

1944

Book Reviews

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Book Reviews, 13 Fordham L. Rev. 137 (1944).

Available at: <https://ir.lawnet.fordham.edu/flr/vol13/iss1/9>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

poration to serve the public may constitute illegal practice of law even when the papers are relatively simple [*People v. Alfani*, 227 N. Y. 334, 125 N. E. 671 (1919)] while the preparation of a single document might be excusable [*People v. Title Guaranty and Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919)]. Recently a New York court upheld this distinction in holding that "supervision service" for taxpayers with "frequent advice" and "opinion" clearly invaded the practice of law. *Application of New York County Lawyers Association*, — Misc. —, 43 N. Y. S. (2d) 479 (Sup. Ct. 1943).

The second point in the *Loeb* case resulted in a victory for the Bar Association. The court held that the tax organization made at least implied promises to the patrons to provide the legal services of a lawyer who is to act for the tax organization, rather than to recommend a lawyer who would serve them in the direct and usual relation of attorney and client. *Lowell Bar Association v. Loeb*, — Mass. —, 52 N. E. (2d) 27, 35 (1943). This constituted the illicit practice of law by the unincorporated association and accords with the well established rule in New York that a layman or corporation cannot engage in the practice of law. In re *Cooperative Law Company*, 198 N. Y. 479, 92 N. E. 15 (1910); *Obiter Dicta, The Lawyer's Best Friend* (1940) 9 FORDHAM L. REV. 294; Correspondence (1940) 9 FORDHAM L. REV. 448; Editorial Note, *Id.* at 450.

This
Way
Out

W. B. K.

BOOK REVIEWS

LAWFUL ACTION OF STATE MILITARY FORCES. By Lt. Colonel Edmund Ruffin Beckwith, Major James G. Holland, Professor George W. Bacon, Associate Professor Joseph W. McGovern. Foreword by Lt. General Hugh A. Drum. New York: Random House. 1944. Pp. xii, 216. Cloth bound with supplement, \$3.00. Paper bound without supplement, \$1.50.

Faced with total war, the United States were themselves forced to muster their entire strength for action, under their total sovereign leadership, both federal and state. With the federal authority primarily engaged in combating the enemy from without, upon the states fell the primary duty of protecting the life, liberty and property of all our citizens from the anticipated depredations and sabotage of the enemy from within our borders, as well as from domestic violence which might interfere with the work of the "arsenal of democracy" and the plans of our military and naval establishments. With the National Guard in all the states immediately mustered into federal service, the states were thus faced with the necessity of promptly reorganizing their militia, and practically from the ground up.

Foreseeing this situation more than a year before Pearl Harbor, both federal and state officials joined in calling the Federal-State Conference on Law Enforcement Problems of National Defense, which met in Washington, D. C., on August 5 and 6, 1940, in which two of the authors of "Lawful Action of State Military Forces" participated. As a result of this conference, in addition to other protective legislation, a "Model State Guard Act" was speedily drafted and laid before all the states for

action.¹ Upon the basis of this draft, together with the so-called "Federal Enabling Act," practically every state in the Union speedily organized a State Guard.

In view of the purpose for their creation, these State Guards were organized for duty solely within the United States and under the primary control of the various states, for state, not federal service. This difference in the function and locale of operations of the State Guard, from that of federal troops, is of much importance legally, as well as practically. Troops operating against a foreign enemy in battle or occupying conquered foreign territory are governed by the laws of war and are answerable for unlawful action only to their own military tribunals, while troops operating in this country among their fellow citizens, solely for the protection of "life, liberty, and property" and "by due process of law," are not free to act under the broad scope of the laws of war, but are restricted to what is due process of law under all the circumstances and in the light of our governmental constitutions, state and federal. The prime purpose of the book in hand is to explain and make clear this important and basic legal difference in the powers of state troops on active duty among their own citizens and those of federal troops in action against a foreign enemy. It is written to be a practical guide for the soldier and officer in the field as well as for the judge advocate and lawyer. Its importance both to the military man and the lawyer cannot be over-emphasized.

One chapter of the book deals with the action of state troops operating within the state against organized groups of citizens who are acting in hostility to this country in aid of the enemy in time of war and in such case the troops as to them are guided not by constitutional limitations but by the laws of war.² On the other hand if domestic disturbances as distinguished from action against enemy forces are the cause of State Guard action, then the troops are to be controlled by constitutional limitations, and this whether the locality is under martial rule, total or qualified, or the military action is simply "in aid of the civil authorities."³ Parts Three and Four of the book, consisting of six chapters (entitled State Troops in Domestic Disturbances—Order to Active Duty; Status of Troops and Their Relations With Other Governmental Agencies; State Troops—Powers and Limitations; Restraint of Persons—Detentions, Searches and Crimes; Use of Force—Protection and Control of Civilians; and Protection, Control and Military Use of Property), deal mainly with the action of troops in times of insurrection, riot, breach of the peace, tumult and calamities such as floods and conflagrations.

Here, as to what military tactics can be lawfully employed by the troops, there is a conflict in the authorities. Among the views which have been advanced in the case law and in the literature of the subject, one is that the troops, when acting "in aid of the civil authorities," have but the power of the ordinary police, while under martial rule (often but inaccurately called "Martial Law") their powers are more extensive. Another view is that the troops have only the powers of civil police when dealing with domestic disturbances, whether they are acting under martial rule or merely "in aid." Still another view is that under both situations the troops are not subject to the restrictions imposed upon the powers of the civil police, but may take

1. Bacon, *The Model State Guard Act* (1941) 10 FORDHAM L. REV. 41.

2. LAWFUL ACTION OF STATE MILITARY FORCES (1944) 12, c. III.

3. *Id.* at 13, 51, c. VI.

whatever action is reasonably appropriate to bring about a restoration of normal conditions so that the civil police may resume their functions. "It is the last view," the authors say, "which is accepted in this text; it is here maintained that the only proper gauge of the lawful exercise of their powers is the appropriateness of the measures used to accomplish their mission, and it is believed that if the question is squarely presented to the courts under modern conditions this view will be sustained." While peace officers have been created to cope with normal conditions and the law which restricts their conduct envisages such conditions, state troops are provided to cope with abnormally lawless conditions and are trained accordingly. The statutes of the states are generally silent upon the powers to be exercised by their military forces. "It must be inferred that the troops are authorized to take measures which appear to be reasonably appropriate to the accomplishment of their mission to restore or preserve the general peace; to still or prevent the tumult; to subdue or thwart the riot; to put down or prevent the insurrection; and to defeat or forestall the invasion. When there is grave emergency, extraordinary measures must be taken to protect the community although they would not be permissible in ordinary circumstances. The measures must be proportioned to the violence encountered and to the danger apprehended."⁴ At the same time, as was said by the Supreme Court in *Raymond v. Thomas*, "It is an unbending rule of law that the exercise of military power, where the rights of citizens are concerned, shall not be pushed beyond what the exigency requires."⁵

These principles the authors exemplify with specific practical illustrations. The book is not a text of law but, as its title indicates, is for the soldier and officer who has to act. It is a guide to the commanding officer who has orders to issue, to the junior who carries them out and to the sentry walking his post. Dozens of practical situations which may confront the military in action are envisaged and the action to be taken is indicated. A few paragraph headings, selected at random, will indicate the method of treatment: Power of Commanding Officer to Order Troops to Active Duty; Martial Rule—Commander's Authority; Duty to Courts—Habeas Corpus—Injunctions—Service of Process; Temporary Detentions and Searches; Dispersal of Unlawful Assemblies; Sentry Action When Orders to Halt Are Disregarded; Road Blocks; Confiscating Arms and Ammunition.

Indeed the method of treatment adopted by the book lives up to the important needs of presenting a clear, brief and practical treatise for use in the field, and at the same time a complete and thorough book of reference for the student or practitioner of military law. These different needs have been met in two ways by its authors who are both legal theorists and practical military men. For the practical needs of the soldier in the field the text has been issued in a paper bound edition in which the rule of law is succinctly stated and practical examples of the application of the rule have been repeatedly given, as of greater service than the statement of abstract generalities. On the other hand, to meet the needs of the student and practitioner of military law, a separate cloth-bound edition of the same text has been issued, containing in addition a supplement with full annotations to the case law and literature, a check list of useful forms to be prepared by Headquarters in advance of action in the field, and a syllabus of points affecting officers and men, and their families, with regard to their military and civil rights and claims for compen-

4. *Id.* at 49-51.

5. 91 U. S. 712, 716 (1875).

sation. Perhaps, ultimately, this supplement may itself be enlarged to contain drafts of such typical forms themselves, as well as a brief exposition of the personal rights of the troops.

Both editions contain, as the final chapter, a general description of military law relating to military offenses and of the nature, composition, jurisdiction and conduct of courts-martial. There is a felicitous foreword by Lieutenant General Hugh A. Drum, now the Commanding General of the New York Guard.

On the whole, "Lawful Action of State Military Forces" is the first work of its kind to fill a very practical need throughout the United States, and its method of treatment seems well adapted to meet the requirements of its readers, whether they be practical soldiers or practitioners of military law.

RICHARD HARTSHORNE†

TRADING WITH THE ENEMY IN WORLD WAR II. By Martin Domke. New York: Central Book Co. 1943. Pp. xv, 640. \$10.00.

Although the author has resided in this country for only a few years, he appears to be well qualified to approach the American reader with this survey of modern trading-with-the-enemy law. During the past decade, while living in France, Domke has enjoyed considerable reputation as an expert and writer on different types of emergency legislation, primarily on gold clause abrogations and on foreign exchange restrictions and among his numerous publications, those dealing with the conflict-of-laws aspect of such legislation have been repeatedly referred to in American legal writings.¹

Following a method he has applied in his previous publications, the author again in this work favors the comparative approach. His primary subject, of course, is the law of this country. Our Trading with the Enemy Act and the Executive Orders and Regulations issued thereunder are broadly discussed and, as far as they are of particular importance, reprinted in an appendix. The analysis and discussion of the law of about 200 decisions rendered by American courts from the outbreak of the present world war until March, 1943, would make it appear that the domestic law is covered rather exhaustively. But, in addition to his presentation of domestic law, the author makes ample reference to the corresponding law in other jurisdictions, particularly to the jurisdictions within the British Commonwealth. A large number of court decisions within these jurisdictions, mainly by courts within the United Kingdom, are discussed, and the basic "Trading with the Enemy" enactments of the United Kingdom, Canada, Australia, South Africa, and New Zealand are reprinted in the appendix. Moreover, similar legislation by continental European countries, particularly French law prior to the June 1940 armistice, is comparatively considered, and even Axis enactments, decisions, and legal literature are referred to where the author wishes to demonstrate their differences in principle and purpose.

† President Judge, Essex County, New Jersey, Court of Common Pleas; Inspector-General, New Jersey State Guard.

1. See Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws* (1942) 56 HARV. L. REV. 30, ns. 25, 37, 74, 140; Rashea, *Foreign Exchange Restrictions and Public Policy in the Conflict of Laws* (1943) 41 MICH. L. REV. 777, n. 9.

Although Dr. Domke does not limit his survey of the law to typical trading-with-the-enemy problems, he devotes a substantial part of the volume to them. Thus, in the introductory chapters, he discusses the meaning and the judicial interpretation, under the different enactments here and abroad, of expressions like "enemy government," "enemy country," "enemy" or "enemy national." In this connection, the author emphasizes the fact that in England and in this country the test of whether a person is to be regarded as an enemy is usually not one of citizenship but one of residence ("territorial test"). He believes, however, that an additional, more modern test is one arising out of the necessities of "economic warfare." He calls this new test the "loyalty test." The author finds this test reflected in our laws. For example, in Section 10 (a) of Executive Order No. 9095, as amended, the Alien Property Custodian is authorized to determine as a "national of a designated enemy country" a person not otherwise coming under the statutory definition of an enemy, even a citizen and resident of the United States, if "the national interest of the United States" so requires. The "loyalty test," as found in this and similar provisions, is of course a matter of administrative discretion, and does not appear to be suitable for judicial determination. Recent decisions in which the author finds a judicial application of the "loyalty test" do not seem to be in point.²

In analyzing the enemy character of corporations³ the author points out that the English "control-theory," under which enemy-controlled domestic corporations are considered enemies, is generally not applied under our Trading with the Enemy Act, except that it is adopted in the field of Foreign Funds Control, by Executive Order No. 8389, as amended.⁴ A broad discussion is devoted to the questions arising out of suits by or against enemies⁵ and two basic United States Supreme Court decisions on this subject⁶ are reprinted in full. The seizure and the administration of enemy property by the Alien Property Custodian is considered in Chapters 17 and 18, with a particular view to patent rights, trademarks, and copyrights. In this connection, the author's inquiry into the problem of remedies against seizures by the

2. The author refers to Matter of *Weinmann*, 264 App. Div. 899, 35 N. Y. S. (2d) 853 (2d Dep't 1942), involving the question whether a former Czechoslovakian national, resident of New York, could be appointed guardian for his son. The court had to decide only upon the individual qualification as a guardian; no enemy relationship was involved. The author further refers to *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185 (1920), dealing with Section 10 of the New York Real Property Law, whereunder only an alien "friend" can take, hold, and dispose of real property free from the state's right of escheat. But *Techt v. Hughes* did not apply any test of "loyalty" in order to determine whether the alien involved was a "friend," but applied the test of nationality, and the recent decision in *George v. People*, 180 Misc. 635, 40 N. Y. S. (2d) 830 (Sup. Ct. 1943), following *Techt v. Hughes*, applies the same test.

3. DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* (1943) c. 8, 9.

4. For a recent example in which the "control" test was applied in connection with Foreign Funds Control, see *Alexewicz v. General Aniline & Film Corp.*, — Misc. —, 43 N. Y. S. (2d) 713 (Sup. Ct. 1943), decided after publication of the reviewed book.

5. DOMKE, *op. cit. supra* note 3, c. 15, 16.

6. *Ex parte Colonna*, 314 U. S. 510, 62 Sup. Ct. 373 (1942) and *Ex parte Kawato*, 317 U. S. 69, 63 Sup. Ct. 113 (1942).

Alien Property Custodian, and into the possibility of their judicial review, seems to be of especial practical interest.

Next to these typical trading-with-the-enemy questions, the author gives ample consideration to Foreign Funds Control⁷. While it is true that this control was established under the Trading with the Enemy Act, its scope is not limited to enemies but extends also to neutral countries outside this hemisphere and to the nationals of those countries. Nevertheless, the author deems Foreign Funds Control, particularly in its adaptation to the requirements of war after Pearl Harbor, by General Ruling No. 11, as amended, to be an integral part of trading-with-the-enemy law. In emphasizing this view, he occasionally used language that might create an impression of complete identity of a "foreign country" or a "foreign national" under Foreign Funds Control, and an "enemy country" or an "enemy national" under enactments and regulations dealing exclusively with enemies. In this respect, the text fails to make sufficiently clear that, insofar as Foreign Funds Control extends to neutral countries and their nationals, the purpose of the control cannot be presumed to be completely identical with that of enemy property control. Aside from this criticism, the chapters on Foreign Funds Control constitute perhaps the most valuable part of the book; they contain ample and most recent material, outline in detail the operation of the licensing system established by the Treasury Department, point to some examples of general interest where this system of business supervision was actually used, and indicate the policy behind that system. The Executive Order No. 8389, as amended, and the most important Regulations and Rulings interpreting it are fully reprinted.

Following his discussion of Foreign Funds Control, Dr. Domke outlines a number of similar measures taken by governments-in-exile of enemy-occupied allied countries for the purpose of preserving national assets abroad and discusses cases dealing with the question whether and to what extent domestic courts should recognize such measures.⁸ Of other chapters dealing with subject-matter beyond the scope of typical trading-with-the-enemy law, those on 'Stateless Persons Formerly of Enemy Nationality,'⁹ and on "Internees, Evacuees, and Prisoners of War,"¹⁰ both mainly dealing with questions of administrative and international law, may be mentioned as of some actual interest for the practicing lawyer.

The effect of war on contractual relations with enemies is touched upon in connection with the author's consideration of contracts with parties resident in enemy-occupied territory, and also in connection with his discussion of the liability of domestic or neutral guarantors for enemy obligations. It is to be regretted that the influence of war upon contracts with enemies has not been made the subject of a comprehensive chapter. Although a very carefully prepared index enables the reader to find discussions of these questions, their legal importance seems to warrant a more coherent treatment.¹¹ A similar criticism appears justified with respect to the mere

7. DOMKE, *op. cit. supra* note 3, c. 19, 20.

8. *Id.* at c. 21.

9. *Id.* at c. 6.

10. *Id.* at c. 7.

11. The effect of administrative measures taken under the Trading with the Enemy Act and under Executive Order 8389, as amended, upon contracts has most recently been considered in *Alexewicz v. General Aniline & Film Corp.*, — Misc. —, 43 N. Y. S. (2d) 713 (Sup. Ct. 1943). There, the plaintiff, a German-born naturalized citizen of the United

incidental discussion of the influence which war or an enemy relation may have upon the administration of decedents' estates, and upon property problems arising out of domestic relations. The repeated reference to recent American and English decisions dealing with such questions shows the practical importance of these matters and would have warranted their separate and coherent treatment.

On some occasions, apparent haste in speeding publication has left unchanged language which, owing to later insertions, may easily lead to erroneous conclusions on the part of the reader. For example, the author states¹² the English case of *Kohnstamm Ltd. v. Krumm Ltd.*¹³ in a way not indicating that, two pages later, after an intermediary paragraph, he would refer to a subsequent decision of the same court, *Stockholms Enskildabank Aktiebolaget v. Schering Ltd.*,¹⁴ which he thinks to be a departure from the previous decision. Then again, the United States District Court decision in *Bernheimer v. Vurpillot*¹⁵ is criticised,¹⁶ but it is not until the author has discussed two other cases that he reports¹⁷ that the District Court had subsequently been reversed by the Circuit Court of Appeals.¹⁸ Such instances of undue haste, which also is apparent from the occasionally repetitious treatment of various subject matters, are to be regretted because they may mislead a reader who does not read through the complete section, but merely consults the book on a particular question.

The few indicated grounds for criticism do not, however, affect the value of the work as a whole. There does not appear, at present, to be available another publication with equally exhaustive legislative, judicial, and comparative material. Anybody, especially government agents, who are, or may become concerned with foreign trading-with-the-enemy problems or currency restrictions, may find particular aid in those parts of the book which the author devotes to stating and explaining principles and purposes of foreign (including Axis) legislation in this field. The fact that his view is constantly directed to the possible connection between present trading-with-

States, resident in this country, had been in the employ of defendant, a Delaware corporation controlled by German nationals, under a contract the agreed period of which had not yet expired when action was brought. After this country had entered the war, the Secretary of the Treasury—under the authority conferred upon him by Executive Order No. 8389, as amended, as ratified by the amendment of § 5 (b) of the Trading with the Enemy Act contained in Title III of the First War Powers Act of 1941—had assumed active supervision of defendant's business and had assigned to it a representative who caused plaintiff's employment contract to be terminated. Upon plaintiff's suit for breach of contract, the court—in a very careful opinion which also upheld the constitutionality of § 5 (b) of the amended Trading with the Enemy Act—held defendant excused from further performance, mainly on the ground that the direction by the Treasury representative to terminate the contract with plaintiff was within the statutory authority conferred upon the Treasury Department, thus rendering further performance of such contract illegal and thereby legally impossible.

12. *DOMKE, op. cit. supra* note 3, at 159.

13. [1940] 2 K. B. 359.

14. [1941] 1 K. B. 424.

15. 42 Fed. Sup. 830 (E. D. Pa. 1942).

16. *DOMKE, op. cit. supra* note 3, at 205.

17. *Id.* at 207.

18. 130 F. (2d) 396 (C. C. A. 3d, 1942).

the-enemy law and future peace settlements demonstrates that the author looks beyond the immediate problems of the subject matter.

The practical use of the book is facilitated by a voluminous appendix containing reprints of important foreign and domestic statutes and decisions, and of the more important domestic Executive Orders, Rulings and Regulations. Aside from the appendix, which covers over one hundred and sixty pages, the reader is aided by extensive indices. The reviewer has been informed that a supplement is in preparation, which is to bring up to date the legislative and judicial material of the book.