries so far occupied.

Mr. Feilchenfeld's book is in six chapters. In the first he discusses the "place of belligerent occupation in the system of international law," dealing with the history and philosophy of the general subject. He stresses the economic aspects, pointing out that prior wars found political and economic structure stable, whereas the present war frequently finds "countries in a stage of profound transition." He remarks that some countries sincerely disapprove the political structures of others and asks: "Should an occupant be forced to respect in an invaded fascist region both racial discrimination and the suppression of free speech"? Recent events in Sicily have given the answer to this question, but the recital above illustrates Feilchenfeld's general method. He is provocative; he raises issues and says: "It will be necessary to seek new answers to many fundamental questions." The book continues with a running commentary on the Hague Rules in chapters which read: "Treatment of Property, Private and Public;" "Public Finance"—a general subject on which Feilchenfeld has already written a most substantial book dealing with public debts and state successions. In the present work, Chapter IV is on regulation and organization of the occupied country, while Chapter V deals with "Occupation During an Armistice". It ends with Chapter VI, "Relations Between Jurisdictions", in which Feilchenfeld summarizes his labors under the heading "How Will or Should Other Jurisdictions React Toward Occupation Measures?"

Feilchenfeld's European education and his American associations join in giving him high qualification for this book. Though short, it is packed with material. Its index makes the material accessible; its bibliography in various languages has been drawn on in the text. It would be more readable if it were less tightly packed; but the author no doubt remembered that he was doing a monograph.

*G. H. Robinson**

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Protection of Coastal Fisheries under International Law. By STEFAN A. RIESENFELD. Washington, D. C.: Columbia University Press, 1942. Pp. xii, 296.

This volume is another monograph, No. 5, in the Carnegie Endowment's

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International Law Series. It had its origin in the Institute of Pacific Relations' investigation into sea fisheries off the Alaska and Western United States coasts, which resulted in three books. The economic problem was dealt with in *North Pacific Fisheries 1939* by Gregory and Barnes; the legal study was by Bingham, *Report on International Law of Pacific Coast Fisheries,* 1938. The third, the present work is, Riesenfeld himself says, "a survey of the authorities and precedents available" for Bingham's *ad hoc* application to the North Pacific situation. In Part I, "International Legal Theory," Riesenfeld discusses the subject historically from Roman Law to the 18th century, and from the 18th century to the present. That the sea was an economic asset to a nation did not concern the Romans much. The Mediterranean was entirely under the dominion of a single state—their own. But when different countries faced the same waters, the littoral states soon found that fishery could be something to quarrel over and the author deals with the famous squabble of the English and the Dutch out of which grew Grotius and Selden's battle of the books over the open *versus* the closed sea. Riesenfeld's industry has listed all the volumes by all the writers and such is his equipment that neither English nor Dutch nor French nor German nor Spanish nor Italian nor Latin nor Norwegian eludes him.

His first part concludes with a statement of the various efforts by international lawyers to arrive at a working formula. Our latest in the United States was *Research in International Law,* Harvard Law School Draft Convention on Territorial Waters in 1929. Discussion concerning fishery in what may or may not be "territorial" waters seems scarcely wide enough in scope, however; nor is the problem one of merely "coastal" waters. So long as the theory admits that there are non-territorial waters, there can be dispute both as to where the territorial waters end and as to fishery in the non-territorial waters not "coastal." The Harvard Research article 20 reads: "The navigation of the high sea is free to all states. On the high sea adjacent to the marginal sea, a state may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection." The draftsman, however, added as a comment: "Sometimes the conservation of fisheries has also been mentioned as a reason upon which a state may take measures upon the high sea adjacent to its marginal sea." Oppenheim, *International Law,* 5th ed., Chap. II, The Open Sea VI, "Fisheries in the Open Sea," shows that the use and conservation of economic values to be found in the open sea is far from being the concern merely of any one nation which can grab them.[1]

Riesenfeld's discussion of the North Sea Convention regulating taking by the littoral nations in that small fish pond is followed by further material on

[1]See Anderson, *Exploitation of Products of the Sea* (1927) 20 A. J. I. L. 752. Seals and later whales have been the subject of international arrangement. See Oppenheim's *Bibliography,* and, since his list, (1937) 31 A. J. I. L. 112; and (1940) 34 A. J. I. L. 324. See J. TOMASEVA, INTERNATIONAL AGREEMENTS ON THE CONSERVATION OF MARINE RESOURCES (1943).

the topic. It shows that the idea of extending the territoriality of the waters was a solution for fishery purposes often put forth and often violently opposed. So far as the citizens of any one state are concerned, their own sovereign may control them on the high seas,[2] but it has no such traditional power over non-nationals. No general philosophy has been arrived at; but the idea that there is a common interest in even the high sea will not down. Some pronouncements on the matter might well be part of the world settlements following the present war.

In Part II of Riesenfeld's book, headed "State Practice," the author shifts from general theory to the actual diplomatic, legislative and judicial practices of the several states. His chapters deal with those of Great Britain and the British Commonwealth of nations, European East Atlantic Coast States, the Mediterranean states, the Baltic states, North-east coast states, the American Republics other than the United States, the Far East, and finally the United States itself. The plan is therefore highly ambitious and the author inserts a caveat that his work is necessarily incomplete because of his inability to get information in all cases. The result, however, is impressive, and no one who has occasion to deal hereafter with the subject can afford to be without the book.

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[2]In *Skiriotes v. State of Florida*, 313 U. S. 69, 61 Sup. Ct. 924 (1940), the court elaborated on the power of the United States in "governing the conduct of its own citizens upon the high seas," and held that, "if the United States may control the conduct of its citizens on the high seas we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas." Skiriotes was taking sponges off the Florida coast. Florida had taken thought and added not merely cubits to Florida, but leagues—three leagues, nine miles, off shore, and had barred the taking of live sponges within the area. The Supreme Court's opinion deftly avoids this lifting of itself by its own boot straps on Florida's part by finding that Skiriotes was a citizen of Florida. If he had been a Greek from Greece or a Cuban from Cuba, we should have had presented the question of Florida's interest in the adjacent high seas as against the world.

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