

BOOK REVIEWS

International Rivers—A Monograph Based on Diplomatic Documents. By G. Kaeckenbeeck. Grotius Society Publications No. 1. London, Sweet and Maxwell, Limited. 1918. pp. 255.

International Rivers might more properly have been entitled *Navigation on International Rivers*, as the question of the use of waters for irrigation and the generation of electricity is not considered, though there are diplomatic documents dealing with these subjects, especially the treaty of 1909 between Great Britain and the United States creating a Joint Commission to pass on application for the use of water from boundary streams, and the discussion between Mexico and the United States, preceding the treaty of May 21, 1906, granting to Mexico a share in water stored by a dam on the Rio Grande above the point where that river becomes the boundary between Mexico and the United States.

The author, after a very short examination of the legal theories and principles which have been advanced in respect to freedom of navigation on international rivers, devotes his book to a documentary study of the negotiations and treaties in which navigation on the Rhine, Scheldt, Danube and Congo have been settled. He annexes a translation of the draft treaty approved by the Institute of International Law at Heidelberg in 1887, pp. 174-187, and notes on other European and American rivers, which are in fact a less complete continuation of his documentary study.

The reviewer is entirely in sympathy with the principle on which the work is based; that the practice and experience of states rather than theories of jurists should be, and it might be added, certainly will be, made the basis of projects for changes in the conventional law of nations, but that "juridical principles and notions," p. 3, "have exercised an undeniable influence in history, and are therefore entitled to the careful consideration even of the most positive statesmen," p. 4. In respect to international rivers it is to be expected that the peace conference will "make use of all accumulated experience in order to settle a vexed question in conformity with the present needs of international commerce and intercourse," p. 29. The author sounds a warning note which will be echoed by those who carefully examine his diplomatic study, that "the work (of dealing with international rivers) will not be satisfactorily performed by simply framing a beautiful proposition signed and sealed by a score of governments, be it ever so free from the plague of amendments and reservations," p. vii. They will also agree that the same provisions will not work on different rivers because of "the variety of circumstances and localities, which is so great that often what is perfectly sufficient on one river is nugatory on another, while what is expedient in one case may elsewhere be intolerable," p. viii.

The peculiar circumstances which gave birth to and continued the life of the extra riparian Danube commission, see p. 113: the possession of the delta by Turkey—a power weak politically, administratively and financially,—the danger of Austrian or Russian domination over Turkey or the comparatively weak state of Roumania, which after 1878 succeeded her as local sovereign, and finally the persistence of Great Britain with her important interests on the lower river, are so clearly different from those which exist on the lower Vistula and the Dutch mouths of the Rhine that it would indeed be bold to recommend for the latter rivers an institution which has worked so well upon the Danube.

The section of the book on legal theories and principles, pp. 5-33, contains a very brief discussion on feudalism, the Roman law and the law of nature in their application to free fluvial navigation, followed by a short examination of

the system which has arisen from the actual practice of states. It is manifestly impossible to expect much enlightenment in regard to the complicated system of the period up to the peace of Westphalia of 1804 from one paragraph, p. 5; but the reviewer thinks that it is scarcely correct to say that during this time "no limit was set" to the tolls exacted by riparian landlords. In the Germanic empire the right to take tolls rested in theory at least on grants from the king, later from the emperor and the electors, so that while illegal tolls were exacted during the frequent periods of disturbance, they were always illegal. The interest of the Rhine electors was used to prevent indiscriminate grants of tolls. The treaties of Munster and Osnabrück in 1648 prohibited all tolls or monopolies not resting on imperial grant, and an express prohibition of the creation of new tolls or rights was contained in the treaties with France, of Ryswick, 1697, and Baden, 1708.

The author believes that the jurists have not proved that a "right of free navigation for all exists on international rivers," p. 18, and that only the actual practice of states can create the right, p. 19. This practice shows a tendency to recognize the reasonableness and the common advantage of permitting free passage at least to upper riparians, and the author believes that its refusal by states owning the mouth of a river "would now be regarded as an abuse or infringement of right," p. 24. In fact he cites no case, nor is the reviewer aware of any, in which this right has been effectively asserted in the absence of treaties or statute, so that all that can be said with confidence is that the common practice of states and expressions in treaties, together with a due consideration of reason in international relations, would make it very difficult for a lower state, such as Holland on the Scheldt or the Rhine, Great Britain on the lower St. Lawrence, to take full advantage of its opportunity and impose too hard conditions and drive too hard a bargain for compensation for the right of free navigation.

The question of freedom of navigation, it seems to the reviewer, would have been made clearer if the author had developed Mr. Westlake's excellent idea that there is just cause for free navigation of a stream only for vessels of states having intercourse with riparians, p. 10. The essential is, that there be free use of rivers for the commerce of upriver states, consequently no unnecessary interference with their river boats or with other river boats which they authorize to use their ports should be permitted, nor should the ships of overseas states be prevented from ascending to their ports. All ships should be free to pass up the river to river ports and there transship to any river boat; but whether or not the riparians desire to allow free navigation to river boats of all flags is a question properly left to them. Why, for instance, should a Belgian company be permitted to start a line of steamers on the Great Lakes between Canadian and American ports without the approval of either the United States or Canada; why should an English company run a line of towboats on the Rhine against the will of the riparian states? Cases will arise in which a contrary rule should be applied, as on the Congo in 1885 when the right of free navigation was a necessary adjunct to that of free commerce since no adequate navigation facilities existed and a monopoly of navigation by Belgians might, as in fact it later threatened to, abolish in practice freedom of commerce. On the lower Danube, in 1856, when the lower riparians neither had nor seemed likely to have any mercantile fleet, so that a restriction of navigation to riparians would have meant simply an Austrian monopoly, the powers were correct in requiring entire freedom for all flags, even for river boats, irrespective of the decision of the riparian powers. This limitation on freedom of navigation for all flags should satisfy the author's requirement that the upper riparian states have the same facilities for overseas commercial relations as have the lower, p. 3, p. 39.

The chief value of the book lies in its history of the opening of international rivers, told from documents. The author begins with the failure of Joseph II

to open the Scheldt in 1788, quotes the declaration of the French Executive Council on March 16, 1792, abolishing the Dutch rights based on the treaty of Munster and their possession of both banks near the sea. He then takes up the development of the Rhine, Scheldt and Danube and the Congo question in the Congress of Berlin in 1885.

The collection of extracts from and digests of the documents upon which the conventional fluvial law of the present depends, is of great value to students, and these are the documents upon which, in the main, must be based the conventional fluvial law of the future. The fact that the reviewer is critical of some of the digests does not lessen his appreciation of the hard work which the book shows, its eminent correctness in method, or of its great value. The author should, however, have noted that the French decree of 1792, together with the treaties following it, did not open the Scheldt to all nations but only to riparians, p. 32, an oversight which also led him to a similar mistake on p. 26. The navigation of the Elbe was made free to all flags in 1821 only so far as navigation from and to the sea was concerned; river navigation proper was reserved for riparians, p. 28, p. 189. The port of Hamburg up the river thus was recognized as practically a seaport.

The author is scarcely correct in his conjecture, p. 34, that it was because the Rhine was a common boundary that the common system of toll collection and administration was devised by the draftsmen of the octroi convention of 1834. The octroi or toll was created not primarily for the use of the riparian states but to pay the dotation of specified German princes, chiefly of the arch-bishop of Mayence, who was not a riparian to the Rhine after 1804, except in the vague sense that he represented the shadowy empire. Consequently, an organization controlled by the parties in interest was imposed by the circumstances, and that organization could not be composed of the local Rhine states who were not parties in interest. The towpath, as necessary to the development of navigation on the river, was put at the cost of the octroi, so there was another reason why a strong, central organization was needed in 1804 and was not agreed to in 1815.

The reviewer does not think that enough stress was laid on the importance of compulsory unloading at Mayence and Cologne at the conference of Vienna. It was one of the most vigorously discussed questions in the subcommittee and the fact that it was finally abolished may help to explain the satisfaction of France in the final draft of the section limiting free navigation to riparians. The discussion was on the point as to whether a publicly controlled monopoly was to the advantage of commerce on the whole river and in the end individualism and the modern theory of unrestricted competition won a victory, the more notable since the battlefield was a reactionary subcommittee at the reactionary Congress of Vienna.

In his careful investigations of Humboldt's project the author omits the distinction made by the Prussian minister between river commissions with, or without, administrative power. If, says Humboldt, a commission is merely a meeting of plenipotentiaries of the states, then each state should have an equal voice; but if it is to have administrative power, then it should not be too large and each state interested should have a voice in its selection equivalent to the actual rights it surrenders, in this case, to the extent of its bank ownership. These principles were in fact adopted in the membership of the central commission, a deliberative assembly, p. 52, and in the method of election of the chief inspector, the common administrative authority, where the votes of the states were weighted as Humboldt proposed.

The importance of the position of small nations at the present day makes worth noting the inaccuracy of the statement on page 55 that the committee agreed on a special provision regulating the Neckar, Moselle and Meuse. In

fact, following the principle of confiding the draft of treaties to the powers most interested, a special commission composed of riparian states of the Main and the Neckar was created to report on drafts of treaties for their rivers according to the same principles established for the Rhine. (See 3 Klüber, *Acten des Wiener Congresses in den Jahren 1814 und 1815*, 86.)

The author seems unduly severe on Holland for refusing to extend the expression *jusque à la mer* used in the Rhine treaty of 1815 to mean *jusque dans la mer*, p. 83, and so to abandon a very important source of revenue as well as an important right. The difference between the two expressions meant that the Rhine toll had to be charged on boats passing into the sea instead of only on the river. Holland had laid heavy dues on ships in her maritime waters, which she maintained had not been affected by the Vienna treaty. That she wanted an equivalent for giving up a right which evidently was not thought of or at least not provided for at Vienna, is no discredit to her honor, though it may be to her judgment. The diplomatic myopia which prevented the negotiators at Vienna from seeing beyond the river into the ocean was not Holland's fault.

The author deals at length with the Scheldt negotiations and treaties after the Belgian Revolution. His discussion of the difficulties of the commission of two, one from each state, appointed to supervise pilotage and the maintenance of navigation, shows how hard it is for an outside body to enforce rules on the administrative authorities of a state; but as a matter of fact, the great increase in shipping at the port of Antwerp is the best evidence that the method adopted, whatever its faults, has worked in practice fairly well.

The chief diplomatic documents in regard to the Danube are digested and long extracts from some of them given; but the author should have stated that the treaty of 1883, so far as it created a mixed commission for the Braila and Iron Gates section of the stream, never took effect on account of the refusal of Roumania and Bulgaria to accede to the treaty. It would have been a great addition to the Danube documents had the author included a portion of the Hungarian Iron Gates regulations against which such vigorous protests have been made by Roumania on the ground that Hungary as a result of her right to levy tolls for the use of the improvements, is practically in a position to control at her will the trade from the upper into the lower Danube. Another important document for an understanding of the Danube commission is the internal regulation of the commission, which has been recently printed by Professor Francis Bowes Sayre in *Experiments in International Administration*.

It is perhaps not within the scope of the Monograph, but for the sake of avoiding a misconception on the part of people not as familiar as he with the subsequent history of the Congo commission, the author would have done well to have noted that the Congo commission had never had an effective life. The diplomatic history of the St. Lawrence should have included the treaty of January 11, 1909, between the United States and Great Britain which proclaimed freedom of navigation of the St. Lawrence system and on the canals for the subjects and citizens of the contracting parties; and the treaty between Bolivia and Brazil of August 12, 1910, is important in Amazon history not only as granting free navigation for the vessels of the two powers in international rivers, but securing to Bolivia the use of the railroad around the falls of the Madeira, a tributary of the Amazon, an important application of the theory of the Congo Convention that a railway "substituted for an obstructive portion of its course" should be considered as a dependency of a river, p. 150.

The book is accompanied by four excellent maps, one, of the Rhine valley; two, of the regimes of navigation on the Danube; three, of the whole river and the lower river from the Iron Gates to the sea; and a fourth, showing the conventional basin of the Congo. The regime of the Danube was far worse than the map shows. The Austro-Hungarian river is colored as if it were under a

single regime, but in fact it was subject to separate Austrian and Hungarian regulations. From the Iron Gates to Braila, the map would make it appear as if one regime existed, while in fact Serbia and Bulgaria had each independent control of a share of the southern, Roumania of the northern, bank, the treaty of 1883 never having been put into effect. It was undoubtedly an error of printing that the Iron Gates—Cararact section was not extended into Serbia, beyond the Roumanian boundary, to cover the whole improved reach of the river. The map of the Congo basin indicating the railway around the fords and rapids to Stanley Pool and other breaks of navigation on the river system is a most useful addition to the work.

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The Position of Foreign Corporations in American Constitutional Law. By Gerard C. Henderson. Cambridge, Harvard University Press. 1918. pp. 199.

This is a most stimulating contribution to the literature of what has long been a nebulous branch of constitutional law. Few departments of the law exhibit more clearly the flexibility of the constitution, its adaptability to changing economic conditions and the resulting difficulty of forecasting constitutional decisions, than that of foreign corporations. But the greatest factor contributing to uncertainty and anomaly in this branch of the law has been the unfortunate confusion in the theory of the corporation. Curiously enough, by piling fiction upon fiction, some measure of justice has now been worked out by treating the corporation as a "person" or a "person within the jurisdiction" under the Fourteenth Amendment. Not even yet have the Supreme Court and the legal world generally accepted the view that incorporation is merely a device, a form or method adopted by real human beings for doing business and enjoying their property, just as a partnership is. The author clearly perceives the inaccuracy of the "fiction" and of the "real" theory of a corporation, into which we have been led principally by continental jurists. But his praiseworthy attempt to explain away the confusion (p. 165 ff.) would have derived much assistance from the able contribution to that end already made by the late Professor Hohfeld in (1909) 9 COLUMBIA L. REV., particularly at pp. 288-291. It is to be doubted whether "modern jurisprudence" has "generally rejected" the theory that "only persons can be subjects of rights and duties." (p. 165). On the contrary, it seems to the reviewer that recognition of that fact shows the superfluity of the "fiction" and "real" theory and enables the corporation to be seen as a mere device covering the transactions of a group of individuals.

The author has devoted himself primarily to the task of tracing the evolution of our constitutional law of foreign corporations from the restrictive rule of Taney's dicta in *Bank of Augusta v. Earle* (1839) to the liberal rule of almost compulsory recognition sanctioned in the *Pullman* and *Western Union* Cases against the State of Kansas (1910). The task has been performed with marked ability. Not only is his critical analysis of the decisions themselves a meritorious service, but his discussion of the economic background of the decisions throws much light upon the motives consciously or unconsciously actuating the court.

Taney's refusal, because of the jealousies and provincial interests of agrarian communities, to extend the protection of the comity clause to corporations or to recognize their inherent privilege to exist and do business outside the state which created them, has impressed our constitutional law until very recent times. The resulting power to exclude, and therefore to admit on conditions, was finally driven to such an extreme application by Kansas in taxing the entire capital stock

of the *Western Union* and the *Pullman Company* (216 U. S.) that the Supreme Court was impelled to break down its logic and invoke the "due process" clause of the Fourteenth Amendment to save foreign corporations from extortionate conditions of admission. Holmes' dissenting opinion in the *Western Union* case attests his deference to logic and the virility of Taney's views, as fortified by such cases as *Paul v. Virginia*. But as the *Western Union* and *Pullman* cases also involved the commerce clause it can hardly be said that the court has fully sustained the author's view that the state no longer has an unlimited power to exclude foreign corporations from an independent local business. Possibly they will some time take that position, but in *Baltic Mining Co. v. Massachusetts* (1913) 231 U. S. 68, 34 Sup. Ct. 15, they had not yet reached it; and in the two very recent cases of *Looney v. Crane Co.* (1917) 245 U. S. 178, 38 Sup. Ct. 85, and *International Paper Co. v. Massachusetts* (1918) 246 U. S. 135, 38 Sup. Ct. 292, decided since Mr. Henderson's book went to press, the commerce and due process clauses jointly afforded protection against the state statute. What would have been the result had there been no assistance derived from the commerce clause is not certain. Again the restrictive principle has been greatly weakened by the so-called doctrine of unconstitutional conditions, which grew out of the attempt of various states to penalize or expel foreign corporations for the removal of suits from the state to the federal courts. Some sophistry is necessary to sustain the distinction between the exaction of an agreement not to remove, which was held unconstitutional, and the expulsion for actual removal without advance agreement, which has been sustained. Possibly *Donald v. Philadelphia and Reading Coal Co.* (1916) 241 U. S. 329, 36 Sup. Ct. 563, although also involving interstate commerce, justifies the view that all attempts to prevent or punish the privilege of removal will be enjoined as unconstitutional.

To the vexed problem of the "citizenship of a corporation" (Chap. IV) the author has made a useful contribution; our constitutional law in this matter has had little help from the voluminous continental literature on the subject. Arminjon (p. 188) was a Frenchman, not a Spaniard, although his monograph was translated for the Spanish Treaty Claims Commission. One of the best among the several excellent chapters in the book is Chapter X entitled "A critical re-examination" in which the author exhibits that understanding of the underlying economic conditions in a growing industrial country without which our constitutional law becomes a disconnected series of judicial reactions to unrelated facts. The work has decidedly enriched our legal literature and deserves hearty welcome from a profession but poorly endowed with scholarly contributions.

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