Fordham Law Review

Volume 16 | Issue 2 Article 7

1947

Book Reviews

BOOK REVIEWS

ENCYCLOPEDIA OF NEW YORK LAW. By William F. Walsh. New York: Metropolitan Law Book Company, Inc., 1947. Pp. xi, 1542. $15.00.

This book is published under the *imprimatur* of the late Professor William F. Walsh, of the Faculty of New York University School of Law. Through his articles in law reviews and his excellent books, especially in the fields of Property and Equity, Professor Walsh contributed much learning to legal literature. He was one of the best of our legal scholars.

The book under review is not a treatise on the law, but, as its title indicates, is a compendium of significant cases and of statutory materials comprising the New York law as classified under the topics which constitute the standard ones of the law school curriculum.[1] It is intended to bring within the covers of one book, not too large to be handled conveniently, the principles and rules announced by the courts and the legislature relative to these subjects,—an outline, in short, of the New York law of Contracts, Negotiable Instruments, Sales, Torts, Evidence, Equity and so on.

With respect to the common law of the subjects covered, this book does for the student and the lawyer something such as is done by the statutory annotations of such works as McKinney's Consolidated Laws of New York, but in a textual style. In addition to abstracts of cases expounding the common law, the terms of relevant statutes of summaries of them are also included, together with summaries of cases construing such statutes. The following statements from the preface fairly describe the content of the book: "Hundreds of quotations and abstracts of landmark cases have been included. Pertinent statutes have been cited and quoted. All are expertly integrated with text statements by the author where necessary for proper continuity."

In the main, no critical comment is made, nor is there any independent formulation of principles by the author. His work, aside from the painstaking labor of searching out and sifting of the cases to be included, has been the making of the abstracts, the choosing of the quotations, the organization of the material, and, as the publisher says, the provision of continuity. The book is not, and does not purport to be, a text discussion of the law of the type for example of Williston's *Treatise on the Law of Contracts* or of Vold on *Sales*.

An encyclopedia of law necessarily has the defects of its form. General statements must be made without discussion of the refinements which may count for so much when a sound solution to a specific problem is sought. A series of rules is often presented without developing the fundamental principle from which they spring. When a case comes along in the law office—or in a law examination—which is not within the four corners of a stated rule all will be lost if the principle on which the legal rules are based is not understood.

Sometimes a general statement is made in dogmatic form, true enough as a general rule, but one which is subject to exceptions or qualifications which are not

1. The topics covered are Contracts, Negotiable Instruments, Sale of Goods, Agency, Torts, Crimes, Possession and Ownership of Real and Personal Property, Freehold Estates in Land, Landlord and Tenant, Conveyances of Land-Easements—Covenants, Future Estates and Interests, Mortgages, Suretyship—Personal Security, Equity, Wills and Administrations, Domestic Relations, Corporations, Partnership, Trusts, Insurance, Evidence, Practice and Pleading, Conflict of Laws.

always stated and explained. On occasion a general statement may not only be an incomplete exposition of the law on the point, but it may also be misleading. The above is not said in criticism of the book under review but as a warning to law students not to rely too much on outline treatments of the law. Lawyers know well enough that although an encyclopedia presentation is useful as a starting point it is only a starting point.

That compression of too much into a short statement is sometimes inadequate, and therefore apt to be misleading without further study, is illustrated by this one appearing in the article on the "Sale of Goods."[2] "In f.o.b. contracts title passes on delivery to the carrier, since the place of delivery is so specified, and the risk of loss passes to the buyer, even though the bill of lading runs to the seller, or order." The uninstructed reader of the statement would probably take it to mean that whenever the terms f.o.b. are used title always passes on shipment. That may be true if (1) the shipment was a conforming one and (2) if the place of delivery to the carrier was the designated f.o.b. point, but it will not be true if the shipment did not conform to the contract,[3] nor will it ordinarily be true if the terms of the contract called for delivery f.o.b. destination.[4] Furthermore, if in an f.o.b. point of shipment case the seller ships conforming goods and takes out a bill of lading to himself or order, only a qualified kind of "title" passes to the buyer. Subdivision 2 of Section 101 of the New York Personal Property Law provides that in such a case the seller retains "the property in the goods" as security.[5] This interest is usually called the "title." In fact, on the next page following that upon which the above quotation appears, where Section 101 is discussed, it is said that if the seller takes a bill of lading to himself or to his order, "he reserves title,"[6] although on the preceding page it has been said that in such event ". . . title passes on delivery to the carrier."

On the whole, however, such instances of inadequacy are infrequent in this book and, of course, such deficiencies cannot be avoided in a short treatment of any legal subject. It is much superior to most of the outlines so popular with students.

Lawyers will find this book a valuable time-saver. It is a means of quick review of the main points to be borne in mind and investigated when commencing a research. It also provides a ready case-finder and draws attention to statutes which are pertinent to the subject. For what it purports to do, it does a very good job.

GEORGE W. BACON†

2. P. 263.

3. Shapiro v. Goodman, 226 Mich. 412, 210 N. W. 211 (1926); and see Lopez v. Henry Isaacs, Inc., 210 App. Div. 601, 206 N. Y. Supp. 405 (1st Dep't 1924).

4. Harbison v. Propper, 112 Misc. 588, 183 N. Y. Supp. 508 (Sup. Ct. 1920); *cf.* Goodyear Tire and Rubber Co. v. Northern Assurance Co., Ltd., 92 F. 2d 70 (C. C. A. 2d 1937).

5. UNIFORM SALES ACT § 20.

6. A rather extensive study will have to be made in order to arrive at a real understanding of the divided legal interests in the goods which are possessed by the buyer and the seller when the facts are of the kind assumed in the statement commented on above. See 1 WILLISTON, SALES, c. XI (2d ed. 1924), and VOLD, SALES 322-331 (1931).

† Professor of Law and Veteran's Counsellor, Fordham University, School of Law.

THE NUREMBERG TRIAL AND AGGRESSIVE WAR. By Sheldon Glueck. New York: Alfred A. Knopf, 1946. Pp. xvi, 121. $2.00.

Dr. Glueck's position is that even before the Nuremberg Trial acts of "aggressive war" had become "crimes" under International Law, for which heads of states could be held liable *as individuals*. The Nuremberg defendants could not, therefore, plead the old defense of "Acts of State," nor claim that they were being punished for acts made criminal *ex post facto*.

Count Two of the Nuremberg Indictment assumes it to be "law" that a "war of aggression" is an "international crime." No World Legislature having formally enacted such a "law," it is the author's purpose to find its "source." Earlier writers looked to the "Natural Law," supplemented or declared in international custom, to find the rules of International Law.[1] Legal Positivism repudiating the "Natural Law" is thus rather narrowly limited to custom or usage as evidenced in treaties, declarations and resolutions.[2]

In an earlier work *War Criminals: Their Prosecution and Punishment*,[3] Dr. Glueck was ". . . not at all certain that the acts of launching and conducting an aggressive war could be regarded as 'international crimes'."[4] He was led to this view by a strict reading of the 1928 Paris Pact (Briand-Kellogg Pact) and also by the practical consideration that fewer difficulties would be met in prosecuting the Nazi malefactors for violations of the "laws of war" under the Hague and Geneva Conventions, than for the "crime" of aggressive war which might lead to "long and questionable historical inquiries not suited to judicial proceedings."[5] Further reflection, however, now leads the author to say ". . . that for the purpose of conceiving aggressive war to be an international crime," the Paris Pact and subsequent international treaties, resolutions and declarations ". . . may be regarded as evidence of a sufficiently developed *custom* to be acceptable as International Law."[6]

The evidentiary documents cited do not seem to carry equal weight in sustaining the author's thesis. Some, like the Geneva Protocol of 1924, while indeed declaring wars of aggression "international crimes," were never ratified. Others like the Sixth Pan American Conference resolution were not world wide in scope. Nowhere is "aggressive war" clearly defined. The author points out that evidence of international custom need not be limited to agreements *unanimously* ratified, nor even to *ratified* treaties. Thus we may receive unilateral declarations like that of Senator Borah's resolution declaring "the view of the Senate of the United States" to be that war should be made *"a public crime under the law of nations."*[7] Whether the documents cited by the author sustain his thesis will be for the reader to determine. This reviewer did not find their cumulative weight overwhelmingly convincing.

We are reminded that so far as the Nazi leaders were concerned, the victors, under the "law" of an armistice or treaty which is "in the final analysis the will of

1. F. SUAREZ, *Tractatus de Legibus ac Deo Legislatore*, II, c. xix, § 9; GROTIUS, *De Jure Belli ac Pacis*, Lib. I, c. 1, § 10.
2. WILSON, INTERNATIONAL LAW 6 (2d ed. 1928).
3. New York: Alfred A. Knopf, 1944.
4. P. 4.
5. P. 5.
6. *Ibid.*
7. P. 33.

the victor," could have executed the Nuremberg defendants without any judicial procedure whatsoever, ". . . and without any consideration whatsoever of whether the acts with which the accused were charged had or had not been previously prohibited by some specific provision of international penal law." There was "enough evidence" already on hand to have justified their execution without "formal trial." The victors, in deference to a more "civilized way," decided to give a formal trial after indictment and extended the usual privileges to the defendants.[8] "One recoils," says Dr. Glueck,[9] "from the thought of what the Nuremberg defendants would have done to our leaders had they won the war." This animadversion can hardly lend force to the author's main thesis, *viz.*, that by custom before Nuremberg, acts of aggressive war were crimes under International Law. Certainly the author does not mean to suggest that the *de facto* might of the conquerors into whose hands the vanquished had fallen is a "source" of International Law? If this is so, the future of International Law in this field is not reassuring to the jurist whose concern is with *law* and not with the depravity of the accused or the strength of the accuser. It was not a jurist who said, "Give them a fair, quick trial and then hang all of them."

Even if one should grant that the documentary evidence reasonably interpreted, does sustain the author's point that by international "custom" before Nuremberg, "wars of aggression" were "international crimes," it remains to be shown that the same "custom" had taken away from the Nuremberg defendants the plea that their acts were not their own, but those of the State they served. The author[10] seems more concerned with showing that such a defense *ought not* any longer to be allowed than with proving that "custom" had destroyed it before Nuremberg. That the "scoundrels at the top"[11] should not be made to suffer alone for the crimes of those who betrayed them, that we should at last "pierce the veil of the corporate entity" of the State (in Professor Wormser's expressive phrase) and reach back to the criminals behind the State,—will strike responsive chords in the human heart. The author, however, has chosen to limit himself to "custom" as a source of the rule for which he contends. It certainly does not seem to this reviewer that the documents the author cites prove that the defense of "Acts of State" was outlawed before Nuremberg, however much they may show that "wars of aggression" had become "international crimes."

Much the same may be said of the author's discussion of the *ex post facto* defense.[12] Either "wars of aggression" had become "international crimes" for which heads of states might be held liable *as individuals*, or they had not. If they had (and this is the author's view) then logically the Nazis at Nuremberg could not fall back on the *ex post facto* plea. We have no further need of argument. It is regrettable that the author in his discussion obscures the issue by castigating the Nazi lawyers at Nuremberg for pleading *ex post facto* after Nazi domestic jurisprudence had for years make a mockery of the principle. The discussion is irrelevant. Nor is there logically any need of the author's unlimbering his batteries of "realism" against the "conceptualist" approach to the *ex post facto* principle.[13] Some readers will remain unimpressed by the point that the Nazi leaders had been "warned" in the speeches

8. P. 11.
9. P. 12.
10. Pp. 46-59.
11. P. 58.
12. P. 71-90.
13. P. 92.

of Messrs. Churchill, Roosevelt and Stalin, of the fate in store for them.[14] Few tears will be shed over the fate of the Nuremberg defendants, but the jurist's concern is lest the current of International Law shall be muddied for the future.

To those who thought that the Nazi prosecutions should have taken place in a neutral state, the author points out that practical difficulties stood in the way. "Facist" Spain was out of the question. Switzerland might well plead her fear of a war of vengeance if Germany should revive.[15] No mention is made of Sweden. To those who argue that at least some of the judges and prosecutors at Nuremberg came from states whose hands were none too clean, the author replies[16] that "The fact that a Government—whether a domestic or an international one—is not at some particular time in a position of power and authority sufficient to prosecute all individuals whom it suspects of violating the law is no reason why it should not proceed with the prosecution of those who are within its power." As for Russia, the "inside facts about Russian actions" in the Russian-Finnish War are not sufficient to enable us to form any judgment as to whether Russia's action constituted a war of aggression.[17] As for the Soviet's belated attack on Japan in 1945, in violation of treaty, the author's answer is that Japan's membership in the Axis made her already "an enemy in fact of Russia."[18] There is no mention by the author of the Russian attack upon and seizure of Latvia, Lithuania, and Esthonia—conquests which incidentally, still are not recognized by the United States. There is no mention of the Fourth Partition of Poland. Nor is there any reference to the role of Russia in the Nazi-Soviet Pact of 1939. However, as Dr. Glueck points out, Russia was not on trial.[19] As for the United States, it is suggested[20] that ". . . there is no valid reason to believe that the United States . . . would not be willing to submit the question of its alleged violation of neutrality by the destroyer deal . . . to an international tribunal. . . ." The author remarks parenthetically that the destroyer deal cannot be "reasonably denominated 'aggressive war'."

The questions raised by Dr. Glueck's book are profoundly important. The Nazis are in their graves, but the juristic problems created by their trial remain. The wealth of literature already available on the subject indicates the absence of solutions giving general satisfaction.[21] A narrowly positivistic approach which relies on "custom" alone, or at least as a major "source" of the rule that wars of aggression were crimes under International Law before Nuremberg, for which heads of states might be held liable *as individuals* may well fail to carry conviction. Legal positivism discovered long ago that the Austinian concept of law as the "command of the sovereign" would not fit International Law. In fact it was the defendants at Nuremberg who had carried the Austinian concept of law to its last logical stages of

14. P. 81.
15. P. 95.
16. P. 99.
17. P. 119, app. E.
18. *Ibid.*
19. P. 98.
20. P. 121, app. E.
21. A few may be here cited: Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20 (1947); Hula, *The Revival of the Idea of Punitive War*, 21 THOUGHT 405-434 (1946); Kelsen, *Collective and Individual Responsibility in International Law, With Particular Reference to the Punishment of War Criminals*, 31 CAL. L. REV. 530 (1943); Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38 (1947).

moral bankruptcy in their domestic legal system. Legal positivism also had long ago repudiated as a "source" of International Law, the "Natural Law" which the older jurists regarded as the "hard core" of International Law, with custom in a secondary place as supplementary or declaratory. Legal positivism then is compelled to make "custom" bear at times a load too heavy for it. It might be helpful not indeed to "turn back" but to "turn to" an International Law which grants a primary place to "Natural Law" as a source of its rules. Here the positivist with his insistence on "custom" evidenced by paper treaties and declarations might find the corroboration he seeks to support his thesis on the juristic basis of the Nuremberg Trial—a corroboration which lacks conviction when based on mere "liberal" construction of broadly worded treaties and resolutions.

EDWARD F. BARRETT†

† Lecturer in Law, Fordham University, School of Law.