Book Reviews

DECLARATORY JUDGMENTS. By Edwin Borchard. Cleveland: Banks-Baldwin Law Publishing Co. 1934. pp. xxii, 669.

Reviewed by Walter F. Dodd†

PROFESSOR Borchard's volume comes at a peculiarly opportune time. The movement for declaratory judgments in this country owes its success primarily to the ability and persistence of the author of this volume, and the essential step toward the general adoption of this important procedural device—the enactment of a federal declaratory judgments act—came while the volume was in press. Although the approval of the federal act did not take place until June 14, 1934, the aspects of the problem in the federal courts are sufficiently considered in the present volume. The controversy with respect to the power of Congress to provide for declaratory judgments is still to some extent reflected in the tone of the author's discussion of this matter, but this may be readily excused in view of the author's success in obtaining the approval of his position by the United States Supreme Court and by Congress. In *Nashville, Chattanooga and St. Louis Ry. v. Wallace*,[1] the United States Supreme Court has taken a broad and intelligent view as to what constitutes a "case" or "controversy," and it is to be trusted that no future restriction of this view will limit the use of declaratory judgments under the recent act of Congress.

The writer of this review practices in a state which has not adopted a declaratory judgment statute but which permits what are in fact declaratory judgments in the construction of wills and in proceedings to quiet title. Illinois has recently taken important steps toward the simplification of judicial procedure, and the publication of Professor Borchard's volume, together with the adoption of the federal act, will, it is believed, have an important share in bringing Illinois and other states into line with the federal government, and with the thirty-four states and territories that have adopted the declaratory judgment procedure.

The volume under review is much more than a mere analysis of American statutes and of American practice under such statutes. The chapter on history and comparative law presents the first adequate discussion of the declaratory judgment in other countries, and furnishes an important background for future guidance in the application of a relatively new procedural device in this country. The thorough analysis of the purposes for which declaratory judgments may be used will be of distinct value to the practitioner. Yet, since the author has given us so much, it may be suggested that the practitioner needs to apply the declaratory judgment to specific cases in a single jurisdiction. To him it would have been of aid, even though involving repetition, if the author had analysed the experience of a single jurisdiction, as Professor Borchard had previously done in an article limited to Pennsylvania. The practitioner also needs aid in formulating pleadings under a new procedural device, and while the chapter on procedure and practice tells him what he may do, it would have been of value had the author included some forms of typical prayers for relief where a declaratory judgment is sought.

With respect to the use of declaratory judgments as a means of raising constitutional issues, the author may properly have argued[2] that little change is made in

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1. 288 U. S. 249 (1933).

2. Pp. 301-303.

practice. Ever since the stipulation in *Hylton v. United States*,[3] that Hylton kept one hundred and twenty-five chariots "exclusively for the Defendant's own private use and not to let out to hire", constitutional questions not involving complicated issues of fact have largely been determined in "made cases", and it is not material whether the issue be raised by injunction, declaratory judgment or otherwise. This is recognized by the United States Supreme Court in *Nashville, Chattanooga & St. Louis Ry. v. Wallace*.[1]

To the present reviewer the most promising thing about Professor Borchard's volume and about the services of Professor Borchard in stimulating an important procedural advance, is the demonstration that law school teachers may actually accomplish something to help solve the problems of our legal system. A new and independent profession of law school teaching has arisen largely within our generation, and this profession has attracted a number of persons who have the ability and time to aid in legal progress. Yet this profession has as yet done little or nothing to counteract the declining public respect for the lawyer—whether in teaching or in practice. Aside from Wigmore's work upon evidence, the profession of law school teachers has contributed little in the way of leadership. Law schools have more and more become adjuncts of business colleges and agencies of apprenticeship for big corporate law firms, and have not fully recognized that the social aspects of the law outweigh the law as an aid to organized business. The development has been one toward finding the highest price for the law school product, and this tendency has not been materially weakened by the influence of the present depression upon the market.

The large amount of ability which is found in the field of law school teaching has in recent years devoted itself primarily to two tasks: (1) The restatement of the law, when perhaps a good portion of the restated law should, upon proper investigation, be abandoned. The restatement is of value as a basis for further progress, but may promote stagnation rather than progress. In the field of criminal procedure alone has really constructive work yet been done. (2) A large and growing mass of literature has been produced by the law schools in support of the so-called "realistic" approach to the study of the law; whereas the energy devoted to the production of this literature, if applied in part to the types of investigation necessary to determine the facts as to procedural and substantive law, would have aided in a progressive improvement of our legal system.

In the most active period of our legal development and with a profession that may devote ability and time to the actual problems of the law, we may, perhaps, hope that the future offers more than the past has produced, and that persons like Professor Borchard will undertake and accomplish much in aid of legal progress. Professor Borchard has shown that such accomplishment is possible.

Reviewed by Robert von Moschzisker†

THE Bar as a whole is probably the most conservative body to be found in America, and lawyers are set traditionally against changes in practice. They like old ways of doing things and are not prone to take up new ways, or even to approve the extension of old ways if labeled as new; knowing this, Edwin Borchard's efforts to establish the declaratory judgment in the United States command our admiration. Commencing, years ago, with an article published in the *Yale Law Journal*, Professor Borchard's good work in teaching his professional brothers just what the

3. 3 Dall. 171 (U. S. 1796).

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declaratory judgment is, and where applicable, has culminated in a recently published volume, entitled *Declaratory Judgments.*

The preface to this interesting book denotes the author's mission, to demonstrate that in the declaratory judgment will be found a means to serve society by ascertaining and adjudicating the legal rights of contending parties before a wrongful move on the part of any of them, beyond the assertion of the right in question or the threat to carry it into effect, has taken place; that through the declaratory judgment innumerable issues may be determined which are not susceptible of adjudication under old forms. Professor Borchard's preface indicates also an intention, which he later on amply fulfills, to show that the idea of the declaratory judgment is not a new one, but merely the extension into more universal use of a long-existing form of procedure, which had its roots in the Middle Ages and had been used extensively elsewhere before its limited adoption in this country.

The difficulty in winning general recognition for declaratory judgment procedure was that, in the words of our author, it required "a broadening of the conception of 'cause of action' and of the view that the judicial process is merely a means of redress for committed wrongs"; it required also "an appreciation of the fact that harm is done and rights are jeopardized by mere dispute or challenge without any physical attack," and of the thought that "the mere existence of a cloud, the denial of a right, the assertion of an unfounded claim, the existence of conflicting claims, the uncertainty or insecurity occasioned by new events" properly "may constitute operative facts" sufficient in themselves to create a right of action. All of which is shown in this book.

The author also demonstrates how necessary it was to rid the professional mind of a rather common idea that a declaratory judgment was nothing more nor less than an advisory opinion, and to establish the fact that it was a final binding judgment between adverse parties, which determined conclusively their respective rights. That these objectives have been accomplished, and how accomplished, is shown by Professor Borchard.

He attacks the prevailing notion that the chief function of a court is to compel people to do those things which the law requires of them, and shows that the command to perform is collateral and incidental to the determination that there is a duty to perform; that the adjudication, not the command, is the essence of judicial power.

Borchard believes that the professional conception of the meaning of the term "cause of action" has become so involved in description and definition that it may be profitable to revise entirely our idea of what constitutes a cause of action. We all can agree that the term "cause of action" has become greatly confused, and perhaps too limited; further, that for purposes of declaratory judgment procedure our ideas as to what constitutes a cause of action must be revised. Most active practitioners feel that a more liberal attitude than some of our leading courts have taken toward this form of procedure, its purposes and scope, is desirable; but, at the same time, those of us who have had contact with the practical administration of the law in the courts recognize that there must be some limitation on the right to bring matters into court, or otherwise our tribunals would be swamped with efforts to obtain judicial consideration of alleged points of law which really do not constitute points of controversy between actual contestants. Hence, the very proper insistence by most of the courts that in all declaratory judgment proceedings the record must show either an "actual controversy" or the "ripening seeds" of one; in other words, there must appear a controversy which is actually existing, or one which is imminent and inevitable, between real contestants, all of whom are before the court, and that, where the record shows no such controversy but only a desire to be instructed

on the law, the case is not one for declaratory judgment; this our author recognizes.

Professor Borchard, however, gives the impression of holding a view that the declaratory judgment should supersede very generally other forms of procedure. We may agree that the declaratory judgment has a useful place in the field of preventive and curative justice and that this fact ought to be recognized by all, but it seems to the present reviewer that, while the courts should be empowered to apply in their discretion the declaratory judgment to any case where the essentials for such relief are present, yet an attempt to force that remedy into the places occupied by other set forms of procedure, in cases where the controversy between the parties involved makes no special call for declaratory judgment and where the controversy has reached a point at which an established remedy may be applied equally well to it, would be a mistake; first, because such a course would meet with opposition from the courts and, secondly, because it would be abandoning in too large a measure old and well-sustained procedures, which have gained useful places for themselves in our judicial system, in favor of a procedure concerning which many novel points of practice are bound to arise for decision.

Lack of space will not allow one to epitomize or summarize the various chapters; suffice it to say that they take up in due order all conceivable aspects of the declaratory judgment and the practice which has grown up in connection with it. The theory back of this form of procedure, its relations to other well-known forms, its development in this and other countries, and the manner in which it fits into and aids our established system are all shown in this useful book.

There is an Appendix giving the text of the Uniform Declaratory Judgment Act and of several other declaratory judgment statutes, as well as the report of the United States Senate Committee on the subject, submitted on May 10, 1934, and the full text of the recent Federal Declaratory Judgment Act. The Appendix contains likewise an alphabetically arranged list of the various state acts, with the decisions thereunder, showing thirty-five American statutes in all, counting the recent Federal Act.

This book is the last and most comprehensive work on the important subject of declaratory judgments, and should be possessed for purposes of reference by all law libraries and active practitioners; finally, it is written with Professor Borchard's usual clarity, which makes it entertaining reading.

Reviewed by W. Ivor Jennings†

IN ENGLAND the declaratory judgment is of respectable antiquity. In the Chancery Division most proceedings begin with an originating summons and end with a declaration. In the Probate, Divorce and Admiralty Division, as Professor Borchard points out, most decisions are necessarily declaratory. In the King's Bench Division it is not used so much, partly because it was first imported from Scotland into equity jurisdiction and the common law lawyers have taken some time to get used to it, partly because some substantive remedy is much more frequently required at law than in equity, and partly because common law pleaders frequently prefer to use such remedies as the prerogative writs. A declaratory judgment may also be obtained in a county court, though it does not appear that it is frequently used in such courts. If proposals for extending county court jurisdiction, which are now being placed before a Royal Commission, are accepted, it will clearly be of more significance to the lower courts. In any case, it is an important and essential part of English legal procedure.

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Professor Borchard's contributions to legal periodicals had raised high anticipations of his forthcoming book. Now that it is before us, we find that those anticipations have been fully realised. It is not merely a study of an important branch of legal procedure. It is also a comparative study which helps to indicate the kind of contribution which modern jurisprudence can make to the solution of the practical problems of legal administration. It draws upon the experience of a dozen or more legal systems. For instance, in connection with "case or controversy" reference is made to the federal constitutions of Canada, Australia, Argentina, and Brazil. Elsewhere, much emphasis is laid upon Scottish, New Zealand, German and Austrian decisions. In the historical chapter, the author goes even farther afield. One lesson which he teaches indirectly is the vast range available for research in the several Anglo-Saxon jurisdictions. It emphasizes the need stressed by the Atkin Committee on Legal Education for some further coordination of Law Libraries in London. For nowhere in England outside London is the literature available. And even if the libraries of the four Inns of Court and of the London School of Economics were coordinated, to follow up some of Professor Borchard's references would be impossible.

The distinction which the author draws between declaratory judgments and advisory opinions is of course necessary for American conditions, but it is rather artificial when applied to England. Even the general declaration of legal principles, as in *McNaughton's Case*,[1] has considerable advantages. At certain stages in its development through isolated decisions, the common law has fallen into an intolerable confusion. The process of adding case to case produces chaos. It is appropriate that judges should be asked to blaze a trail through the jungle that they have made. Possibly such a step is less necessary now that a serious attempt is being made to cut away the undergrowth by legislation. But even in respect of statute law a simple answer to a simple question will sometimes avoid substantial delay and expense. The Canadian Supreme Court and the Judicial Committee of the Privy Council have had experience in the working of this system in the interpretation of the Canadian Constitution. Judges sometimes object to the vagueness of the questions; but the legislator is entitled to retort that nothing can be less precise than the principles elaborated in the local prohibition and insurance cases. Also, the law lords turned out in force and compelled the Government to withdraw clause 4 of the Rating and Valuation Bill of 1928, which would have permitted the Minister of Health to put questions on local taxation law to the High Court. No doubt the clause was too widely drafted, but experience since 1928 has demonstrated that it was essential to an effective local taxation system. One decision on sporting rights affected the taxation of 140,000 properties. On the "derating" legislation of 1928 and 1929 there has been a host of decisions, and before these gave the law some elements of stability there was hopeless confusion. The appeal in *Moon v. London County Council*[2] had to be expedited in order to get a simple answer to a simple question which was troubling local taxation authorities.

Opinions on such general questions are of course different from declaratory judgments in individual controversies. But the difference is more apparent than real. If the Minister of Health states a case under the National Health Insurance Acts or the audit provisions of the Local Government Acts, he is following exactly the procedure adopted by inferior courts in cases stated, or by the parties under the appropriate order. Each case is a "test" case, deliberately framed to get an opinion on a specific point of law. Professor Borchard rightly remarks that every case raising a point of law involves a declaratory judgment, whether or not a substantive

1. 10 Cl. & F. 200 (1843). 2. [1931] A. C. 151.

remedy is also sought. An insurance company which takes a "running-down" case to the House of Lords is not concerned with the damages; it is concerned with the declaration of law. Much of the American argument on "case or controversy" seems to me to be highly artificial.

Professor Borchard rightly stresses the importance of the declaratory judgment in disputes with administrative authorities. In spite of recent legislative changes, it is probable that England is still more highly "socialised" than most of the American states. The tendencies point towards a substantial development of public services. In the absence of a set of administrative tribunals, it is essential to make recourse to the ordinary courts rapid and effective. Many recent statutes have created a statutory modification of certiorari which is working well in respect of housing schemes. But in the absence of such a special procedure, which theoretically quashes the order but in substance declares the law, the ordinary action for a declaration is the most effective remedy. I would, indeed, stress one application of the remedy which Professor Borchard does not emphasise, perhaps because it has no application to American conditions. Frequently the most effective substantive remedy is administrative action, such as a surcharge or disallowance of illegal expenditure by a public officer. But in order to permit a taxpayer to accomplish this, it is necessary to have the law decided by the courts. The taxpayer's remedy for this purpose, as *Attorney-General v. Merthyr Tydfil Union*[3] showed, is an action for a declaration. I would not, however, give to *Dyson v. Attorney-General*[4] the emphasis which Professor Borchard gives it, at least under English conditions. Owing to the limitations of the law of proceedings against the Crown, the case is of strictly limited application in England. If, however, the agitation for the reform of the law on this point succeeds, its importance will greatly increase.

A review which considers only the importance of Professor Borchard's work for English lawyers is necessarily one-sided. The enormous list of cases decided in American jurisdictions during the past fifteen years suggests that new uses of the declaratory judgment will be discovered by the American courts, and the future of the Federal Act which the author did so much to secure is likely to be of absorbing interest. It is to be hoped that Professor Borchard will follow up his study of the declaratory judgment with an examination of other aspects of comparative legal procedure.

UN PARÈRE DE JURISPRUDENCE COMPARATIVE. By Edouard Lambert. Paris: Marcel Giard. 1934. pp. xl, 221.

PROFESSOR LAMBERT, a leading French scholar in the field of comparative law, presents in this "parère" (opinion) a comparative examination which may interest American readers both for its subject matter and for the manner in which it discloses the personality of its author.

The opinion deals mainly with a controversy developing out of the depreciation of the pound sterling. The commercial agency of the U. S. S. R. in Germany bought commodities on credit, on a large scale, from German firms. Prices were fixed in pounds sterling, and the Russians gave bills of exchange as security for the indebtedness. After the depreciation of the pound, sellers and billholders claimed sums higher than the face amounts of the contracts and the bills in order to be indemnified for the decrease in the value of the pound. The Russians, considering these claims to be wholly unjustified, asked Professor Lambert for his opinion. The author decides in favor of the Russians. His investigation rests primarily on Ger-

3. [1900] 1 Ch. 516.

4. [1911] 1 K. B. 410.

man law, which governs the contracts, but he illumines his work by an application of the comparative method, referring to French, Italian, Belgian and Anglo-American law. Although the discussion of Anglo-American law is not very comprehensive, importance for this country is to be attached to the author's study because depreciation of the dollar in the face of the world wide use of dollar contracts will presumably provoke similar controversies in the future.

The attitude of the German courts with regard to the pound depreciation has vacillated. It is well known that after the complete breakdown of the former German mark, mark creditors were granted a revalorization (*Aufwertung*) by the courts, the extent of which was to be determined arbitrarily, without definite criteria, according to the circumstances of the case ("free revalorization" as contrasted with "statutory revalorization" which provides for definite percentages of the original debt).[1] Originally revalorization was denied to contracts in foreign money, until a judgment of the *Reichsgericht*, dated June 27, 1928, extended it to such contracts, provided that the depreciation of the monetary unit had been a "catastrophic" one.[2] This the court considered to have been true for the Austrian crown, devaluated at about fourteen-thousandths, as opposed, for instance, to the French franc which kept approximately one-fifth of its value. Thus sterling debts did not come within the scope of revalorization. However, in a judgment of June 21, 1933, the *Reichsgericht* took a surprising turn.[3] A German spinning mill sold yarns for sterling, before the fall of the pound, to another German firm. The seller asserted that in the making of the contract pounds had been chosen only because of their supposed stability, and he brought suit against the buyer for the original gold value of the pounds. The *Reichsgericht* did not assume that a tacit gold clause was involved in the contract, nor did it grant the seller a "revalorization", but it admitted an adjustment (*Ausgleich*) in accordance with the demands of good faith and the special circumstances of the case.

Professor Lambert violently assails the judgment of the *Reichsgericht*. Indeed, *Aufwertung* and *Ausgleich* are as alike as two peas, and many further objections may properly be raised against the court's reasoning. But Professor Lambert's method of argument can scarcely be appreciated. He approves of the *Reichsgericht's* revalorization doctrine including the distinction between "catastrophic" and "non-catastrophic" depreciations. Free revalorization, however, rests completely on a discretionary if not arbitrary power of the judge. One may point out that the *Reichsgericht*, with respect to "non-catastrophic" depreciations (like that of the franc) first denied, and then, under a new name, granted revalorization. But, if one regards equity and free judicial discretion as the legal solution of the depreciation problem, then it is, at best, a matter of sheer expediency to exclude from this solution cases where creditors have lost "only" four-fifths of their debt. Such a limitation is foreign to the logic of law and negates the very spirit of equity. One cannot dodge in this instance the question of principle. Is the judiciary enabled, and called upon to solve the revaluation problem, or must it pass this task along to the legislature? This problem may some day be presented also to American courts. In Germany free revaluation originated out of a conflict between the democratic government and the judiciary, which proved to be stronger. It brought about countless abuses and unprecedented confusion, described by the reviewer in *Bilanz der Aufwertungstheorie*. Professor Lambert's opinion overlooks the very

1. For an excellent history of the German revalorization judgments see Dawson, *Effects of Inflation on Private Contracts: Germany, 1914-1924* (1934) 33 MICH. L. REV. 171.

2. JURISTISCHE WOCHENSCHRIFT (1928) 1197.

3. 141 *Entscheidungen des Reichsgerichts in Zivilsachen* (1933) 212.

serious failures of free revaluation[4] and it does not take into consideration the fact that other countries, having doubtless experienced like Austria a "catastrophic" depreciation of currency, denied free revaluation.

Moreover, the distinction between catastrophic and non-catastrophic depreciation is arbitrary and impracticable. Professor Lambert is the first writer to advocate it. The *Reichsgericht* itself did not always follow this distinction. Free revaluation was granted by the *Rechsgericht* to mark creditors who had suffered loss by a depreciation absorbing no more than seventy-five and even less per cent.[5] Thus in practice the distinction is illogically confined to foreign money. But how is it to be carried through within this sphere? Is, for instance, the depreciation of the Roumanian *leu,* which kept about three-fourths of one per cent of its original value, catastrophic or non-catastrophic?

This objection raised by the reviewer[6] is held "surprising" by Professor Lambert. He points out that the distinction chosen by the *Reichsgericht* is less "elastic" than the conduct of pater familias according to Roman law, or the rule of reasonableness in Anglo-American law, or the distinction between use and abuse of rights. I think these examples are non-comparable. Whether for instance a negotiable instrument, payable on demand, has been presented within a "reasonable time"[7] depends on the nature of the instrument, the usages of trade or business, the distance of the residence of the holder from the place of presentation, of what had been said between the issuer and the holder and of other facts of the particular case.[8] The decision, as to whether or not under numerous and various circumstances the time taken for presentation was reasonable, can be found only in a reconstruction and appreciation of the whole situation, necessarily tempered by a discretionary element. But with regard to monetary depreciation the exclusively decisive criterion is the degree of depreciation. It would be unacceptable to hold catastrophic a depreciation, which reduced the value of the monetary unit of state *A* to three per cent, which at the same time was held non-catastrophic for state *B*. Therefore, the partisans of the *Reichsgericht's* doctrine are at a loss to find out a precise figure of demarcation. Professor Lambert himself refrains from taking a definite position with regard to Roumanian currency. He passes this thankless task to the courts, which are scarcely better equipped for it than Professor Lambert.

On the other hand, Professor Lambert will meet general consent when he argues that contracts made in foreign money do not imply a gold clause except where the clause is contained in the contract either expressly or by the whole of its provisions. There is an abundance of decisions to the same effect. But I do not think that the *Feist* case,[9] copiously discussed by Professor Lambert, is pertinent. First, not a tacit but a very explicit gold clause was disputed in that case; secondly, the bonds were to be paid in pounds sterling, issued in England, phrased as English bonds, and wholly governed by English law, the only foreign element being that the debtor was a Belgian company. This situation is thoroughly different from that of a contract made in dollars between a Russian and a German party. Not more pertinent, in my opinion, is *Bronson v. Rodes,*[10] likewise treated by the author. Here, also, an express gold clause was presented to the Supreme Court, and its compatibility with the monetary laws of the United States was the point of the judgment. The question of a tacit gold clause has been dealt with in *Thompson*

4. This is indeed done also by Dawson, *supra* note 1.
5. NUSSBAUM, BILANZ DER AUFWERTUNGSTHEORIE (1928) 24.
6. JURISTISCHE WOCHENSCHRIFT (1928) 1197.
7. NEG. INST. LAW, § 71. 8. Ibid., at § 193.
9. Feist v. Societé Intercommunale Belge d'Electricité, [1933] Ch. 684, [1934] A. C. 161.
10. 7 Wall. 229 (U. S. 1868).

v. Riggs,[11] and in *Frothingham v. Morse*,[12] restricted however to domestic (American) currency.[13] Decisions emanating from other jurisdictions are also cited by Professor Lambert.

The second part of the opinion concerns the question whether an arbitration court, as instituted by the contracts of the Commercial Agency of the U. S. S. R., would be entitled to grant the sterling creditors a revaluation or compensation. Professor Lambert answers in the negative. He points out that the question at issue is one of "social politics", "involving the future of the entire commerce of Germany and the development of its international relationships." The solution of such a problem should, in the opinion of the author, be left to the legislature, not to national courts and even less to arbitrators who would have neither ability nor authority to deal "in the name of Germany" with equally far-reaching problems of *"politique juridique générale."* German arbitrators deciding an individual case never would speak in the name of Germany. And in the granting or the denying of a compensation for a depreciation of the contractual currency, they are clearly moving within the field of law. There is no doubt about that, if one takes into account the *Reichsgericht's* decision of June 21, 1933. It is a matter of course that any arbitrator, acting under German law, would justifiably and probably follow the precedents of the highest German court, even those criticized on serious grounds in legal literature. There is an evident inconsistency in Professor Lambert's reasoning, for he approves of free revaluation by both the courts and arbitrators, while as a matter of fact, free revaluation as well as "compensation" is a question of "social politics" or *"politique juridique générale."*

However, German authors generally indicate that arbitrators are not restricted to legal reasoning, but may base the award on mere equity,[14] but this latter doctrine does not support the author's assertion. On the contrary, if arbitrators may decide on principles of equity, they will not exceed their authority in distributing equitably between the parties the loss resulting from the depreciation. In the case contemplated by Professor Lambert the arbitration agreement contained the provision that the arbitrators had to make the award under German law. But it is not certain that considerations of equity not in the corpus of German law are excluded thereby. An esteemed German writer admits the interpretation that such a provision excludes only the application of foreign (non German) law.[15] Be that right or wrong, the whole controversy vital to the discussion carried on by the author has been overlooked by him.

It was the reviewer's duty to express frankly his objections to the present opinion. They do not diminish, however, the high esteem which he feels for Professor Lambert's achievements in the field of comparative law.

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11. 5 Wall. 663 (U. S. 1867).

12. 45 N. H. 545 (1864).

13. See furthermore, for contracts made in the former Russian currency, Tillman v. Russo-Asiatic Bank, 51 F. (2d) 1023 (C. C. A. 2nd, 1931); Klochkov v. Petrogradski Bank, 239 App. Div. 687, 268 N. Y. Supp. 433 (1st Dep't, 1934).

14. See STEIN AND JONAS, ZIVILPROZESSORDNUNG (14th ed. 1929) 1034; 1 BAUMBACH, DAS SCHIEDSGERICHTLICHE VERFAHREN (1931) 97.

15. BAUMBACH, *supra* note 14, at 97.

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FIVE HUNDRED DELINQUENT WOMEN. By Sheldon Glueck and Eleanor T. Glueck. New York: Alfred A. Knopf. 1934. pp. xxiv, 539, x.

DISCOVERY in the social sciences lacks that dramatic quality characteristic of the discovery of a new star or a new chemical element. Social and psychological facts are usually familiar long before the careful investigator transforms familiarity into precise knowledge; and the run of men is not especially thrilled to know clearly what they have already dimly felt. Then too, there are deap-seated attitudes that tend to make fact-knowledge of social processes unwelcome. The rationalistic and sentimental formulas by means of which men habitually face their social problems are generally resistent to the frequently disconcerting results of social inquiry. In such an atmosphere we may expect that the social scientist will be accused either of elaborating the obvious, or else of preaching untried and subversive doctrines.

The present study by Professor and Mrs. Glueck is an example of the modern, scientific social investigation at its best. They have asked a multitude of familiar questions about the careers of 500 delinquent women, and they have sought the answers in definite and quantitative terms. Few of their results are surprising; but all of them are important. They are important, not only because they are accurate and essentially unarguable, but also because of their portentous bearing upon the enterprise of social control. They clearly show the uselessness of the "moral" attitude toward fallen women, even where that attitude is one of sentimental pity rather than of scorn or hatred. The authors demonstrate by means of an avalanche of facts the purely natural and comprehensible relationships between given combinations of biological, psychological, and social circumstances and resulting delinquency.

Professor and Mrs. Glueck do not conclude that our present procedures are utterly hopeless. Women incarcerated for a year and a half in the Massachusetts Reformatory for Women show some improvement during the succeeding period of parole and supervision; and during the next five years they do not slip back to the average level of maladjustment prior to incarceration. But considering the total careers of these women, they are a sorry lot. Reeducation in the Reformatory must surmount a terrible obstacle in that the women's personalities have been warped since childhood and therapy begins too late. Gains that actually are achieved by the Reformatory are difficult to hold because of the unpropitious environments to which the released inmates must be returned. It is little wonder that dull and unstable young women fail to appreciate the bargain when they are offered house work at $7 a week as a substitute for fast living.

All but two per cent of these women had been sexually irregular prior to incarceration, which clearly shows why the public has so persistently identified such delinquents simply with the problem of prostitution. But the very complete data of the present study show how inadequate was the earlier conclusion that sexual irregularity is brought about through ignorance of moral precepts. "The biological and social heritage of sexual offenders is essentially similar to that of other delinquents; female wrongdoers, regardless of their crimes, have much the same sordid background of unfortunate heredity, mental abnormality, ignorant and vicious parentage, underprivileged childhood, and like evils."

The ultimate and inescapable conclusion from this study is that social control in the area here represented must be largely ineffective until public attention is focused upon those deficiencies of community life out of which delinquency arises. One is forced to admit that much in the way of cultural inertia must be overcome before society will turn aside from the relief it has obtained by moral gestures and face seriously the issues here involved. In the meantime able workers, like the authors of this book, will go on collecting and presenting factual evidence with the

assurance that, though this type of persuasion is slow, there can be no genuine doubt about its final result in the realm of social responsibility and action.

New Haven, Connecticut. EDWARD S. ROBINSON.†

RESTATEMENT OF THE LAW OF TORTS. St. Paul: American Law Institute Publishers. 1934. Vol. 1, pp. xxxii, 730. Vol. 2, pp. xxxi, 731-1338.

THESE two volumes contain those portions of the Restatement of the Law of Torts which were approved at the annual meeting of the American Law Institute at Washington, D. C., on May 10-12, 1934, and, as we learn from the introduction to Volume I, are to be followed later by two or three additional volumes completing the treatment of torts.

The Reporter selected for the restatement of the law on this subject was Professor Bohlen of the University of Pennsylvania Law School, who has long been recognized as a leading authority on the subject. The entire treatise bears his impress, not only in the terminology with which, by his writings, he has done much to familiarize at least the teachers, but also by the doctrines embodied in the treatise relating to matters upon which there is a conflict of authority. To him, therefore, is due the major portion of responsibility and credit for the work in its final form. The contributions of the Advisers, however, as we learn not only from the introduction but also from reports hitherto submitted at the annual meetings of the Institute and elsewhere have been by no means nominal.

The first characteristic of the Restatement that attracts the attention of the reader is the terminology employed. The first chapter contains a series of definitions of terms used throughout the work, many of these terms not having hitherto been customarily used by the courts with reference to the law of torts, either at all or in the sense in which they are employed in the Restatement. For example the word "interest" as defined indicates "the object of any human desire." Again the word "privilege" is defined as denoting "the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances, does not subject him thereto." This latter is another way of conveying the idea traditionally expressed by the term "defense." "Battery" is no longer "an unlawful touching of the person of another" but under the new terminology is "An act which directly or indirectly, is the legal cause of a harmful contact with another's person." To one who takes the time to master the definition of new terms and their application throughout various portions of the Restatement, the sections in which they are used will be intelligible, but to the lawyer who has not thus taken the time to familiarize himself with the new terminology it will constitute an obstacle to his understanding of, and a deterrent to his use of, the Restatement. The extent to which this innovation may interfere with the use and application of the Restatement in the briefs and arguments of lawyers and in the opinions of the courts, time alone will reveal.

At earlier stages of the preparation of the Restatement of Torts, tentative drafts of text and comments were accompanied or followed by pamphlets, "Commentaries," containing citation of cases and other authorities supporting propositions in the text, and in some instances also citing authorities contra, thus assisting the reader in forming an independent judgment as to the extent to which the text embodied the existing law. The final draft now published is not accompanied by a republication of these commentaries, the idea being apparently that the final draft is to be ac-

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cepted as a definitive statement of the law, and authorities in conflict therewith, no matter how numerous or how long accepted and applied, are to be treated as erroneous and therefore disregarded. The omission of these commentaries, however, must be regarded by the average reader as unfortunate and calculated to arouse some distrust with the conclusions reached in the text. Lawyers and judges are so familiar with the practice in text books and cyclopedias, of looking down from propositions in the text to foot-notes citing authorities supporting them, as to hesitate to accept text statements without the citation of supporting authorities.

The text of the Restatement represents a high order of scholarship as to both substance and style. It is evidently based upon extensive research and contains a comprehensive statement of the rules of law approved and applicable to the subjects covered. At times the style seems to lack elegance, but this is justified in the effort to achieve an exactness of statement that cannot be misunderstood. However one may disagree as to the soundness of the rules stated, there is little room for disagreement as to the meaning of the text.

There has been no effort to evade pronouncement upon questions of difficulty or upon which there is a conflict of authority. In fact one of the good results that may confidently be anticipated from the publication of the Restatement is the focusing of attention upon controversial matters, thus challenging criticisms from opponents of the doctrines embodied in the text. It is impossible for any man or body of men, no matter how learned and wise, to prepare a comprehensive treatise on the law of torts that will meet with universal assent as to what the law is or should be, but it is beyond the scope of this review to indulge in detailed criticisms of the propositions approved by the Restatement.

Every reasonable effort has been made to acquaint the profession with the Restatements in general, including that of the law of torts, not only by the wide distribution of the successive drafts and their discussion at meetings of bar associations, meetings of the Association of American Law Schools and at annual meetings of the Institute, but particularly by efforts to attract the favorable consideration of the judiciary. This has been done by the appointment of judges as advisers and by generous appropriations for the payment of their expenses to the annual meetings of the Institute at Washington, which is but a frank recognition of the fact that the judges rather than the text-writers still make the law; and it seems reasonable to anticipate that members of the judiciary thus honored will acquire familiarity with the doctrines of the Restatement and will be stimulated to gracious citation and approval of its text.

One of the greatest services that may reasonably be anticipated from the Restatement is the influence to be exercised by it in the development of a national jurisprudence. It seems probable, however, that progress toward this consummation so greatly to be desired is more likely to be influenced by promotion of a basic philosophy of the law, such as that of the sociological school of jurisprudence, rather than by efforts to secure the sanction of specific rules. For example, the rule established upon grave consideration in the English courts and in many American jurisdictions to the effect that a person guilty of negligence is liable for all the damages resulting therefrom in an unbroken chain of causation, whether he could have foreseen them or not, is not likely to be abandoned, in the jurisdictions in which it now prevails, because of disapproval in Section 281 of the Restatement, the more especially since such abandonment may well be considered socially undesirable.

Recent reaffirmations by the courts of last resort in New York[1] and Ohio[2] of

1. Cullings v. Goetz, 256 N. Y. 287, 176 N. E. 397 (1931), per Cardozo, C. J.
2. Berkowitz v. Winston, 128 Ohio St. 611 (1934).

the old rule (repudiated by Section 357 of the Restatement) that a lessor is not liable in tort to a lessee, or to persons on the premises with the lessee's consent, for personal injuries sustained by reason of a dangerous condition of the premises arising after delivery of possession, although the lessor has covenanted to repair and has been notified of the dangerous condition, may be taken as a fair indication of the tendency of the courts to adhere to doctrines long established in their respective jurisdictions, notwithstanding their disapproval by the Restatement.

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CONSTITUTIONAL LAW OF ENGLAND. By Edward Wavell Ridges. Fifth edition, edited by A. Berriedale Keith. London: Stevens and Sons, Limited. 1934. pp. xlviii, 672.

THIS new edition of an old and valuable textbook meets a real need. The description of the modern organs of the government, executive, legislative, and judicial, as they exist under contemporary conditions, is admirably done. As would be expected from the interests of the present editor, Professor Keith, the volume contains a clear and authoritative discussion of the present organization of the empire, which is not the least significant section of the work.

Combined with this picture of the modern state, there is, as in the older editions, a survey of the historical origins of the various instruments of government, which has also been radically modified in order to incorporate the latest results of research. Herein the editor exhibits wide knowledge of his theme, as his footnotes and the textual modifications demonstrate. So many additions to our knowledge of the constitution have been made during the past generation, however, that it would have been better to have rewritten the historical parts entirely, rather than to endeavor to remodel them. The result of the combination is not always happy, and sometimes gives rise to confusion and inaccuracy. Thus, the statements about the Curia Regis, the Witenagemot, and the Great Council lack clarity. The Commune Concilium, in article 12 of the Great Charter, is called parliament. "Haxey's Case" would hardly be cited today in tracing the evolution of free speech in the House of Commons. The law merchant is not placed in its proper setting in the history of the medieval period; one would gather that it was of little or no importance in the history of the law, and this conclusion is probably due to the fact that the text is primarily concerned with the growth of the royal courts. While the parliamentary privilege of freedom from arrest is derived from ancient customs connected with the Witan, the Curia Regis and the early parliament, there are vital distinctions between them and the principles that were at issue in the 16th and 17th centuries, which are not developed.

Certain underlying theories in the volume do not seem to be quite in harmony with contemporary views. Great emphasis is justly laid upon the "rule of law," as Dicey has developed it. Not sufficient care has been exercised, however, to explain how the recent growth in complexity and in power of the administrative system has profoundly modified the application of Dicey's conclusions to current governmental practice. It also seems unhistorical to suggest that the notion of the rule of law reaches far back into medieval times as a characteristic of the English government, in contrast with continental states. The distinctive features of English practice in this respect only developed in the 16th and 17th centuries when the appeal to custom and to the courts began to protect individual liberty and to exercise a

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check upon the new national organization far more in England than on the continent.

Every one knows that the Tudor and Stuart periods form an age of fundamental constitutional interpretation. In the great dispute under the Stuarts, both parties (king and parliament) bolstered their cases with appeals to precedent; in this, says George Burton Adams, it must be admitted that history was on the side of the king rather than of parliament. But parliament won and became the legal sovereign. Later writers, influenced by emotions aroused by the conflict, often declared that the contentions of the royal party were "illegal" and "unconstitutional"; as indeed they were in the 18th century, but not earlier. Now the tone of the volume in the historical parts often suggests this conventional attitude of an earlier day. Combined with the persistence of these old emotions, is the concept that law is unchanging, and hence that what is now unconstitutional has always been so. This tone is in part also due to the effort to retain the original text of this able work. Is not all this evidence that we need more study of constitutional, and above all of legal history?

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THE THEORY AND PRACTICE OF MODERN TAXATION. By William Raymond Green. Chicago: Commerce Clearing House. 1933. pp. vii, 266.

The author of this book is in a position to speak from a wide experience in tax matters. Before being appointed to his present position as Judge of the United States Court of Claims he served as Chairman of the Ways and Means Committee of the House of Representatives, and Chairman of the Joint Committee of the House and Senate on Taxation. A reading of the book leaves one disappointed that Judge Green did not delve more deeply into his subject in order that we might have the benefit of his experience with the more intricate and difficult problems of tax administration.

The book is a very general summary, pleasingly written, of the principal forms of modern taxation, prefaced by an exceedingly brief discussion (eleven pages) of the tax theories of some of the leading economists. After devoting four pages to a consideration of the incidence of taxation, the author treats of income taxes, profits taxes, customs duties, sales taxes, estate and inheritance taxes, occupation taxes and capital levies. In addition, he finds space for chapters on the British system of taxation, the French system of taxation, and state taxation in the United States. All in two hundred and fifty pages! The author probably never intended the book to be anything more than a panorama painted in very bold strokes, and that is all it is.

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