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apparently indicated in the Treasury Regulations. If hardships result from the application of the common law definition, it would seem that the sounder view is that taken by the court in *Williams v. United States*,[41] that any extension of the coverage under the Act is for Congress to decide rather than for the courts, which are historically supposed to be without power to legislate.

BOOK REVIEWS

INTERNATIONAL TRIBUNALS, PAST AND FUTURE. By Manley O. Hudson. Washington, D. C.: Carnegie Endowment for International Peace. 1944. Pp. xii, 287. $2.50.

No one in our country or elsewhere is more capable of writing upon this important subject than Judge Manley O. Hudson. By reason of his great learning and a lifetime devoted to the study of international law as well as his experience in connection with many international conferences and his distinguished services on the Permanent Court of International Justice, he has a very complete and profound knowledge of this subject. He has also performed a most useful function at the Conference in San Francisco in bringing his counsel and aid in the reorganization of the International Court of Justice. His book cannot but be interesting and informative to any lawyer devoted to public law and to our foreign relations.

We are confronted for the second time in the first half of the Twentieth Century with the problem of organizing the world so as to maintain peace, at least long enough to give civilization a chance to recover from a devastating world conflict, and to afford mankind an opportunity to resume that march of progress which was so rudely interrupted in 1914. If man could not learn anything from the past, then there would be little hope for the future; yet, it is not utopian to believe that lessons of history may not go wholly unheeded, and now that the moment has arrived with such complete Allied victory, world reorganization becomes the paramount problem, and we must hope that the experience of the past may be wisely utilized in the reorganization of the relations between the nations—so disrupted by the most devastating war of all time.

Between 1919 and 1939 a great experiment in organizing the judicial settlement of international disputes was attended with a very considerable measure of success, although a strong parochialism in the United States Senate prevented our adherence to the first real world tribunal that mankind had ever attempted. Today this tribunal is, in all its essential features, reaffirmed by the United Nations, and again will reestablish permanently, I trust, a Court with a large general jurisdiction over those legal controversies which may arise among the nations.

It is, therefore, very opportune that at this moment Judge Hudson should have written a book on International Tribunals indicating what those tribunals have been able to accomplish in the past, what was their structure and general organization, their procedure and the law applied by them. On all these questions he has written with clarity and precision and has made it possible for those interested in international law to understand readily the methods that have been employed during the last one hundred and fifty years to effect judicial settlements in a great variety of controveries.

41. 126 F. (2d) 129 (C. C. A. 7th, 1942), *cert. denied*, 320 U. S. 750 (1943), 36 ILL. L. REV. 586.

It was the Treaty of 1794 between the United States and Great Britain, known as the Jay Treaty, which provided for three mixed commissions to deal with questions not otherwise disposed of in the negotiation of the Treaty. Nearly six hundred awards or judgments were rendered by those commissions after the fullest argument and discussion of the merits of the claims; this was a very real epoch in the history of judicial settlement. Since then, there have been a great number of arbitrations, especially between the United States and Great Britain, and some of them, like the Bering Sea controversy, the Fisheries question and the Venezuela Boundary Line, excited much national feeling.

It was out of this long series of arbitrations taking place in the Nineteenth Century, that the Permanent Court of International Justice grew. There arose a strong sentiment in the United States in favor of the substitution of law for that of force, and it was felt that many controversies, otherwise dangerous to the peace of nations, might be adjusted by law rather than by a resort to war.

The question of the jurisdiction of such a court has always been one of difficulty and was much discussed by eminent lawyers throughout the world before the subject was formulated in the statute of the Permanent Court. It is there provided that the jurisdiction of the Court shall extend to all classes of legal disputes concerning:

(a) The Interpretation of a treaty;
(b) Any question of International law;
(c) The existence of any fact, which, if established would constitute a breach of an international obligation;
(d) The nature or extent of the reparation to be made for the breach of an international obligation.

It is, therefore, interesting to note that the statutes also provided what law the Permanent Court should apply. Article 38 reads: "The Court . . . shall apply:

a. international conventions whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

This is little more than a codification of the general principles observed by international tribunals heretofore in reaching their conclusions. International law is in the main either customary, that is, the usual rules observed by nations in their intercourse, or the law found in treaties and general conventions. The recent practice of multiple conventions has been termed "international legislation," although it is of consensual origin and no real international legislation has existed.

There are, of course, limitations to international judicial settlement and it has been felt widely that causes of war were frequently not of a justiciable character, that is, controversies which might be resolved justly in accordance with existing rules of law. It had been the custom to exempt from arbitration matters of "vital interest and national honor." This put largely out of the purview of judicial settlement the most important international questions. I think the tendency is against this narrow view, and the hope for the future lies in the extension of the groups of categories subject to judicial settlement. Many had hoped that the jurisdiction of the Permanent Court might have been made compulsory, but apparently it was thought impossible to do this at the present time, although there is hope that most of the nations may take advantage of the so-called Optional Clause, which is an

agreement to submit to judicial settlement all questions that may come within the defined jurisdiction of the Court.

In summation it may be said that much could be accomplished for international peace through the use of the instrumentalities primarily of the International Court, and secondly, if nations choose, by the establishment of *ad hoc* special international tribunals. It is not universally true that great questions which arouse national feelings are not susceptible of judicial settlement. Such famous arbitrations as the Bering Sea, the Atlantic Fisheries and the Venezuela Boundary cases, prove that at least among the English-speaking people such a result is not impossible.

While in form the San Francisco Conference created a new Court, in fact the continuity between the old Court and the new Court has not been broken. The word "Permanent" was left out of the title of the Court, and the name "International Court of Justice" was adopted without discussion. The Charter states in Article 92 that "the new statute is based upon the statute of the Permanent Court of International Justice." The very numbering of the Articles of the old statute has been retained and most of those Articles are retained verbatim, or modified very slightly. Thus both in appearance and in substance the principal features of the old Court are retained and the succession of the new Court is expressly envisaged in several Articles in the new statute. With the general acceptance by the United Nations of the Charter, the institution of an International Court will be again reaffirmed and, while its jurisdiction is not made compulsory, many if not all of the states will adopt ultimately the so-called Optional Clause, thus assenting to the jurisdiction of the Court in all justiciable controversies to which they may be parties.

If the inventive genius of man seems, since 1914, at least, to have been devoted largely to the creation of instrumentalities for his own destruction, we may also say that the Charter, with its readoption of the Court of International Justice furnishes a not inadequate instrument by which nations may, if they so desire, substitute methods of law, conciliation and diplomacy for those of war. Unless there is a fair prospect of their so doing, the future of the human race cannot be envisaged without dark forebodings.

The future of international judicial settlement rests upon the willingness of the nations to refrain from war as a means of carrying out their national policies. Recent experience would seem to indicate that unless some such result is reached modern methods of destruction may bring about the end of *homo sapiens* on this troubled planet, in which event the problems relating to international tribunals will become academic. If, however, there be enough intelligence and morality among the nations to preserve civilization from total destruction, one of the most useful instrumentalities toward this end will be the Court of International Justice—a result which can only be brought about if the man of the future can develop the morality and intelligence necessary to maintain his existence as a civilized being and the perpetuation of a world in which some measure of decency and justice may prevail.

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TWILIGHT OF INDIVIDUAL LIBERTY. By Hamilton Vreeland, Jr. New York: Charles Scribner's Sons. 1944. Pp. iv, 171. $2.00.

Into this compact volume that is no longer than some briefs submitted to the United States Supreme Court or than some of its recent opinions, Dr. Hamilton Vreeland, Jr., an eminent authority upon international and constitutional law, has made crystal clear what he aptly calls the *Twilight of Individual Liberty* into which the New Deal Supreme Court has led the unsuspecting and unaware nation. Whether this twilight is to be followed by nightfall or is merely the penumbra of a short eclipse remains to be seen. The book gains greatly in significance by the unexpected change of presidential administration almost simultaneously with the end of the war danger because, for the first time in many years, the American people are able to take their governmental bearings.

The history of the United States has been, in one respect, a cyclical rise and fall of executive power to meet national emergencies requiring untrammeled action at the expense of checks and balances. This resiliency has enabled the structure erected in 1789 to withstand the shock of every crisis. Throughout this period, however, there has remained an independent judiciary enforcing or, what has been often equally effective, standing ready to enforce constitutional restrictions upon the other two of the three separate branches of the government carefully devised by the framers out of the wisdom of the eighteenth century political philosophers who lit the lamp of modern freedom.

The American Constitution has been used as a model for many others that in practice have become dead-letters and it is of the most vital importance that, from time to time, we chart our position, as Dr. Vreeland does so brilliantly in this work, because our liberties not only can be swept away by conspicuous and dramatic executive usurpation or by equally open legislative excess (the fly-leaf quotes Jefferson's celebrated remark that an elective despotism was not the government we fought for) but also by the almost imperceptible judicial erosion of the restraints. The book is a shining reminder of the fundamental precept that general principle must not yield to the temptation of the particular occasion, so eloquently expressed by Wordsworth in describing his happy warrior: "And through the heat of conflict keeps the law in calmness made and sees what he foresaw."

The scope of Dr. Vreeland's study is epitomized in this paragraph of the Introduction:

> "We have, in the last ten years, witnessed an enormous extension of Federal power and a considerable extension of State power, both at the expense of individual liberty. I am not speaking of war power and statutes and orders based thereon."[1]

This change has occurred since 1937 and may be traceable to the dissenting opinions before that of the late Justice Holmes. What Dr. Vreeland has to say about the influence of Justice Holmes upon individual liberty is enlightening and almost sensational in view of the lustre that has crowned the reputation of that great jurist. The author interprets the Holmes philosophy, as revealed by his written expositions, as having been based upon the view that the essence of law is force, the direct negation of the theory of so-called natural law and of the concept of absolute truth, the Holmes utterances amounting to an euphemistic way of saying that might makes right. Dr. Vreeland reaches the conclusion that:

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1. P. ii.

"Instead of the humanitarian liberal whom his admirers see, his written words disclose him as a cynic and sceptic, who not only expressed little concern for human liberty but was generally indifferent to it, except in respect of the liberties of thought and expression."[2]

In tracing back the political philosophy of Justice Holmes to certain of the eighteenth century philosophers, the author may not be entirely fair to the latter, particularly Locke, but that is of minor importance. Dr. Vreeland does not leave the reader in doubt as to where he himself stands with respect to what he calls the "persistent strokes of a brilliant pen" wielded by Holmes.

"There can be no place for such a philosophy in the basic law of a free people. If it becomes so embedded, we shall no longer be free, because individual liberties of minorities will fall beneath the chariot wheels of political liberty, that is, the right to vote."[3]

The conclusion arrived at, after a thorough and objective analysis of the relevant decisions of the Supreme Court since 1937, projected against the historical background, not only of the United States but of the long struggle for individual rights since the days of the Roman Empire, with all of which the author has a rich familiarity and in presenting which he is never the least bit pedantic or pedagogic, is that the due process clause has been transformed from a substantive safeguard to a rather empty assurance of formal regularity.

The encroachments upon individual liberty were made both by the several states and by the central government.

The former were able to accomplish this by the weakening of Federal constitutional restraints in construing the due process clause of the Fourteenth Amendment. What is almost sensational in Dr. Vreeland's analysis is the tracing of this trend unmistakably to the jurist hailed as the arch-liberty of the age.

"This theory that power or might makes right action was a favorite one of Mr. Justice Holmes, particularly in the fields of conflict of laws and constitutional law, which is where *Blackstone v. Miller*[4] rests. How he acquired that philosophy would make an interesting study, but it is unquestionably related to his belief that the due process clauses do not protect substantive and jurisdictional rights but only relate to formal methods of procedure. More will be said of this in the following chapter, but in plain language it means that, as far as the due process clauses are concerned, a legislature can deprive a person of his property, liberty, or even his life as long as the operating statute is regularly passed. It is the theory of legislative absolutism against which this book is written."[5]

Without attempting to become an amateur psycho-analyst and explain either the origin of Holmes' anti-liberalism or influence upon his colleagues, Dr. Vreeland suggests that the cause of Holmes' attitude

". . . is clearly and definitely and directly connected with his physical power theory of valid sovereign action, and it seems probable that both theories are to some extent rooted psychologically in his Civil War experiences. Clearly they are expressions of his basic philosophy as revealed by his writings. It was this: Jurisdiction is power. Might makes right. The essence of law is force. Natural law concepts of right and wrong have no place in law. There is no absolute truth. The sanctity of human life is overemphasized. Man may be sacrificed to the good of the state and minorities to the prevailing force of majorities."[6]

While the Supreme Court, under the influence of the Holmes philosophy, held

2. P. 102.
3. P. 102.
4. 188 U. S. 189 (1903).
5. P. 72.
6. P. 101.

that the due process clause was not to be construed as an effective restraint upon state invasions of individual rights, a philosophy leading directly toward the tempting fallacies of dictatorship, Congress was given a free hand to work its social will regardless of the individual. Only when dictatorships abroad burst into exaggerated extremities, absurdities, terrors and catastrophies did the American public fully realize that any omnipotent—which is another way of saying any unrestrained—government can damage and destroy any part or all of its subjects—the citizens of such a government are necessarily subjects—but, with even the most noble intentions in the world, even with an idealistic benevolence, would lack the wisdom—for humanity lacks the wisdom—to improve its people. Any doctor can kill but to preserve and improve life is a far less simple problem. It was in blissful forgetfulness of what had been learned through bitter suffering by the Lockes, Montesquieus, Paines and Franklins of the eighteenth century that the Holmes-led Supreme Court began to loosen the constitutional brakes upon the Congress.

This was accomplished by a dilution of the strength of the due process clause of the Fifth Amendment which the author demonstrates is the source, practically speaking, of "all protection of individual rights against the Federal government."

The due process restraint of the Fifth Amendment upon the Federal government and the due process restraint of the Fourteenth Amendment upon the states were weakened by the same transmogrification of the meaning of that clause:

"To accomplish this it was necessary to change the traditional meaning and scope of the due process clause to such an extent that the substantive due process test was practically eliminated from the cases, that is, the test which would deny validity to a statute if it was unreasonable or arbitrary or capricious or had no substantial relation to the end sought to be attained. . . . Those cases, decided since 1937, mean that substantively the due process clause of the Fourteenth Amendment does no more than protect against the invasion by States of some of the rights specified in the First Amendment as protected against Federal action, and that substantively the due process clause of the Fifth Amendment means nothing as a protection against the exertion of Federal power."[7]

Perhaps the most important contribution of the book is the refutation of the modern notion, dignified and indeed given authority by the opinion of the Supreme Court, that the due process clause historically—before the adoption of the Fourteenth Amendment—merely had procedural meaning.

"They are wrong in substance and implication because the truth is that up to the very time that due process began to have real substantive significance the doctrines of natural law were protecting individual substantive rights."[8]

Dr. Vreeland shows that the application of substantive due process occurred in many of the pre-Civil War decisions of state courts. Then he reaches his inspiring and magnificent interpretation of due process as the deliberately intended and legitimate child of the age-old doctrine of natural law, the crystallization into the constitutional phraseology of the principle of the rights of man:

"The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away."[9]

The issue is sharp and Dr. Vreeland's book makes it clear. In his view, which he shows has sound historical support, the principle of the due process

7. P. 99.
8. P. 115.
9. P. 119.

"confers a positive right that the treatment by government of all persons shall conform with a standard below which government may not go in the treatment of human beings."[10]

This is the doctrine that the liberals of the world now are seeking to have recognized as universal.

But the recent decisions of the Supreme Court have followed the divergent trail blazed by Holmes and proclaimed with shocking candor by Mr. Justice Frankfurter in an article published in 1939, the year that he ascended to that bench: "The due process clauses ought to go."[11]

Every judge and lawyer, every editor and other leader of public opinion, and every intelligent citizen should realize what has been done to weaken our constitutional structure at its base. Dr. Vreeland's book may be read in a few hours and its message should be taken to mind and heart. With all of its wholesome fervor, it never betrays the rigid objectivity of sound scholarship and the authorities are cited in the notes, unobtrusively contained in an appendix, so that the skeptical reader may check Dr. Vreeland's interpretations against his own.

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MUNICIPALITIES AND THE LAW IN ACTION. By Charles S. Rhyne. Washington, D. C.: National Institute of Municipal Law of Municipal Law Officers. 1945. Pp. 500. $10.00.

Significant of the matters contained in the eighth annual volume of *Municipalities and the Law in Action* (1945 Edition) is the subtitle "A Record of City Experience Covering the Third Year of the War." The index (from abattoirs, under OPA, to zoning) consumes 44 of its 500 pages. One might be dismayed at examining this large volume in order to obtain general legal information even on municipal law. Such, however, is not its purpose. It is a clinical compendium of problems confronting a special group of practising lawyers, city attorneys. For that reason it cannot be a mere academic treatise. Many practical suggestions and much sound advice are contained in its pages.

The volume appropriately opens with a message from President Roosevelt, reading in part as follows:

"The agenda . . . embraces some of the most vital questions to be faced by our municipalities not only while the war is progressing but in the all important period of rehabilitation and reconstruction which is to follow. It is of the utmost importance that immediate steps be taken to correlate municipal programs with Federal plans. I trust therefore that your deliberations will be guided by the wise counsels and that a constructive approach will be made to the vital problems under consideration."[1]

It can fairly be said that in this volume that constructive approach is achieved. It is one of the most valuable in the series of eight which began in 1938, and constitutes a report of the year's legal experiences of American cities. Some of the troublesome municipal problems finally decided by the highest courts have their beginnings in the diverse reports contained in these volumes. For that reason alone, this series of books would be unique as source material.

10. P. 126.

11. P. 138; FRANKFURTER, LAW AND POLITICS (1939) 16.

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1. P. 12.

Every phase of municipal activity is analytically reported upon—public housing, city planning, taxation, municipally-owned utilities, city contracts, civil liberties, municipal bonds, tort liability, city-state relations, Federal-city relations, and many others.

There is a comprehensive and extremely timely chapter on public housing. We are informed that FPHA will give preference in the sale of permanent housing that is adaptable for individual homes to present or prospective occupants, with special consideration given to veterans. Preference will also be extended to non-profit mutual ownership corporations operating for the benefit of their tenant members. To unload the entire stock of war housing upon the real estate market would have disruptive effects in many localities. Accordingly, it is suggested that those projects that are suitable be turned over to local housing authorities for low-rent public housing in areas where there is a great need for housing for low-income families.

It has also been found practicable to move surplus temporary housing to localities where the need for such housing is most acute. Some experiments have been made in cutting buildings into panels, moving the sections to other sites and re-assembling them there. In one such experiment, sections were moved 180 miles and re-erected in their original form as part of a new project. In another such operation, a two-story structure, consisting of 16 units, was converted into four one-story buildings of four units each. Tests also indicate the feasibility of disposing of some of the units by removing these structures to farms or industrial sites to be converted into utility buildings. In large cities, however, the use of temporary housing is a much debated subject, because of the complicated sewer and utility problems created thereby.

Recommendations to re-use these units as temporary reconstruction buildings in bombed European areas have met with some favor. Indeed, interest has been shown by several European countries in the purchase of dismantled dwellings for shipment abroad. Since demolition costs normally exceed the sales value of the salvaged materials, these new avenues of disposal will help reduce government loss. An added advantage is that the actual useful life of the properties will be prolonged after their original housing purpose has been accomplished.

Housing authorities have received from FPHA applications for financial aid for low-rent and slum clearance projects, to be added to a post-war shelf for preferential treatment when conditions are ripe. Here, it is perhaps not out of place, in a review of this practical volume, to make a practical suggestion. Cities should begin immediately to make their local surveys and to adopt appropriate resolutions. Federal moneys will always be allocated to the city that is ready with definite plans and construction blueprints. Moneys will not be allocated to cities which have nebulous construction plans for the future.

Urban redevelopment through private corporations is also adequately treated. Bills patterned after the New York urban redevelopment laws are recommended for adoption by states throughout the Union. In these cases inducement is given to private agencies through the device of tax exemption which may extend over a period of years. A notable instance of this type of project is the Stuyvesant Town development in New York in the area previously known as the "gas house" district. Interesting legal questions presented by this kind of project, including the right of the City to condemn the land, were passed on finally in *Murray v. LaGuardia*.[2] This

2. 291 N. Y. 320 (1943); *cert. denied*, 321 U. S. 771 (1944).

is the first housing development in New York City authorized under the Redevelopment Companies Law (L. 1943, ch. 234).

Cities are interested in acquiring some of the huge stock of surplus property which the Government has accumulated. In order to avoid the necessity of purchasing through private profiteers, cities have been insisting upon a preferred position among buyers of this property. Through the Surplus Property Act of 1944, such preference has been established in the law.

The sections on taxation point out that the main source of municipal revenue is the real estate tax, established when ownership of land "was a badge of independence, responsibility and wealth." The financial status of cities as well as of taxpayers is affected by the ever increasing rolls of tax-exempt property. Sound, hard thinking on the re-establishment of the base for municipal taxation is imperative. This is a problem for state legislatures rather than for cities. In Michigan, an amendment to the state constitution, which would require that state to reimburse cities for all revenues lost in this way, has been proposed.

We are also reminded that the tax-exempt rolls have been further augmented by the acquisition of land by the Federal Government. As a result, the financial stability of many cities might have been strained if the war had continued much longer. Some criticism has been heard that the Government has permitted itself in some instances to be used as a cloak by certain war contractors in order to escape local taxation. Under the shelter of government ownership of their properties it is claimed that many have achieved undeserved tax exemption. This situation is graphically highlighted by the startling fact that 24% of the land area of the continental United States is owned by the Federal Government. In Arizona government ownership is 73%; in California 46%; in New Mexico 44%; in Wyoming 51%; and in Utah 72%.

However, Congress has expressly declared that property of the Reconstruction Finance Corporation and the Defense Plant Corporation shall be taxable.[3] This is also the case with a dozen other government corporations or agencies. In addition, Congress has recognized the gravity of the plight of municipalities by organizing the combined Congressional Public Lands Committee under the chairmanship of Hon. J. Hardin Peterson of Florida. It has held hearings all over the country and has prepared an Interim Report,[4] setting forth factual data on the municipal loss of assessable property by reason of exempt Federal ownership. Approximately 50 bills have been introduced in Congress proposing remedial legislation.

Although his committee has not yet acted, Mr. Peterson has unofficially expressed the viewpoint that some of the recommendations of the committee should be:

(1) The Government should pay taxes, or an amount in lieu thereof, on land held in a proprietary capacity.

(2) In the disposition of surplus Federal property, the purchaser should assume the burden of local taxes.

(3) Local units should be permitted to tax where the Federal ownership is technical, the beneficial interest being in private parties.

(4) Immediate return of land to private ownership after Federal use of land has ended.

There is a chapter on tax lien foreclosure *in rem*, a matter of vital importance to all municipalities. The Land Tax Collection Act of Jackson County, Missouri,

3. 55 STAT. 248 (1941), 15 U. S. C. A. § 610 (Supp. 1940).

4. H. R. REP. No. 1884.

predicated on Title 3, of Article 7-A of the Tax Law of the State of New York, "Foreclosure of Tax Lien by Action in Rem" is discussed at length. The Missouri Supreme Court *en banc* on July 31, 1944, upheld the constitutionality of the Act.[5] The foreclosure *in rem* statute has not been used in the City of New York because at present it is mandatory to foreclose all tax liens. An attempt on the part of the New York State Legislature to permit selection of tax liens for foreclosure was vetoed by the Governor in 1945.

Treated also is the question of zoning. Cities have relaxed their zoning ordinances to allow for war conditions. Permits granted under this relaxation of zoning ordinances require that the uses permitted during the war period be terminated within six months after the end of the war. As a result, many legal problems will confront city attorneys in this connection. Mention may also be made of airport zoning to protect the approaches of publicly-owned airports from obstructions.

One of the practical hints on proposed Federal subsidies to aviation is contained in the opposition by the Institute of Municipal Law Officers to Federal payments to the respective states, to be doled out by them to municipalities. It is suggested that direct payments be made to the municipal owners of airports, thus avoiding "in-between" agencies, as suggested by the Randolph Bill.[6]

Some may say that the material contained in this volume might have been substantially condensed by omitting duplication. Reiteration occasionally results from the fact that the functions of several of the committees overlap, resulting at times in double treatment of the same subject matter. However, the duplicated items serve in most instances to add an accent to some urgently important matters which cut across different fields of municipal law.

It would be a gross understatement merely to report that the volume under review is worthwhile. For those who are not only engaged in, but interested in, municipal law, this volume is essential. It makes no pretense at being a philosophy of municipal law; it bears the styles of too many hands to have coherence; but it is history of current municipal activity hot off the griddle—a volume to which the practising municipal law officer and even those less directly interested in these problems, including the ever increasing number of law students studying this subject, may turn with considerable profit. Because of space limitations, this review can give but a cursory view of the many and important subjects of municipal law which are of vital importance in the general legal pattern of the nation.

As a result of the war's end, many new city problems will have to be faced. Those involving government contracts, the civil service status of returning soldiers, their rights on entrance to civil service and on restoration to civil service are but a few of them. The city counsellor can be of inestimable help in bridging the stream of reconversion from war to peacetime activities. This volume gives the reader considerable insight into his mental approach to this desired result and into the methods employed by him in his efforts to solve some of the problems involved in this process.

JULIUS ISAACS†

5. Spitcaufsky v. Hatten, 353 Mo. 94, 182 S. W. (2d) 86 (1944).

6. H. R. REP. No. 5024.

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THOMISTIC BIBLIOGRAPHY: 1920-1940. By Vernon J. Bourke. St. Louis: The Modern Schoolman. 1945. Pp. viii, 312. $3.00.

This book constitutes a treasury of sources for the Thomist scholar. Its purpose is to supplement the *Bibliographie Thomiste,* published 1921 in Belgium by the Dominican Fathers, Mandonnet (famous authority on St. Thomas and St. Dominic) and Destrez. That work listed some 2,219 items, arranged under analytical indexes. The present work is particularly important, because no general bibliography of Thomism or Scholastic material has appeared since 1921. The Modern Schoolman in 1933 and 1941 did carry two lists of books on the *philosophia perennis,* but in each case no attempt was made to list any but the more important works.

The present work must have required painstaking research and much scholarship from its author, Doctor Bourke, Associate Professor of Philosophy at St. Louis University, and author of the recently published *St. Augustine's Quest of Wisdom.* Dr. Bourke includes articles from learned magazines as well as books.

After an introduction which describes the nature of the *Bibliography,* a chronology of the life of St. Thomas and a chronological list of his works, Dr. Bourke divides his Bibliography into six main parts (and a very extensive set of indexes). These parts deal with previous bibliographies, the life and personality of St. Thomas, the works of St. Thomas, his philosophical doctrines, theological doctrines, and doctrinal and historical relations (for example, St. Thomas and the Greeks and Romans, St. Thomas and the Arabs, St. Thomas and the Fathers, *etc.*).

For law review purposes, the works collected under the headings of Ethics, Social and Economic Philosophy, and Political and Legal Philosophy are most interesting; particularly, the latter. One hundred and seventy-two references are made to materials on political or legal philosophy. Of these only twenty-five are in English, and of these twenty-five, thirteen are single essays in learned magazines or books. The outstanding English books (as distinguished from mere essays or doctoral dissertations from Catholic University) are disappointingly few. They include three works by Jacques Maritain: *The Things That Are Not Caesar's, Freedom in the Modern World,* and *Scholasticism and Politics,* all works which no one interested in jurisprudence can afford to miss, even though they do not deal with jurisprudence *ex professo.*

Of course, no bibliography of this kind can be completely exhaustive; nor does it pretend to be. But, it covers the field in a fairly satisfactory manner. This makes it all the more remarkable that during the twenty year period involved, no important work on jurisprudence as such should have been discovered by Dr. Bourke among Thomist or Scholastic sources. That is a rather sad record for Thomist scholarship. It indicates a crying need. Moreover, it explains why positivistic legal philosophy enjoys such unchallenged and uncriticized vogue, outside of Thomism. The latter has trained against it only a desultory drumfire of magazine articles.

This is not to say that there are not excellent works covering one or the other aspect of jurisprudence in this bibliography. I have already mentioned the extremely valuable works of Maritain. Deserving very high place are such lectures as Y. R. Simon's *Nature and Functions of Authority,* (Aquinas lecture of 1940, delivered at Marquette University, and pubilshed by that University); Mortimer Adler's essay, *A Question About Law,* which in the opinion of this reviewer makes a valuable contribution to the study of the natural law, discriminating as it does between positive law and the natural law; Father Walter Farrell's essay, *The Fate of Representative Government.* (Adler's and Farrell's essays are included in a symposium entitled *Essays in Thomism.*)

The author unfortunately made no effort to include law review articles. In view of his inclusion of doctoral dissertations from Catholic University, I wonder why he omitted the useful, if not very significant text, on *Jurisprudence* by LeBuffe and Hayes. Moreover, since he included such a work as Joad's *Guide to the Philosophy of Morals and Politics,* because it devoted some four pages out of eight hundred and sixteen to St. Thomas, I see no reason why he omitted such works as Sorokin's *Social and Cultural Dynamics* (1937); Dickinson's *The Statesman's Book of John of Salisbury* (1927); Pollock's *Essays in the Law* (1922), (especially for its chapter on the "Law of Nature"); the second volume of Dunning's *History of Political Theories* (1923); Maitland's Translation (1922) of Gierke's *Political Theories of the Middle Ages*; Barker's *Introduction to Gierke, Natural Law and the Theory of Society* (1934); and Haine's *The Revival of Natural Law Concepts* (1934).

GODFREY SCHMIDT†

SELECTION AND TENURE OF JUDGES. By Evan Haynes. Washington, D. C.: National Conference of Judicial Councils. 1944. Pp. xix, 308.

The purpose of this book, as stated in the author's preface, is "to provide a reasonably full collection, in one place, of the essential data bearing on the technique of judicial selection." Such has been the function of the other volumes of the Judicial Administration Series in their respective fields, and all have done well, especially George Warren's *Traffic Courts*, which has served as a textbook and handbook in the current nation-wide traffic court improvement program.

There is a great need for a similar textbook and handbook in the field of judicial selection and tenure. None has ever been attempted before, and the literature on the subject is widely scattered throughout the professional periodicals. Interest has been rising, and every year sees judicial selection improvement campaigns in progress in various states. A major problem of those in charge of the campaigns has been to acquire information as to what has gone before, what the problems are, what mistakes and what progress have been made elsewhere, and what lines the current thinking on the subject is taking. This volume will serve that purpose to a slight extent, but much less adequately than might have been hoped.

The material supplied, in order of practical usability, may be listed as follows:

A twenty-four-page tabulation of present (1944) methods of selection of judges in all states and territories, with constitutional and statutory citations. These are only brief statements, without description or discussion.

A sixty-five-page bibliography of articles in the legal periodicals and bar association reports. This is by far the largest and best bibliography on judicial selection that has yet appeared. It is subdivided into fifteen separate subject classifications, and its value is considerably reduced by the author's effort to classify into one of these groups many articles that are not so classifiable, as well as many out-and-out mistakes of classification. Thus, Thomas F. McDonald's comprehensive description of the Missouri plan, published in the *Journal of the American Judicature Society*[1] a few months after it went into effect, comes under the heading "Unusual Methods

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1. McDonald, *Missouri Ideal Judicial Selection Law* (1941) 24 JOUR. AM. JUD. SOC. 194, p. 273.

of Confirmation," where nobody would ever think of looking for it. Wigmore's "New Way to Nominate Supreme Court Justices,"[2] which was a proposal that bar associations maintain honor rolls of men eligible for judicial appointment for the guidance of the appointing authority, is listed under that same classification rather than under "Plans for Recommending Candidates to the People or to an Appointing Power Free to Accept the Recommendation or to Ignore it," for which it was tailor-made. If the user understands, as he soon will, that the headings do not mean much, and that every search through the bibliography is a needle and haystack proposition, he can probably find what he wants somewhere in the sixty-five pages.

An eight-page tabulation of judicial retirement and pension provisions in the states that have them, together with citations, is interesting and valuable. This is a live field, and the 1945 legislatures made so many changes that the data here given are already considerably out of date and should be checked with some more recent source of information.

There is a long tabulation of the year-to-year changes in methods of judicial selection in the various states from the time of their founding up to now. To the history-minded scholar who attacks any problem by first going back to the year one, this will be a good starting point for reviewing the history of judicial selection in his state, but the practical value of all this mass of detail of obsolete and forgotten legislation may be doubted, especially in view of what has been left out of the book.

There is a chapter giving an extended and complete picture of the present English judiciary, with emphasis on selection and tenure of judges, and another chapter surveys the practices in France, Italy, Germany, Canada, Latin America and Scandinavia. Elsewhere, the author reviews in minute detail the status of judges under the Stuarts in England, and the democratic revolution in America a hundred years ago. Finally, in a long chapter replete with case discussions and citations, he concludes that appointed judges have been more liberal than elected judges.

In Roscoe Pound's introduction the statement is made:

"It is not the least merit of Mr. Haynes' book that it is not at all propagandist. In it those who have to consider proposals as to tenure and selection of judges will find set forth what they will need to consider in the way of plans which have been tried or are in force or have been proposed, and what statesmen and lawyers and writers on politics and historians have thought and written on the subject. Thus they will have before them the materials for intelligent choice."[3]

That is precisely what the book does *not* do, and for lack of which there is still need for a good text on judicial selection and tenure. Apart from the statistical data, the pages of text are largely taken up with lengthy discussions, not entirely irrelevant but "far afield" in the author's own words, on historical and foreign aspects of very scant value to the bar committee presently confronted with the question of what to do. He makes no attempt to discuss the various methods that have been tried and proposed; he says nothing about present conditions in either elective or appointive states; in his zeal to avoid the appearance of sponsoring one plan or another he leaves his reader in the dark about them all, save for the references in the bibliography to materials that in many instances ought to have been part of the text.

Most remarkable of all, the author has at last accomplished what practically amounts to producing the play entitled *Hamlet* without the appearance of the

2. (1939) 22 JOUR. AM. JUD. SOC. 207, p. 273.

3. P. xvii.

character by the same name. The American Bar Association and its Special Committee on Judicial Selection and Tenure, the adoption of the American Bar Association plan by that organization's House of Delegates, and the Special Committee's voluminous reports in the annual reports of the American Bar Association, all go entirely unnoticed from one end of the volume to the other. As thoroughly as the author combed the legal literature to compile his large bibliography, and as carefully as he searched the annual reports of the state bar associations, it is inconceivable that he actually missed these rich sources of information and materials, and that, knowing about them, he should have intentionally omitted them is entirely inexplicable. Perhaps they are there after all and merely escaped us somewhere among the sixty-five pages of bibliography. However, a mere bibliographical reference to sources and developments as important as these in the realm of judicial selection is itself grossly inadequate in any volume that purports to be a full-scale book on the subject.

This book will be a useful one, chiefly on account of its bibliography, but there still remains a need for a text that is not more than half taken up with background material and that will contain within its covers the descriptive, argumentative, illuminating discussions of the various problems of judicial selection and tenure, analysis and criticism of various proposals, full accounts of experiments such as that in Missouri and their results, and a general, down to earth picture of developments in the field that will enable a man to read the book and lay it down with the feeling that he now has some comprehension of what it is all about. That is neither accomplished nor attempted in this book.

GLENN R. WINTERS†

BOOK NOTES

THE ROMAN LAW OF SALE. By F. de Zuleuta. London & New York: The Oxford Press. 1945. Pp. xi, 265. $6.50.

This book provides English and American students of comparative law with selected texts in the original and in translation from the Roman Law of Sale. The value of the study of Roman law, as the author says, "lies chiefly in its being the best introduction to a general familiarity with the basic conceptions of most continental systems" of today, which, as is well known, have their roots in the Roman law.

The author provides for their historical value some of the pre-Justinian materials dealing with the law of sale, including brief excerpts from the writings of Cato, Varro, Cicero and Aulus Gellius and selections from the *Institutes of Gaius,* from the *Curulian Edicts,* from the *Theodosian Code* and other pre-Justinian fragments. Then follow extensive selections from the *Justinian Institutes* and *Digests* which provide a comprehensive coverage of the subject. The texts set out not only the law of sale of chattel property but also that concerned with the sale of interests in land. The method of presentation is to print the Latin text on the upper portion of the page and the English translation immediately below.

For those readers who will not care to read systematically either in original or translation the Roman texts but who do wish to obtain a general view of the

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subject, Dr. de Zuleuta in the first sixty pages of the book gives in his own words the principles and rules of the Roman law in an orderly development from the formation of the contract, through its effects, to the matters of rescission and variation by subsequent agreement. His own text is fully footnoted to the Roman texts and after one dips a few times into the Roman texts (most Americans, I fear, will limit themselves of necessity to the translated passages, as did the writer) he will be persuaded to read a good many of them not alone to extend his learning in the subject but because of the entertaining illustrations which the Roman authors took from the market place and which throw so much light upon the business activities of the times and the mores of the people. These Roman texts are not nearly so dry as one might suppose, particularly the passages from the *Digests*.

At the end of the book are printed the English Sale of Goods Act and the Factors Act of 1889, the United States Uniform Sales Act and Uniform Conditional Sales Act and a number of the Articles of the French Civil Code in the original and in translation. Thus the student has within the covers of this book a very complete set of tools for the comparative study of the law of sales as developed in ancient Rome, in a modern European nation and under the common law system of England and the United States.

GEORGE W. BACON†

SCHOULER DIVORCE MANUAL. By Oscar LeRoy Warren. Albany: Banks & Co. 1944. Pp. xxxvi, 918. $12.50.

This work consisting in all of over 900 pages, as the title indicates, does not purport to be a textbook on divorce law. It is a handy reference book which should be very useful in connection with matrimonial litigation.

In some respects, it is something more than a mere reference book. Part V, consisting of about 150 pages, deals with Foreign Divorce Judgments, Rulings of the United States Supreme Court, and Jurisdiction in general. The chapter on Supreme Court decisions, bringing the discussion up to the first case of *Williams v. North Carolina*[1] is a fairly successful attempt to simplify a confusing problem. This chapter will give the practitioner a background on this subject which is concise and time-saving. In a book of this kind, the Table of Contents and the Index are especially important and it is noteworthy that in this work they seem to have been thoroughly and intelligently prepared.

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1. 317 U. S. 287 (1942).