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BOOK REVIEWS

THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION. By M. Louise (Mrs. John Brisben) Rutherford. Chicago: The Foundation Press, Inc. 1937. pp. 393. $3.00.

At a time when many citizens are endeavoring to appraise and to sustain such independent agencies as can be relied on to help maintain an alert and informed public opinion, Mrs. Rutherford has published the important study which she presented to the Faculty of the Graduate School of the University of Pennsylvania as a part of the requirements for the degree of Doctor of Philosophy. Her critical examination of the record as to what the American Bar Association has done and failed to do since its founding in 1878 is projected against a background of the state of the world today. She observes that "the capacity of democratic government to maintain and defend itself is being questioned" in many lands. She sketches causes, and enumerates one of them as "the failure to organize services of voluntary groups, especially those expert in government and law." In overcoming this failure she thinks that there can be erected agencies which will aid church, home, school and press, in counter-balancing the forces which seek the ascendancy of arbitrary, personal power in government.

In furtherance of her thesis that "the voluntary services of unbiased experts in government should be evaluated and used," the author recognizes that "The American Bar Association may constitute one of these voluntary groups, and this study represents an effort to obtain facts in relation to what contribution, if any, the American Bar Association has made and is making in the field of government and administration." Her starting-point is expressed in quotation from Mr. Harold J. Laski's "Politics," that "Effective public opinion for the purpose of government, in a word, is almost always opinion which is organized and differentiated from that of the multitude by the possession of special knowledge." Although sensing that such a group as the American Bar Association could not, if it would, dictate or control public opinion or determine the votes or views of even its own members, Mrs. Rutherford finds that "lawyers, because of their training and acquirement of specialized knowledge" and because of the nation-wide character of the profession and its highly diversified membership, may well be in a position to assist and implement public opinion in matters pertaining to the administration of justice, the competent function of democratic government, and the enforcement of rules of law as obstacles to collectivist interference with individual rights which are fundamental in a free society. She trenchantly says:

"Though governmental problems are difficult of solution, yet quacks and Charlatans are not lacking with their ready remedies. Little is accomplished by ballyhoo. There are no panaceas, especially for governmental and legal problems; only knowledge and organization can offer workable solutions."

"There is need of perfecting the democratic process, especially in the fields of law making, law enforcement, and interpretation * * * . Can the organized Bar be of any assistance in obtaining efficiency in the functioning of democratic government?"

Although a lawyer, the author says that she "holds no brief for lawyers, individually or as organized in Bar Associations. The purpose of this study is to gather facts. . . . " She proclaims that "There is need of factual data regarding the policies and activities of the American Bar Association because the profession of law represents a public profession and occupies a strategic position in the government and the society politic."

The underlying point of view and purpose of Mrs. Rutherford's searching study of the American Bar Association have been quoted at length by this reviewer, as they

are in a sense as significant and timely as are her accumulation and analysis of data. From her survey of nearly sixty years of the Association's history, she finds that its services to the public and the profession have been so numerous and so substantial that it has on the whole met the tests which she laid down for her survey. In consequence, Mrs. Rutherford ranks the American Bar Association as one of the representative, independent and highly useful public institutions whose activities may be a bulwark against extensions of arbitrary power and casual, untrained experimentation in the processes of government.

Within reasonable limits of space, this review cannot reproduce here the items of that evaluation or the impressive array of facts with which it is supported. Of outstanding significance is the revelation that a relatively small part of the work of the Association is in controverted or contested fields, except as minor special interests or parochial views may interject themselves as opposing elements. Preponderantly, the activities of the Association relate to matters in which the expert assistance and counsel of Association Committees and groups are cordially welcomed and availed of and are substantially unopposed. The inference seems warranted that the author thinks that the Association has been of the greatest usefulness and influence when it has given active aid to improvement of the administration of justice and to trained draftsmanship in the processes of legislation. Nevertheless, the Association has rarely hesitated to speak and act boldly in controversial issues, if the independence of the administration of justice, the good repute of the profession, or the fundamentals of free government according to law, appeared to be at stake.

Mrs. Rutherford has not only made competent and exhaustive research among published and unpublished documents to which she refers categorically in footnotes, but has also consulted extensively the recollection of many persons identified with the events which she records. All in all, she has rendered a real service to the public as well as to the profession of law, and has made a most readable chronicle on a subject which might have been made deadly dull. It is of minor importance that there are noteworthy omissions from her summary of the services performed by the Association, and that she has adhered steadfastly to facts for which she can cite record references, even at the cost of failing to catch altogether the spirit and the purposes which have animated the many activities and are in reality the ultimate test of their worth. Her study has the demerits as well as the merits of being resolutely factual; it does not attempt to evaluate the intangibles or the imponderables.

Mrs. Rutherford evidently assembled her data in 1935 and early 1936; her chronicle speaks as of that time. When the structure of the Association was thoroughly reorganized and decentralized in August of 1936, she added text and footnotes which told of the changes. The volume went to press before anyone had opportunity to observe and analyze the practical effects of the 1936 transition to a representative basis. In particular, the author had no opportunity to survey and evaluate the extensive use of referenda, in 1937, as the means of deciding the attitude and action of the Association upon major questions of policy such as the proposed re-making of the Supreme Court of the United States; likewise no opportunity to narrate and appraise the functioning of the new House of Delegates and the substantial results achieved by it during the first year.

In a vital sense, this volume reviews the record of the Association down to the close of an epoch in its history. The achievements of which Mrs. Rutherford writes are those of nearly sixty years of Association history—achievements under a form of organization and a concept of purpose considerably different from those of today. The distinguished service record of the Association during those years has been the foundation on which the present broader and more representative structure has been brought into being. This volume tells the story of the rise of the American Bar Association from distinguished but modest beginnings to the attainment of stature as

an important and useful institution in the domain of law and justice and government. It rests now with the changed and changing leadership of the Association to determine whether the substantial achievements of the past sixty years can be surpassed or matched, under a more democratic government of the Association and a more frequent consultation of the views of the rank and file of its members. Mrs. Rutherford's volume is noteworthy not only for its thoroughness in research and skill in the presentation of material, but also for the timeliness of its appearance, just as the Association appears to be moving ahead to realize a broadened concept of its functions and its usefulness. Under present circumstances, as at all times, there is sanity and force in her admonition: "One of the most effective means of creating a favorable public opinion is through the performance of a necessary public service. 'If thou doest well, shalt thou not be accepted?' Genesis 4:7."

WILLIAM L. RANSOM†

LAW AND THE MODERN CITY. By Barnet Hodes. Chicago: The Reilly & Lee Co. 1937. pp. 107. $1.00.

This excellent little book by the Corporation Counsel of Chicago was written for the purpose of clarifying to the average layman the difficulties under which a great city labors in endeavoring to serve its citizens. It is not a professional text book, although lawyers may read it with profit.

The author complains, most forcibly, against the passion of legislatures to dominate cities, not only in their larger affairs, but even in matters of petty administration, and argues for a form of municipal home rule under which cities will be at liberty to adopt and amend their own charters and, in general, manage their local affairs with much of the simplicity and expedition that large business corporations use in the conduct of their enterprises. Very circumspectly, the author argues that the courts have done too much in embarrassing cities in dealing with their local problems, and, his Illinois citations sustain his view.

The chapter on municipal liability in tort is highly informative, but its speculation based on the majority opinion in *Brush v. Commissioner of Internal Revenue*[1] goes too far. All that the *Brush* case really decided was that the salary of the Chief Engineer of the Bureau of Water Supply of the City of New York was not subject to Federal income tax, notwithstanding that for purposes of giving redress for wrongs committed in the course of the City's water supply activities, the defense of "governmental function" was not available. The *Brush* case does nothing toward dissipating the fog, that makes municipal liability for wrong, a matter in which each state persists in its own errors. The most that can be said for the *Brush* case is that it indicates that the Supreme Court of the United States will not look with favor upon attempts of the Federal government to extend the arm of taxation to the salaries of municipal officers or employees, engaged in public enterprises, which may lawfully be established or maintained by municipal taxation.

The desire of the author, as chief law officer of a great city, for the maintenance, if not the extension, of the doctrine of sovereign immunity in tort cases is understandable, but there is no truly sound reason why any government should not answer for the wrongs committed by its agents, almost as a private person is compelled to respond.

The chapter on "The City and the Family of Government" exhibits a state of affairs in Chicago which makes one marvel at the ingenuity of legislatures in complicating municipal government. In this chapter the author, also, directs attention to the

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1. 300 U. S. 352 (1937).

new, and previously undreamed of, relationships between the cities and the Federal government. He takes no stand, but temperately says:[2]

"Probably it is too early to draw any permanent conclusions. But it is not too early for those concerned with the proper development of modern cities to keep a weather eye on this phase of municipal government. We must be eternally alert so that no new trends or events catch us either napping or drifting aimlessly."

The book is one which every state or municipal legislator should study, and the caviler at municipal impotence and ineffectiveness will be able to find much in its pages to enlighten him.

J. JOSEPH LILLY†

TRADE MARK PROTECTION AND UNFAIR TRADING. By Walter J. Derenberg. Albany: Matthew Bender & Co. 1936. pp. 1162. $20.00.

Lawyers practising in the field of trade regulation are familiar with the well-known case of *Montgomery v. Thompson*.[1] There, it is reported that the manufacturer of the famous "Stone Ale" sought to enjoin a maker of beer who had come to the Town of Stone and begun to sell his product as "Stone Beer." When the respondent asserted that a label on his product to the effect that his business was in no way connected with that of the complainant would obviate any confusion in the public mind, the court replied pointedly that "Thirsty folk want beer—not explanations." Many text writers today, seem to have much the same attitude toward the legal profession. They suppose that the busy attorney is not interested in the explanation of rules of law, at least historically, and they therefore delete or contract as far as possible the lines devoted to exposition of the evolution of legal doctrine. They assume that under the pressure of practise, the modern counsel loses interest in all else save the present content and extent of rules of law as the courts enforce them. Hence the increase in the number of treatises wherein the authors state rules and definitions in their text, list the cases from the orthodox jurisdictions in a large footnote, those of the heterodox group in a small footnote—and consider the work done. But Dr. Derenberg proceeds on the opposite theory in this volume on trade mark protection and unfair trading. He realizes that the decision of the day is better understood as a link in a chain than as an isolated phenomenon. So, his emphasis is on the development of the law concerning which he writes. His approach is that of the historian. On each topic of this excellent work, he offers to the reader a fresh and interesting presentation of its history, and it is history that does not appear merely as a stilted sequence of cases, but rather the development of trends in the law of trading is analyzed and explained.

There is no failure to state the present law. On the contrary, this is done with precision and thoroughness. His work, therefore, will be most acceptable to lawyers in the field, because a restatement of their principles has not been comprehensively attempted since 1929, when Harry D. Nims' text appeared. Many law review articles by such skilfull writers as the late Frank I. Schecter, Edward Rogers, and Milton Handler have been written in recent years and many of the theories expressed in that periodical literature are woven into Dr. Derenberg's work—but law review articles cannot supply the need for a modern text. This need, Dr. Derenberg's work is calculated to fill—and it does the task adequately.

More than 270 pages are devoted to the tabulation of state and federal statutes

2. P. 80.

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1. 41 Ch. D. 47 (1889).

relating to trade regulations. The various important international conventions in the field are set out. This increases the practical value of the work. The interesting notes that Dr. Derenberg adds to his text concerning the practise in foreign countries, particularly the English method of co-ordinating the courts and the Patent Office will be helpful to those who are endeavoring to bring order into what Dr. Derenberg calls the "disorganized" American practise.[2] On the doctrine of "secondary meaning"[3] and the right to use one's family name as a trade name,[4] as well as on the substantive scope of trade mark registration,[5] Dr. Derenberg's remarks are particularly illuminating. He has not confined himself to stating cases; he interposes his own criticisms of the court opinions in many instances. Particularly note his attention[6] to *Rosenberg v. Elliott*[7] and the *Yale* case[8] where the Circuit Court of Appeals is accused in the former case of drawing back in its application of the principles of unfair trading formerly established and is applauded for the view taken of the doctrine of "descriptive properties" in the latter case. The interesting criticisms of the author are the most attractive feature of the work, and, as a result, a reviewer feels at the conclusion of his reading not at all put out that here he is denied his ordinary privilege of throwing a few stones.

WILLIAM R. WHITE, JR.†

PRINCIPLES OF CONFLICT OF LAWS. By George Wilfred Stumberg. Chicago: The Foundation Press, Inc. 1937. pp. xl, 441. $5.00.

Professor Stumberg, writing what purports to be a students' textbook, has done much to remove the objection of factual dearth as one of the arguments of the opponents of the "text" system of teaching law. His text, as a volume for classroom work is a superb example of what may be accomplished in this field, and while it may not serve to stem the increasing abandonment of text method, it should, if others follow its author's example, serve to better considerably the type of instruction in schools using the "text" method of instruction.[1] For the treatment utilized, is essentially factual. The important and leading cases in the field of Conflict of Laws are treated fully in the body of the work, and their essential facts carefully considered and weighed. Principles of legal doctrine are illustrated and illuminated, if not by a summary of the facts in a reported opinion, by a recitation of hypothetical facts which lead to the judicial pronouncement of the rule under discussion. This method of approach is the volume's chief claim to distinction.

Professor Stumberg has integrated his text with the "Restatement of the Law of Conflicts" by giving, at various points, resumés of the views of the Restatement on important and controversial subjects. He has not hesitated to criticize accepted views and rules, nor to offer suggestions of his own, and in doing this he accomplishes the

2. P. 701.
3. P. 325 *et seq.*
4. P. 361 *et seq.*
5. P. 432 *et seq.*
6. Pp. 434, 436.
7. 7 F. (2d) 962 (C. C. A. 3rd, 1925).
8. Yale Electric Corp. v. Robertson, 26 F. (2d) 972 (C.C.A. 2d, 1928).

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1. The case system of teaching, now so widespread, was begun as an heretical innovation at Harvard Law School in 1871 when Professor Langdell's "Select Cases" was substituted for Parsons on Contracts. Subsequently Harvard abolished the use of all text books.

valuable objective of making the reader thoughtful and critical of the views taken in the decided cases, too often uncritically accepted by the undiscriminating or busy student as gospel, and therefore unassailable.

The formal construction of the work suggests several minor objections. Although there is an adequate index and a complete table of contents, as well as tables of cases and leading articles, the material wants that nice subdivision into numbered sections ordinarily employed in legal works. This want detracts from the readiness with which one may scan the text, not because of the absence of section numbers, but because the headings of the subdivisions lack conciseness. Instead of indicating the contents of the subdivision, the headings attempt to summarize the contents. Such headings seriously lengthen the time of research if found in a text for general use, and in a students' text their use encourages the practice of reading only the bold type of the heading. Subdivisions of the text in some places reiterate previously treated material and occasionally elaborate on it. This detracts from the value the book might otherwise have as an instrument of occasional research, for the researcher is prone to look for a complete discussion of one point within one subject heading. The citation of a disproportionate number of Texas decisions is excusable, for the author occupies a chair at the University of Texas and no doubt designed the book for the use of his own students.

As to substance, the author, utilizing a gift for lucid and forceful writing, proceeds to outline in classic arrangement the body of doctrine that has come to be grouped under the subject heading Conflict of Laws. He omits, however, a consideration of the rules regulating taxing jurisdiction, a subject sometimes treated in works and courses in Conflicts. Possibly he felt that material relating to taxing jurisdiction properly belongs in a work on taxation or constitutional law. Such a position is quite tenable in view of the situations involved in tax cases, most of which do not require the application by the forum of the law of another jurisdiction by reason of operative factual events occurring in that jurisdiction. Yet many of the taxation cases involve facts in which the domicil of the taxpayer and the legal situs of the taxed property are in different jurisdictions, and the cases are helpful to indicate the different views taken of the question of the situs of intangibles when the situs is to be ascertained for differing purposes.

A short chapter on Legislative Jurisdiction[2] reveals the author in his best form so far as originality of thought and criticism is concerned. In this comparatively undeveloped field there is much room for speculation and original argument. The chapter is by far the most thought provoking one in the volume. It focuses attention upon the importance of constitutional principles in the American law of Conflicts,[3] and forcefully points out the constitutional phases of comity in the recognition of the statute and common law of the states by their sister states. The "commerce" clause of the Constitution,[4] the "due process" clause of the fourteenth amendment,[5] and, most important, the "full faith and credit" clause[6] are shown to require in many instances, the application by the forum of the *lex loci*. The doctrine requiring state courts to recognize the statute law of other states under the "full faith and credit" clause, has, since the writing of the text, been reinforced by the decision in *John Hancock Mutual Life Insurance Co. v. Yates*.[7] While considering the "due process"

2. Chapter III p. 52.

3. Pp. 56, 57.

4. P. 57.

5. P. 58 *et seq.*

6. P. 61 *et seq.*

7. 299 U. S. 178 (1936), holding that failure of a Georgia tribunal to interpret an insurance policy issued in New York according to the New York Statute prescribing what

clause in this connection, which has been held to require recognition by the forum of the common law of sister states,[8] the author overlooks the opportunity to point out the inconsistency of those cases requiring the recognition and enforcement of so-called "foreign created rights" by state tribunals, with the illogical and untenable doctrine of *Swift v. Tyson*,[9] reiterated as late as 1928 in *Black and White Taxicab and Transportation Co. v. Brown and Yellow Taxicab Co.*[10]

The chapter on domicil occupies a position in the beginning of the text[11] and lays a groundwork for subsequent development of the text where problems revolving about domicil or requiring ascertainment of domicil for their solution, arise. It discusses the various ways in which domicil is acquired by choice[12] and by operation of law,[13] and the effect of status upon domicil.[14]

The next three chapters treat of jurisdiction,[15] judgments[16] and procedure.[17] The fundamental requirements for *in personam*,[18] *in rem*[19] and *quasi in rem*[20] jurisdiction are discussed and the rules requiring recognition of judgment of sister states and allowing recognition of other foreign judgments, are stated and commented upon.[21] The author essays to indicate what rules of law are to be deemed procedural and which substantive, and gives freely of his own ideas on this important question,[22] which many times may be the focal point of a decision.

A discussion of the rules of Conflicts as applied to foreign torts[23] is aptly combined with a consideration of workmens' compensation statutes[24] and their application. The rules of Conflicts treat these somewhat similar subjects quite differently, and Professor Stumberg is quick to point out that workmens' compensation law, though it involves some of the elements of tort, is grounded largely in contract[25] and hence to be distinguished from actions *ex delicto*. He criticizes the undiscriminating application of the rule which applies to torts the rule of the jurisdiction in which the harmful force

constitutes an invalidating and material misrepresentation, when the New York law is pleaded and proven, is an unconstitutional judicial act in violation of the "full faith and credit" clause. *Cf.* WILLOUGHBY, CONSTITUTIONAL LAW (2d ed. 1929) 131; Allen v. Alleghany Co., 196 U. S. 458 (1905).

8. N. Y. Life Ins. Co. v. Dodge, 246 U. S. 357 (1918); Home Ins. Co. v. Dick, 281 U. S. 397 (1930); Alaska Packers Ass'n v. Industrial Accident Comm., 294 U. S. 532 (1935). *Cf.* Western Union Tel. Co. v. Brown, 234 U. S. 542 (1914).

9. 16 Pet. 1 (U. S. 1842) holding that on questions of general commercial non-statutory law, the Federal courts need not follow the decisions of the courts of the state wherein the transactions in issue occurred, but may apply their own rules of law.

10. 276 U. S. 518 (1928).

11. P. 16.

12. P. 18 *et seq.*

13. P. 30 *et seq.*

14. P. 38 *et seq.*

15. P. 66 *et seq.*

16. P. 106 *et seq.*

17. P. 128 *et seq.*

18. P. 69 *et seq.*

19. P. 99 *et seq.*

20. P. 101 *et seq.*

21. P. 107 *et seq;* p. 124 *et seq.*

22. P. 148.

23. P. 160 *et seq.*

24. P. 188 *et seq.*

25. P. 188.

first took effect,[26] and points out its disharmony with social purposes in a number of situations in which, he believes, it ought to be relaxed. For example, he points to a situation where the act causing injury is lawful or even required to be done in the jurisdiction where it is performed, but tortious in the place where the injuries are suffered.[27] He indicates that the question of survival of personal injury actions is closely connected with estate administration and that the law of the decedent's domicil should determine liability.[28] Likewise he feels that the effect of marriage on tort liability should be a matter of domicillary law.[29]

The apparent confusion, even among decisions of a given state tribunal on the rules governing validity, interpretation and form of contracts makes it difficult indeed for an author who is essaying to be more than a case digester to point to any rationale in the decisions or to try to reconcile them.[30] Professor Stumberg tries to do none of these things, but points out the wide variance among the decisions,[31] and discusses and illustrates the principal rules upon which courts have seized to govern the validity of contracts, and other problems which have arisen relating to various phases of contract law.[32] He indicates that some of these seemingly irreconcilable decisions of the courts of a given jurisdiction may be to some extent reconciled when close analysis reveals that some of them present problems concerning capacity, some problems involving form, and others involving interpretation.[33] The cases applying the three principal rules, that is, *lex loci contractus, lex loci solutionis*, and the rule of express or implied intention are stated and criticized. The last of these rules is treated under two separate headings by the author: "Intention of the parties" and "The law which upholds the contract."[34] This last heading, it is the belief of this reviewer, is better viewed as part of the "intention" rule, for it is based upon the reasoning that no one intends entering into an invalid agreement, and hence the intent that the law which upholds the agreement shall apply, is implied.

The last six chapters of the text are concerned with status and domestic relations, business organizations, real and personal property law, and the law of decedents' estates, as affected by the rules of private international law.

The book covers vast territory in its four hundred and thirty-one pages of actual text, and its coverage, while not sketchy, must of necessity be general. It should, if properly used, serve to prepare the student with a working background for any problems that may arise in later practice involving the conflict of laws, and it should leave him with the same impression as that with which it left this reviewer in reinforcement of his belief, that the law of Conflicts is a subject bestrewn with thorny inconsistencies and with problems trying to one's reason, and in many instances is but an arbitrary code of regulations based upon a need for expediency and dogmatic rule rather than a need for abstract justice.

SAMUEL J. WARMS†

26. P. 182 *et seq.*

27. P. 182.

28. P. 186.

29. Pp. 186, 187.

30. See GOODRICH, CONFLICT OF LAWS (1927) 228; 2 BEALE, CONFLICT OF LAWS (1935) 1077.

31. P. 200.

32. P. 201 *et seq.* (place of making); p. 207 *et seq.* (place of performance); p. 209 *et seq.* (intention of the parties); p. 212 *et seq.* (law which upholds the contract).

33. P. 215.

34. See note 32, *supra*.

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