

# REVIEWS

**MEN AND MEASURES IN THE LAW.** By Arthur T. Vanderbilt, with an introduction by E. Blythe Stason, Dean of the University of Michigan Law School. New York: Alfred A. Knopf, 1949. Pp. xv, 156.

THE material in this interesting little book is the text of five lectures delivered by New Jersey's distinguished Chief Justice on the William W. Cook Foundation at the University of Michigan in 1948. The amount of space filled by their pages is not large; the reading time is not long. But the value of what is said is not in this instance to be measured by the number of words used to say it.

"I can easier teach twenty what were good to be done, than be one of the twenty to follow mine own teaching," says Portia. Whether easy or not, the Chief Justice has been following his own teaching for many years in his active and highly useful career in the law. He has been an eminent and successful practicing lawyer. He has been a law teacher and very active dean in a large and important law school. He has worked in the ranks and has been president of the American Bar Association. He has worked steadily for procedural improvement; a notable instance among many was as Chairman of the Supreme Court's Advisory Committee for the new Federal Rules of Criminal Procedure. He has worked consistently for good government in his own community. And most recently as Chief Justice in New Jersey he has turned his energy and leadership to the improvement of judicial administration in his home state. When, in these lectures, he talks about the lawyer's responsibility for making his profession serve the public interest, he is giving not simply wise admonition to young lawyers, nor yet only his mature standard of values, but also a profession of his own fighting faith.

The chapter headings and subheadings show the scope of the discussion. The writer speaks of law in books, law in action and law in law schools. Another chapter discusses the growth of substantive law, with three star credit for Lord Mansfield. The last two lectures are devoted to "Procedure—The Stumbling Block," a field where Judge Vanderbilt can speak with both enthusiasm and authority. Especially good is the discussion of the appellate function.

Here are some happy phrases found along the way: "The predominance of important judges on a judicial council . . . [is] almost a guarantee that nothing fundamental or substantial [sic] will be accomplished."

As to judges and judicial reform: "A weak judge is always afraid of where he will end up if changes come. . . . The strong judge . . . often enjoys advantages in the status quo that might be disturbed in any orderly remodeling of the judicial system." "It is always easier to enact substantive law affecting people generally than it is to change rules of court, which affect lawyers and judges in particular."

With the objectives which concern Judge Vanderbilt and with what he thinks worth working for, there is little or no disagreement. Many enlightened lawyers share them though few have worked for them so hard as he. But along the way, there are dicta to argue about, as is customary among lawyers.

For instance, do lawyers lack a sense of individual responsibility for leadership in public opinion? The author says so. This reviewer would make the criticism differently to the effect that lawyers too often lead public opinion without adequate knowledge on which to express views, much less argue for them.

Again, how much must the lawyer know and how much of it should the law schools try to teach him? Must he know "both the common law and the civil law on a comparative basis?" Have the law schools "lamentably failed to appreciate their responsibility for the educational qualifications of their students in the way . . . the medical schools have?" It is probably true that "In very few of our law schools . . . is any consideration given to the primary importance of lawyers assuming individual responsibility for party leadership or interesting themselves in local affairs." But should there be, except by example and a general atmosphere recognizing that lawyers have public responsibilities?

Lawyers in both private and public capacities ought to know a great deal. Some of what they need to know can be learned in law school. A foundation for some of it should have been acquired before the student came to law school. Sometimes it is; sometimes not. But education cannot stop with graduation. "All too often," says the author, "the lawyer looks on his license to practice as an official certification that he knows all about the law that he needs to know for a lifetime." Judge Vanderbilt is certainly right in pointing out that this point of view is wrong. I doubt that the law schools can supply the extra learning to make it right. The process of education must be continuous in law as elsewhere. The experience of the joint committee on continuing legal education of the American Law Institute and the American Bar Association is finding, to its great satisfaction, that our profession is rapidly recognizing that fact.

HERBERT F. GOODRICH†

DICEY'S CONFLICT OF LAWS. Sixth edition, under the general editorship of J. H. C. Morris with specialist editors. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd., 1949. Pp. cxxix, 912.

DICEY'S sixth edition of *Conflict of Laws* is out with full standard equipment including Corrigenda, Preface, Table of Foreign Cases, Table of Cases, Table of Statutes, Table of Books, Table of Periodicals, Table of Principles and Rules, Introduction and Index. The book is bound in deluxe fabrikoid

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† Circuit Judge, United States Court of Appeals, Third Circuit.

upholstery, weighs 3 pounds, 7 ounces and sells for 4 pounds, 10 shillings f.o.b. London, or 12 dollars and 60 cents delivered in New Haven (18 dollars pre-devaluation exchange).

This work, predecessor in form to the American Law Institute's Restatement of the Common Law, was originally (1896) prepared as a categorical statement of general rules, followed by explanatory comment and illustrations. The new edition follows the same pattern. Inasmuch as the work is intended to be "essentially a practitioner's book, not a work on theoretical jurisprudence," it is to be presumed that this manner of presentation has found enduring favor with the English bar. "The technique of Rule, Comment and Illustration," says the general editor, "is not one which all of us would have adopted if we had been writing our own book on the Conflict of Laws." That English lawyers react to stimuli of this type much as their American brothers is suggested by the further observation that "the method has the disadvantage that it is sometimes apt to produce a false impression of certainty when authority is scanty or conflicting." Indeed, as Falconbridge has pointed out, the editor admits a "regrettable tendency on the part of [English] judges to treat Dicey's propositions as a final statement, perfect in form and merely subject to be checked or modified here and there" (p. xiv). Nevertheless, the general editor finds that "the method undoubtedly possesses advantages for the practicing lawyer," a statement probably more accurate in reference to Dicey where cases and other authority are cited to support blackletter rules than to the American Restatements.

The new Dicey omits the chapter on British nationality on the adequate grounds that its relation to Conflict of Laws is all but negligible and on the more dubious grounds that the British Nationality Act of 1948 has so complicated the subject that hardly anybody can understand it. The reader also gets the somewhat irrelevant information that for the convenience of practitioners who have been accustomed to find an account of nationality within the pages of Dicey, a treatment of the subject by one of the specialist editors will be published in another book.

Also omitted from this edition are most of the references to American cases because, among other reasons, of the difficulty of keeping up with them "and the consequent risk of referring to cases that no longer represent the law." The book is replete, however, with general references to the standard American works on the subject including those of Story, Beale, Goodrich, Lorenzen and Cook, as well as to the Restatement of Conflict of Laws.

A valuable contribution of the sixth edition is its treatment of the highly important preliminary problems of the Conflict of Laws, most of which, apparently, the collective conscience of the editors would not permit them to reduce to Rule, Comment and Illustration. One will search in vain in the index to the first edition for any reference to renvoi, qualification or characterization, although there is a footnote statement of the case of *Collier v. Rivaz*, 2 Curt. 855 (1841) (p. 77), and a brief discussion of the ambiguity in the phrase "law

of a country" (pp. 5, 6). The fifth edition (1932) contains a somewhat more extended discussion of renvoi in the Appendix and a brief footnote reference to primary characterization (p. 43). Indeed, we have it from the general editor that it was not until 1934 that the problem of characterization was introduced to English Lawyers (p. 62).<sup>1</sup> The sixth edition contains an adequate survey of the learning on these intriguing subjects as well as some critical comments by the editors.

To one familiar with English cases such as *Re Annesley*, [1926] Ch. 692, *Re Ross*, [1930] 1 Ch. 377, *Re Askew*, [1930] 2 Ch. 259, *Re O'Keefe*, [1940] Ch. 124, and *Re Duke of Wellington*, [1947] Ch. 506, it may come as a mild surprise to learn that the law of a given country means "usually the local or domestic law which the courts of that country apply to the decisions of a case to which the Rule refers." And yet, as is correctly pointed out, the total renvoi theory has never been applied by English courts outside the field of succession and personal status. This fact induces the editors to differ from the statements of law contained in the fifth edition (p. 866) and come to the plausible conclusion that "the truth would appear to be that in some situations the doctrine is convenient and promotes justice, and that in other situations the doctrine is inconvenient and ought to be rejected" (p. 56).

The problem of characterization is handled largely by summarizing the views of the principal authors who have written in English on the subject, especially Beckett, Lorenzen, Falconbridge, Cheshire, Robertson and Cook. The editors are reluctant to accept the distinction between primary and secondary characterization (to say nothing of tertiary characterization) and are hospitable neither to the suggestion of solution by reference to the law of the forum nor to characterization by the *lex causae*. Instead, they indicate a preference for Falconbridge's view that the court of the forum should consider the provisions of any potentially applicable laws in their context before definitely selecting the proper law—a principle which, the editors believe, will make the process of characterization "fully flexible." At this point, at least one reader gets the impression of detachment from reality which so frequently accompanies a discussion of theories in a vacuum. There is little or no treatment of the policy considerations concealed in the characterization problem and barely a suggestion of any value-standards by which these policies can be measured. And if it be suggested that the English writers are far less concerned about such matters than American or Continental scholars, it may be questioned that a major work designed as "essentially a practitioner's book" should assume that the English lawyer is content to practice his profession without an understanding of what he is talking about.

Finally, in this connection, there is included in the treatment of these preliminary matters a discussion of the less frequently noted "incidental question" (including those of the second degree), *i.e.* the problem involved where the principal issue is referred by the forum's Conflict of Laws rule to the appro-

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1. By Beckett in THE BRITISH YEAR BOOK OF INTERNATIONAL LAW.

appropriate foreign law but there bob up subsidiary or collateral questions which themselves involve foreign elements. Should the subsidiary or collateral issues be governed by the appropriate Conflict of Laws rule of the forum or by the Conflict of Laws rule of the foreign law which governs the main question? The editors hesitatingly indicate a preference for the Conflict of Laws rule of the forum, quoting Nussbaum<sup>2</sup> for the statement that not a single English, American, or Continental case has been found which so much as discusses the problem of the "incidental question."<sup>3</sup>

In conclusion, it may be said that the sixth edition of Dicey's book, in the main, perpetuates the virtues and the faults of the original work. What Dicey called the "positive method" as distinguished from the "theoretical method" is religiously followed. The many important developments in the Conflict of Laws since the date of the fifth edition (1932), especially as they have affected English law, are reflected. The recent English cases have been collected with painstaking care by J. H. C. Morris<sup>4</sup> and his corps of specialist editors<sup>5</sup> and incorporated with skill into the running documentation. The Rules have been appropriately modified or changed, new exceptions added and corresponding Comment and Illustrations added, deleted or qualified. Dicey's sixth edition, although something less than inspired, is a good job, done in the solid tradition of English legal scholarship and, on the whole, is reasonably well calculated to serve the purpose intended by the original author and the new editors.

FOWLER V. HARPER†

2. PRINCIPLES OF PRIVATE INTERNATIONAL LAW 105 (1943).

3. Here again, the American reader is apt to lose patience with the slavish adherence to the "positive method." The editors express their preference as "more consistent with the approach" adopted by the House of Lords in *Shaw v. Gould*, L.R. 3 H.L. 55 (1868). It does not leap to this reviewer's eye in any persuasive form just why the authors of a major work on a difficult subject, with no examination of the policy factors involved, or indeed with no critical analysis of any kind, should take a position based solely on "the approach" of the House of Lords in a seventy-year old case which is only dubiously in point on a part of the question involved.

4. Of Gray's Inn, Barrister-at-Law; Fellow and Tutor of Magdalen College, Oxford; All Souls Lecturer in Private International Law.

5. The imposing array includes L. Cowen, of Gray's Inn, Barrister-at-Law; Fellow and Tutor of Oriel College, Oxford; Vinerian Law Scholar; R. Cross, Solicitor, Fellow and Tutor of Magdalen College, Oxford; O. Kahn-Freund, of the Middle Temple, Barrister-at-Law; Reader in Law in the University of London; K. Lipstein, Lecturer in Law in the University of Cambridge; C. Parry, of Gray's Inn and the South-Eastern Circuit, Barrister-at-Law; Fellow and Tutor of Downing College, Cambridge; Lecturer in Law in the University of Cambridge; R. S. Welsh, of the Inner Temple, Barrister-at-Law; Advocate of the Supreme Court of South Africa, Vinerian Law Scholar; and B. A. Worthley, of Gray's Inn, Barrister-at-Law; Professor of Jurisprudence and International Law in the University of Manchester.

† Professor of Law, Yale Law School.

THE CASE OF GENERAL YAMASHITA. By A. Frank Reel. Chicago: The University of Chicago Press, 1949. Pp. vi, 324. \$4.00.

THE dissenting opinions in the Supreme Court<sup>1</sup>—the moral indignation of the one and the almost Biblical flavor of the other—publicly record the injustice done to General Yamashita. But Mr. Reel has distilled the drama from this record and has added facts within his personal knowledge which explains some, if not all, the causes for this debasement of American law. In lay language, yet with a lawyer's precision, Mr. Reel has detailed the events from October 1, 1945 when the military commission to try Tomoyuki Yamashita was established, to February 23, 1946, when he was hanged. What happened in these five months—indeed that so much happened so quickly, the arraignment of an enemy general, the preparation of his defense, his trial and conviction, his appeal to the Philippine and United States Supreme Courts—is the measure of war's debilitating effect upon our institutions. And though Mr. Reel's book is quietly and tastefully written, it speaks with the roar of our collective conscience.

Yet in all human affairs some good derives from evil. In its Yamashita decision, for example, the Supreme Court rejected the pernicious argument of the Government that the trial was wholly a political matter, beyond the cognizance of the courts even to the limited extent of the inquiry allowed by the writ of habeas corpus.<sup>2</sup> Nor is this the first time in judicial history that a great principle has been established in a case which did not give it full application.<sup>3</sup>

But the case was creative of a far greater good. The wrongs committed against General Yamashita evoked fine passions. The opinions of Mr. Justice Murphy and Mr. Justice Rutledge are among the most impressive documents we have of devotion to constitutional ideals. No less fine was the devotion of counsel, of whom Mr. Reel was one, appointed to defend General Yamashita. As Mr. Justice Rutledge wrote:

"One basic protection of our system, and only one, petitioner has had. He has been represented by able counsel, officers of the Army he fought. Their difficult assignment has been done with extraordinary fidelity—not only to the accused, but to their high conception of military justice."<sup>4</sup>

That our system of justice invokes such fervor and integrity, both in judge

1. *In re Yamashita*, 327 U.S. 1 (1946).

2. As to the jurisdictional questions involved in the *Yamashita* decision, see Wolfson, *Americans Abroad and Habeas Corpus*, 9 FED. B.J. 142, n.3 (1948).

3. The opinion of Chief Justice Stone has been criticized chiefly for its mysterious and equivocal handling of the constitutional issues. In his defense, it should be said, however, that it is not unusual for a judicial opinion to be elusive in order that a majority may be obtained in its support. Cf. Frankfurter, "*The Administrative Side*" of Chief Justice Hughes, 63 HARV. L. REV. 1 (1949).

4. *In re Yamashita*, 327 U.S. 1, 45 (1946).

and counsel, is perhaps more significant for its future than its occasional lapses, even such a major one as that which Mr. Reel portrays.

Possibly the most dangerous aspect of this particular lapse is that, because of the "unprecedented" nature of the trial,<sup>5</sup> it appears unique and yet is not. For as Mr. Reel states the facts, the defects of the Yamashita trial are not unrelated to complaints often made about military justice. First, and foremost perhaps, there appears to have been interference by a superior officer, General MacArthur, who "urged" haste.<sup>6</sup> Secondly, despite the unusual legal grounding of the proceeding, despite the fact that the charge against Yamashita, failure to control his troops, was ingeniously "legal"<sup>7</sup> and despite the serious problems of law and evidence which confronted it, the military commission consisted of five generals, none of whom was a lawyer or had had legal training. All the major abuses of the trial's procedure—the failure to give the defense adequate time, the admission of obviously improper evidence such as a United States Army propaganda film and "hearsay, once, twice or thrice removed"<sup>8</sup>—are adequately explained by these two facts.<sup>9</sup> But there were, in addition, other gross irregularities and crudities too numerous to catalogue, *e.g.*, the attempt to make the trial into a spectacle with facilities such as klieg lights for cameramen and special seats for "generals and important guests,"<sup>10</sup> the grim and tasteless irony of announcing Yamashita's sentence on December 7th, the refusal of General MacArthur to stay Yamashita's execution pending action by the Supreme Court. These also manifest the dangers of entrusting judicial processes to an organization which, far from sharing legal traditions, is antithetical to them.

Added to the extreme doubtfulness of the defendant's guilt whether considered in terms of the charge or in terms of more orthodox conceptions of personal responsibility, the abuses, major and minor, make a sordid tale indeed. Mr. Reel's final and successful play on our sympathies by his descrip-

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5. *Id.* at 42.

6. P. 85. Throughout the book there are suggestions that General MacArthur's influence on the military commission was extremely important. It is mere understatement to add that the ban on the publication in Japan of Mr. Reel's book underscores these suggestions.

7. See note 9 *infra*.

8. *In re Yamashita*, 327 U.S. 1, 44 (1946).

9. Left unexplained, however, is the form of the charge against Yamashita. The charge was, in essence, that he had failed to control his troops. As Mr. Reel points out, if General Yamashita denied control of his troops, then he was guilty of this charge. If, on the other hand, he admitted control of them, he was guilty of their atrocities on a more orthodox "command responsibility" theory. Thus, one of the questions asked by the prosecutor was "Did you fail to control your troops? Please answer 'Yes' or 'No'!" P. 163.

It is difficult to understand approval of this charge by high American military authorities who surely must have been aware of the reciprocal dangers of such attenuated "command responsibility."

10. P. 27-8.

tion of the personable dignity of the defendant is perhaps only confusing of the issues.<sup>11</sup>

Yet just as there is danger in disassociating Yamashita's trial from military justice in general, there is danger in associating it too closely with war crimes trials, and Mr. Reel, in his last chapter, comes within a hair's breadth of destroying some of the effectiveness of his book by indulging in a discussion, happily short, of the merits of war crimes trials in general. For although he recognizes at least one fundamental difference in the Yamashita and Nuremberg proceedings,<sup>12</sup> by his participation in the "trial by victor" and "ex post facto" debate he almost succeeds in leading his reader astray. The significance of the Yamashita trial is that, even if all the premises of war crimes trials be valid, nevertheless Yamashita was not tried on a just charge nor given a fair trial. Our shame is not that Yamashita was tried according to erroneous legal principles but that we did not adhere to our own accepted and announced standards. That shame will continue until we acknowledge it. "It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of all men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late."<sup>13</sup> Mr. Reel has performed a public service by publishing his book before it became too late.

RICHARD F. WOLFSON†

MAGNA CARTA, 1300-1629. By Faith Thompson. Minneapolis: The University of Minnesota Press, 1948. Pp. x, 410. \$6.50.

THE barristers, Hallam, Brougham, and May, began the writing of English constitutional history, but it was Froude with his love of statutes and Stubbs with his worship of charters who really put the law into England's histories. In 1855, the year before Froude published his dramatic story of the Tudor Reformation, he advocated the teaching of history from the statute book. Statutes, he declared, were "the contemporary judgments of the sober minds

11. Compare *Homma v. Patterson*, 327 U.S. 759 (1946).

12. "In the Nuremberg trials three types of crime were alleged: first, offenses against the peace, conspiring and planning and undertaking to wage a war of aggression; second, offenses on racial religious grounds, covering pre-war years as well as wartime; third, offenses against persons and property in the conduct of the war, in violation of the laws of war. Only those Nuremberg defendants who were charged within the third category can be compared to General Yamashita. And it is interesting to note that in the Nuremberg indictments great care was taken to allege that these particular prisoners 'authorized, directed, or participated in' the actual crimes. Nowhere in the record of the Nuremberg trials can there be found the cavalier disregard of that touchstone of our criminal law—the element of personal culpability—that signalize the Yamashita case." P. 242.

13. Mr. Justice Rutledge, dissenting in *In re Yamashita*, 327 U.S. 1, 41-2 (1946).

† Member of the New York Bar; Guggenheim Fellow, 1949-1950.



of England." They were the considered conclusions of wise statesmen and lawyers in Henry VIII's High Court of Parliament, and Parliament's many acts served as a skeleton to articulate Froude's galloping narrative. For students of both law and history, Stubbs prepared his *Select Charters* in 1870, and this little book still remains a text at Oxford. Then came a generation of lawyer-historians—Maitland, whose genius made legal history a part of England's literature, Vinogradoff, Pollock and G. J. Turner—whose works assured to the law a place forevermore in English history. By putting the law into history, the lawyers added an irreducible minimum of solid substance—solid because the legal arrangements which order society at any given time are both significant to contemporaries and of consequence to posterity. Long after the departure of England's kings and captains, England's laws remained to work their effects upon the body politic.

Furthermore, the lawyers also equipped historians with many of their scholarly techniques. The gathering of evidence, its verification and evaluation, recourse to legal records, the citation of authorities, and the summing up of conclusions have become part of the historian's method. So brilliant was the golden age of English constitutional history (1870–1920) that ordinary text books still retain a legal cast. Medieval history, especially, is riddled with law and custom. Even American students read about Henry II's possessory assizes, Edward I's statutes of mortmain and quia emptores, Henry VIII's statutes of uses and proclamations, to say nothing of the Bill of Rights and Magna Carta.

The story of what Magna Carta meant to men after 1300, and of the uses to which they turned it, is the theme of Miss Thompson's book. In 1925, she published the history of the Charter's first hundred years, and now the sequel carries the tale on to 1629, the year after Coke completed his *Second Institute* with commentary on Magna Carta. Hers is a history of an idea, a slogan, as well as of a bundle of laws many of which were obsolete before even Coke began to write. But the basic legal principles are not yet dead, and they still fashion the form and spirit of England's common law, public and private. Miss Thompson tells of the various kinds of men—pleaders and judges, councillors and parliamentarians, churchmen and Londoners, readers and students at the Inns of Court, printers and chroniclers—all of whom talked and wrote about the Great Charter. Although they abused, as well as used, the blessed document to serve their ends, such men, Miss Thompson explains, not only created the "myth of Magna Carta," but they were also "the real 'makers of the English constitution.'" For after all, they kept living the principles, notably sanctity of contract and due process of law, implicit in the rules laid down at Runnymede.

Professor Thompson lets these later men speak for themselves. Hence her volume is replete with quotations from the writings they left behind, supplemented by recent scholars' interpretations of their meanings. Here, perhaps, the dread and fear of inadequate proof has driven Miss Thompson to

reinforce the original evidence and her own cautious deductions therefrom with whole paragraphs from modern authorities. Her assiduity in garnering what men wrote about the Charter fulfills the lawyer's cry for evidence. But the sum total seems noteworthy more for completeness than for selectivity. A finer evaluation of the effects which the various views on the charter had for both contemporaries and posterity might have pointed up the genuine value and importance of Miss Thompson's findings.

The passion for completeness and thoroughness reflects the cult which historians between the Wars made of exhausting, multi-archival research. Few scholars have realized more completely or more literally than Miss Thompson the ideal of the actualist school of history: to tell in all its fullness and detail what men actually did and said. She has, perhaps, carried the lawyer's method to an all-too-logical conclusion in attaching to the glosses on the Charter recent writers' glosses on the glossators—McIlwaine on Prynne on Coke on c. 40 of Magna Carta. Ruled cases in which the Charter was cited are described and expounded with excerpts from readings at the Inns of Court, or from contemporary treatises or those by modern lawyers from Blackstone to Holdsworth and Plucknett. The reprinting of so many and such long quotations from readily available books requires the reader's close attention to make sure just whose words he is taking in. This task is facilitated, however, by the superb typography of the University of Minnesota Press.

The product is a compendium, more than an analysis, of commentary on the Charter, and it offers many a shortcut to much legal data. A full array of footnotes, appendices, and an all-inclusive bibliography will be a boon to scholars seeking material about any aspect of the law remotely connected with Magna Carta. But they must be careful in referring to chapters of the Charter, for Miss Thompson uses the chapter numbers (1-37) of Henry III's 1225 charter instead of the 63 in John's which historians normally follow. This departure from the conventional numeration is justified since the text of 1225 was that used by medieval men; but besides the disappointment in finding the sacred c. 39 designated c. 29, this usage may lead hurried scholars to unhappy errors. Here, perhaps, the sacrifice of utility and convenience seems too high a price to pay for historical consistency.

The lawyers' device of summing up in either an introduction or conclusion is one good habit Miss Thompson neglects. At the end, she might have summarized the significance and the consequences of the uses to which men put the charter. Instead, she is content to "confess to having enjoyed the tale more than the moral," the men "more than the theories they propounded." If lawyers want to learn about the theories, and historians about the moral, all the evidence is in and they may judge for themselves. But none of them is likely to know so much about both as does Miss Thompson, and her excessive modesty in setting forth so few of her own interpretations is to be regretted. Her conclusion that even Tudor lawyers did not forget Magna Carta, as has

been inferred from Shakespeare's failure to cite it in King John, may help to scotch that myth. But her rehabilitation of the Tudors is only relative, for she makes it clear that the Jacobean scholar-politicians, Coke, Selden, Prynne and the rest, were the ones who salvaged the charter and recreated it for future generations. To them we owe Magna Carta in modern dress—the myths about it—for they used old law, and bad, to make new history.

WILLIAM H. DUNHAM, JR.†

THE JEWISH YEARBOOK OF INTERNATIONAL LAW 1948. Edited by N. Feinberg and J. Stoyanovsky. Jerusalem: Rubin Mass, Publisher, 1949. Pp. xv, 304. \$8.00.

THE State of Israel is twice-born: once in law and once in battle. Israel's combined reliance on right and might has led to some curious contrast. During the war, law books were used as barricades. Today the Supreme Court of Israel carries on business under the guns of the Arab Legion less than five hundred yards away. The printing of the present volume, which concerns various subjects of international law which are of particular Jewish interest, was itself delayed some nine or ten months due to violence and war.<sup>1</sup> But its very appearance is evidence that Israel can now cast its lot with formalized law.

To those who fought for the Jewish State, international law must have seemed a mockery. The solemn Mandate of the League of Nations was of small moment to the British Mandatory.<sup>2</sup> And the Partition Resolution of the United Nations' General Assembly didn't seem any more effective. The cold fact is that Israel would not now exist had her people not resisted the laws of many countries: they immigrated illegally; they smuggled and stole arms; and then they won an all-out war.

Despite this, the Jewish people have long been a considerable force in the shaping of international law and international relations. They were often in the forefront of the trade which led to international commercial law. As an unpopular minority, they relied for protection—often unsuccessfully—on the law and order of the countries of their residence. Moreover, the Zionist movement has always claimed its basis in international justice. Finally, the plight of the Jews has led to two high points of United Nations achievement: the Declaration of Human Rights and the Genocide Convention.

Today Israel's outlook is international. Israel is made up of heterogeneous elements from all over the globe. The new nation is much indebted for moral

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† George Burton Adams Professor of History, Yale University.

1. P. vi.

2. For a persuasive demonstration of this point see Stoyanovsky, *Law and Policy Under the Palestine Mandate*, p. 42.

and material support from many places. Perhaps more important, it requires this support for the future.

Accordingly, despite its current opposition to the United Nations' desire to internationalize Jerusalem, Israel has chosen to rely primarily on the nebulous processes of international justice rather than on force of arms. Her impressive Declaration of Independence is addressed to rights which have long been recognized among other nations. When Israel triumphed at war it was felt that she could win her way to the Jordan, and even beyond. But the nation's leaders held back despite vigorous criticism from the militarists who could claim a vital part in the success of the new State. In the country's first general election, on January 25, 1949, the party representing the expansionist viewpoint polled only about 11% of the votes. And even this party is coming to feel that the choice has been made.

Emphasis on international law generally follows from a firm basis in internal law. Israel, at least, inherits from the period of the Mandate a crystallized set of laws in a system of jurisprudence much like our own. Nevertheless, many vexing problems of internal law and government will inevitably arise. And the present Israel Supreme Court of Appeals and High Court of Justice—even with its ranks augmented by two temporary members—is already heavily burdened. Israel's Draft Constitution was to be submitted to the parliament (Knesset) elected in January, 1949. But, partly for reasons of political strategy, the Government has not yet brought the Constitution up for approval. If anything like the Draft Constitution is adopted, the Court will have to pass on such major matters as the constitutionality of legislation and the workings of government.

In these circumstances, any advancement of legal scholarship does an important service. Thus the appearance of *The Jewish Yearbook of International Law* is a significant event. The *Yearbook* is a collection of materials, "some of which deal with various questions arising out of the Palestine Mandate, while others relate to more general questions which present certain specifically Jewish aspects or in which the Jewish people as a whole has a particular interest."<sup>3</sup> But two included documents, the Declaration of Human Rights<sup>4</sup> and the Genocide Convention,<sup>5</sup> which satisfy these criteria, are important to all people in all countries and not just to the Jewish people. Moreover, of universal importance, Israel serves as a testing ground for the United Nations. The editors of the *Yearbook* deplore the weakness of the United Nations in dealing with the Palestine issue after the Partition Resolution.<sup>6</sup> Nevertheless, as one article demonstrates,<sup>7</sup> the member nations worked out a solution which they brought at least to the blueprint stage. The value of the United Nations' prestige and services after that point is a subject of debate.

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3. P. v.

4. P. 293.

5. P. 300.

6. Pp. x-xi.

7. Akzin, *The United Nations and Palestine*, p. 87.

The General Assembly's treatment of the Jerusalem question has stirred up much controversy. But outside of Israel military circles, even those who are disappointed in the performance of the international organization concede that it played an important part in the creation of Israel.

Most of the ten articles and five notes in the *Yearbook* are concerned with matters of less universal interest. We find, among others, an article on *The Recognition of the Jewish People in International Law*.<sup>8</sup> The article traces international recognition from the time of earliest humanitarian intervention until treatment first as a Nation, and now as a State. In the same vein is an article dealing with the international protection of minorities, and, more recently, positive promotion of human rights.<sup>9</sup> Unfortunately the article was written before adoption of the Declaration of Human Rights. A description of the International Refugee Organization<sup>10</sup> was also written too early for maximum usefulness. But the timeliness and caliber of the final four articles<sup>11</sup> is not diminished by the delay in publication.

The format is similar to that of *The American Journal of International Law* or *The British Year Book of International Law*. The common thread is the concern with questions of international law in which the Jewish people have a particular interest. Except for this theme, however, the first volume of *The Jewish Yearbook of International Law* is a disconnected collection of meritorious pieces by prominent authorities. But they are pieces which might never have been printed elsewhere. It is fortunate, therefore, that a forum has been provided for exploration of the many important developments in international law in which Israel and the Jewish people have played an important role. Moreover, the early appearance of this volume demonstrates the solicitude for international law typical of the infant State. For these two reasons, Doctors Feinberg and Stoyanovsky have taken an important step by editing the *Yearbook*.

ARTHUR M. MICHAELSON†

8. P. 1, by Nathan Feinberg.

9. J. Robinson, *From Protection of Minorities to Promotion of Human Rights*, p. 115.

10. Bentwich, *The International Refugee Organization of the United Nations*, p. 152.

11. Lauterpacht, *The Nationality of Denationalized Persons*, p. 164; N. Robinson, *Reparation and Restitution in International Law as Affecting Jews*, p. 186; Goldstein, *Crimes Against Humanity—Some Jewish Aspects*, p. 206; Kelsen, *Collective and Individual Responsibility for Acts of State in International Law*, p. 226.

† Editorial Board, YALE LAW JOURNAL.