UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 24 | Number 3 Article 4

4-1-1946

Book Reviews

North Carolina Law Review

BOOK REVIEWS

Legal Theory. By W. Friedmann. London: Stevens and Sons, Law Publishers; in Canada and the U. S. A.: The Carswell Co., Toronto. Pp. 448. 1944. One pound and ten shilling.

This work by the Quain Lecturer in Laws at University College, London, is the best of its kind in the English language. The standard texts on jurisprudence by Austin, Holland and Salmond were of excellent service to generations of students in Britain and in the United States, but the world in which we live in is so different from the world in which those classics were written that an entirely new approach is needed if the study of legal theory and jurisprudence is to remain vital and significant. In the United States, the need for a solid treatise in this field is no less acute. The best American legal theory is to be found in the judicial opinions and juridical writers of Holmes, Brandeis and Cardozo—to mention but the recent period. Since the systematic studies of Dean Pound there has been a relative dearth of first-rate works on legal theory and jurisprudence in the United States, and while Dean Pound's ideas were trail-blazing a generation ago, they have tended to become static and conservative in terms of the middle of the twentieth century.

Dr. Friedmann has the unusual advantage of knowing intimately the inner workings of the Civil Law countries as well as of the Common Law. His volume, unlike that of any of his predecessors in this field, is thus unique in that it combines the sharp analytical and philosophical training of the Continental jurist with the urbane common sense of the Common Law and of those who are at home in it. If the great and standard classics on jurisprudence, written in Britain or the United States, have usually suffered from a certain philosophical naïveté, Continental treatises on jurisprudnece have justly been charged with being too formalistic and devoid of genuine value to the student and practitioner of the law. Dr. Friedmann has avoided writing a treatise on legal theory by constructing a sky-scraper of legal metaphysics on the foundation of flimsy hypothesis or logical principle, and has also managed to avoid the pitfall of presenting a jungle of facts which no ray of philosophical illumination can penetrate. His style does not possess, perhaps, the brilliance and felicity of a Maitland or Pound or Kelsen, and tends to be rather matter-of-fact and straightforward. But it is always clear, readable, and stimulating. Every page of the work is rich in provocative ideas, and if any reader of the book can lay it aside with-

out having felt a sensation of having gone through a rare intellectual experience, the fault will not be the author's.

In the first part of the treatise, which forms its introduction, Dr. Friedmann discusses the place of legal theory in relation to philosophy and political theory, and then gives a list of the principal antinomies in legal theory. As according to the author legal theory "stands between philosophy and political theory," it is dominated by the same antinomies. The principal of such antinomies are individual and universe, voluntarism and objective knowledge, intellect and instinct, stability and change, positivism and idealism, collectivism and individualism, democracy and autocracy, and nationalism and internationalism. The analysis of these antinomies in legal theory and their philosophical foundation is, in itself, a useful and brief guide to the main trends in philosophy that the philosophically uninitiated reader will find most helpful in following the subsequent arguments of the work. Dr. Friedmann frankly avows that his approach to legal theory is akin to that of philosophical relativists like Radbruch and Max Weber, a position which is rather similar, in its refusal to accept absolutes and finalities, to the predominant Anglo-American schools of legal thought. Dr. Friedmann summarizes this position in the words "Ultimate values must be believed, they cannot be proved" (p. v).

In Part II, the author gives a fairly detailed account of natural law theories and their "search for absolute justice." There is no social rule or institution that has not been either attacked or defended on the basis of natural law, and the only constant element in natural law throughout its evolution has been the change of meaning that it assumed under changing social circumstances. Dr. Friedmann does not repeat the error of extreme positivists of ridiculing the idea of natural law and branding it as rank ideology and thinly veiled hypocrisy. As he sees it, the most important and lasting theories of natural law have been inspired by two ideas which have materially enriched the stock of human civilization: the idea of a universal order governing all men, and the idea of inalienable rights of the individual. In this sense, natural law principles are not mere fancy, but, frequently at least, anticipations of positive law. Thus, the natural law principles of Locke and Paine became positive law by being included into the Constitution of the United States. As to the problem of a legal order for the whole world, Dr. Friedmann comments as follows: "If and when the whole of mankind becomes legally organized, certain principles described by Grotius and others as natural law, and to-day described by more modest names such as 'general principles of law,' will become the foundation of the highest positive law emanating from the international sovereign" (p. 20).

Part III of the book (pp. 63-116) presents, first, a discussion of German transcendental idealism, and, then, of scientific idealism. This section of the treatise will prove very heavy going to most readers. This is due to the complexity and obscurity of the material covered rather than to obscure expression of the ideas involved. In particular, the reader is advised to peruse the analysis of Hegel's legal philosophy as carefully as possible, because his influence has been enormous not only in his own country, but also in other countries, including England and the United States. The discussion of the neo-Kantian legal philosophies does not come up to that of Hegel and the neo-Hegelians. In particular, it would seem that Kelsen's contribution to legal thought is not adequately grasped by Dr. Friedmann. Important as this part of the treatise is, this reviewer does not hesitate to advise prospective readers that this rather heavy discussion of philosophical and metaphysical problems is not essential to the main argument of the work, and might conceivably be omitted in the first reading.

Part IV (pp. 117-226) scrutinizes the "impact of modern social developments on legal thought." Dr. Friedmann examines the leading schools of legal theory in France and Germany as well as in England and the United States in the last three or four generations. In each instance, he is anxious to demonstrate that legal thought is not the product of speculation in a social vacuum, but the result of dynamic social forces and changes that find expression in varying juridical ideas and ideals. The American realists are sympathetically presented as are the main ideas of Holmes, Pound and Cardozo. The author manages to show how the basic propositions of the realists are related to cognate conceptions emerging in Europe somewhat earlier, both in France and in Austria and Germany, and thus he dampens somewhat the enthusiasm of those uncritical adherents of the realist school who saw in it an unprecedented and revolutionary break with traditional legal thinking.

Part V (pp. 227-249) deals with modern political movements and their legal ideas and concepts. In it, Dr. Friedmann examines first socialist legal thinking, as it can be deduced from the works of Marx, Engels, Renner (the president of Austria as this is written), Menger, and Soviet jurists like Pashukanis. Next, Dr. Friedmann analyzes the legal theories of Fascism and National Socialism. Those who still hold that Nazism was the work of one or several devils, with the masses of the German people playing the part of innocent by-standers, will be amazed by the long heritage in German thought that characterizes the leading tenets of Nazi legal ideas and institutions. The author earns our special gratitude by mentioning the contribution of Dr. Carl Schmitt to the Nazi conceptions of law and justice. He was one of the most

gifted German thinkers of his generation, his brilliance being matched only by his complete lack of character and good faith. In 1919, Schmitt was a near-Communist. In rapid successoin, he then became a Social Democrat, Liberal, Conservative Catholic, Nationalist, until he embraced, in 1933, the ideology of Nazism. When the Nazis were in need of a legal theory under which contracts and statutory rights and obligations could be violated under the pretext of a new, and superior, principle, Carl Schmitt formulated the theory of "concrete order thinking" *(konkretes Ordnungsdenken)* which replaced "legalistic" thinking as it had prevailed in pre-Nazi Germany. When German imperialism prepared for the enslavement of the world before 1939, Professor Schmitt obligingly helped out with a new theory of "great space order of international law" *(voelkerrechtliche Grossraumordnung)*.

Part VI (pp. 250-384) is, in many ways, the most interesting of the whole work. Here, Dr. Friedmann comes to grips wtih some of the fundamental modern conceptions that have molded the Common Law, especially in England. Public policy, social security, freedom of trade, corporate personality—these are but a few issues that the author treats in this section of the book. A wealth of interesting cases is cited by Dr. Friedmann at every step of his discussion. Since his work was published, England has, in the meantime, voted the Labour Party into office, thus expressing a change or, at least, acceleration of ideas not sufficiently noticed abroad. The American lawyer and law student will find this part of the treatise indispensable to an understanding of legal developments as they are likely to occur eventually, perhaps fairly soon, in the United States, too. The hotly debated issue of administrative law will command particular attention from American readers.

The seventh (and last) part of the work (pp. 385-441) deals with "legal theory and some problems of our time." The two most interesting topics discussed are the problem of state sovereignty and what the author calls "legal values of modern democracy." Dr. Friedmann published in 1943 a first-rate book on *The Crisis of the National State* in which he took a position on the issue of national sovereignty which is being gradually accepted by more and more people now that the terror of world suicide and world destruction by atomic energy has struck deep into all of us. In his final discussion of the legal values of democracy, the author emphasizes the intimate relationship of democracy with the Rule of Law. Both depend, for their very existence, on each other.

In the opinion of this reviewer, *Legal Theory* marks a milestone in the jurisprudential literature in the English language. Dr. Friedmann combines encyclopaedic knowledge with analytical subtlety, and he has the ability of raising the world of law from the level of craftsmanship

to that of art and philosophy. The wide range of his interests is indicated by the topics cited in this review, and only a limited selection could be presented here for reasons of space. If practicing lawyers look for a treatise on jurisprudence that is practical enough to be of professional interest, and stimulating and delightful enough to be read with sheer pleasure, if law schools look for a suitable text on jurisprudence that will help to train better lawyers and better educated citizens —here is the book.

WILLIAM EBENSTEIN.

University of Wisconsin,
Department of Political Science.

Full Faith and Credit, the Lawyer's Clause of the Constitution. By Mr. Justice Jackson. New York: Columbia University Press. 1945. Pp. 60. $1.00.

It is not often that the legal profession is favored with an "off the record" opinion by a member of the United States Supreme Court as to what that court should do with a vital clause of the Constitution. That privilege is given to the bar in this little book[1] by Mr. Justice Jackson.

After giving an historical review of the manner in which the full faith and credit clause became a part of the Constitution and after considering the statutes supplementing it, as well as the Supreme Court decisions construing it, Mr. Justice Jackson urges lawyers not to permit this, what to him is the "lawyer's clause" of the Constitution, to become the "orphan clause."[2] The Justice finds that the clause has not received its due in legal literature or in the law school curriculum, that it has been neglected by lawyers and overlooked by judges who "not infrequently decide cases to which it would apply without mention of it."[3] This tendency he states has developed as a result of lawyers arguing cases and courts deciding them on the basis of the common law of conflict of laws. A generous application of foreign law under conflicts rules has forestalled pursuit of many questions as constitutional ones under the full faith and credit clause.

The Justice tells us that most of the litigation concerning the full faith and credit clause has related to the *res judicata* effect to be given judgments of a sister state. In that field he finds a substantial body of law which he concludes does not depart essentially from the principles of the clause. Assuming the court of the forum is in accord with the juris-

[1] The book is a recording of the fourth annual Benjamin N. Cardozo Lecture delivered by the Justice before the Assocation of the Bar of the City of New York, December 7, 1944.
[2] P. 60.
[3] P. 4.

dictional finding of the court rendering the judgment the full faith and credit clause has resulted in the enforcement of the foreign judgment even though the original suit was based on a cause of action contrary to the public policy of the forum. But, he says, the full faith and credit clause was not intended to apply to judgments alone. Certainly full faith and credit must be given to the statutes of the sister state and the Justice concludes the decisional law of a state is in equal standing with the statutory law under the full faith and credit clause. Decisional law should be entitled to full faith and credit not only as *res judicata* of the particular rights controverted but should be given the same full faith and credit as the statutory law of the state for "what is entitled in proper cases to credit is the law of a state by whatever source declared."[4]

Mr. Justice Jackson is concerned that a Mr. Green's estate might be taxed upon his death by several states claiming domicile; that a Mr. Williams may be validly divorced in Nevada but guilty of bigamy in North Carolina; that California may apply its own Workmen's Compensation law to an employee injured in Alaska whose territorial statutes say the injured employee's sole remedy shall be under the local compensation laws. He is far from convinced that the federal courts are powerless to relieve the harassed taxpayer. He questions the policy of determining which of two conflicting divorce decrees is to prevail on the basis of "state interests" and he likewise doubts the soundness of choosing one of two workmen's compensation statutes "by appraising the governmental interests of each jurisdiction and turning the scale of decision according to their weights."[5]

Mr. Justice Jackson urges that the proper approach to these troublesome problems is to bear in mind that the policy ultimately to be served in applying the full faith and credit clause is the "federal policy of a 'more perfect union' of our legal systems. No local interest and no balance of local interest can rise above this consideration."[6] The ultimate answer to Mr. Justice Jackson is not a balancing of state interests but a consideration of "state relations to each other and to the federal system."[7] Even when the conflict of decisions proceeds on conflicting findings of fact, as for example domicile, he contends that there is a "federal interest distinct from that of either state."[8] This being so he suggests that the United States Supreme Court when interpreting the full faith and credit clause should sustain the decision of that state court which conforms with the federal interest and should reverse the decision of a state court which does not so conform. The Constitution,

[4] P. 20.
[5] P. 27.
[6] P. 47.
[7] P. 50.
[8] P. 50.

he says, is not concerned with whether Mr. Williams or Mr. Green are domiciled in state A or state B, but he declares, "I do think that the federal interest is concerned that a Mr. Williams and a Mr. Green have some place in our federal system where they really belong for fixing their legal status and determining by whom they shall be governed."[9]

In concluding Mr. Justice Jackson warns that "any hope we may have for a truly national system of justice"[10] which would eliminate the absurdities of the taxation, divorce and other cases is in the application of the full faith and credit clause in such a way as to protect the federal interest of a more perfect union.

The book points out a possible exit from the morass and confusion in which we now find ourselves. Coming from a member of the nation's highest court it has far more than usual significance for, unlike the ordinary case, here is an instance where the means of relief have been suggested by a person not only competent but in a position to apply his own remedies. Whether Mr. Justice Jackson's views are shared in by any other members of the court we are not advised, but it is not too much to hope that such is the case and that in the not too distant future the "federal policy of a 'more perfect union' of our legal systems"[11] will find expression in the opinions of the Supreme Court.

HERBERT R. BAER.

University of North Carolina Law School,
Chapel Hill, N. C.

Labor Policy of the Federal Government. By Harold W. Metz. Washington, D. C.: The Brookings Institution. 1945. Pp. ix, 284. $2.50.

The national government operates in the field of labor under many unrelated laws, shaped by diverse forces, enacted at different times to attain various objectives, and administered by agencies independent of each other. The author, whose words I am paraphrasing,[1] attempts a systematic study of these governmental activities "on a subject matter basis, not on the basis of the individual statutes or agencies involved." After a brief historical survey, he considers in successive chapters what the national government is doing about concerted action of employees (the right to organize, strikes, etc.), collective bargaining and the collective agreement, union organization, the labor market, union preference (closed shop, etc.), wages, hours and child labor and safety, and the settlement of labor disputes. A concluding chapter summarizes

[9] P. 51.
[10] P. 60.
[11] P. 47.

[1] Introduction, pp. 1 ff., especially 3 and 4.

"major trends." The author's "major interest" is not descriptive. And he asserts that he is not concerned with the desirability of governmental policies or the effectiveness of means toward ends. His purpose is to find out whether governmental activities in the labor field "supplement one another, or whether inconsistent objectives are being pursued." Administrative machinery is given only incidental treatment; but the author seeks to discover and base his conclusions upon "what agencies actually do, not merely what they say they do." All this in 284 pages!

A collation and accurate summary, for each of the topics treated, of relevant laws and decisions, would be extremely useful to legislators, governmental officials, lawyers, businessmen, workers and union officials, professors, and students. Demonstrations that what agencies do differs from what they say they do (and that the reasons they give differ from their real reasons for their actions) would enhance its value. If the author supplied all this to us (could he, when he treats administrative machinery but incidentally?), we could check his judgments about the consistency of governmental objectives. Even if we disagreed, we should be grateful for the study upon which these judgments were based.

No such gratitude is due the author. The book is superficial and inaccurate. It abounds in value judgments disguised as statements of fact. Most of its statements are doubtless accurate and not "editorialized news"; but so many are either inaccurate or editorialized or both that all are suspect. Because there is great need for such a study as this purports to be, the book will probably be read widely; unsound judgments about governmental activities and policies will be the result.[2]

The author's most egregious blunder occurs at page 146. The point is an important one—whether or not the National Labor Relations Board compels employers to grant closed shops. The author says it does. He cites, in support of his statement, a Board decision, the most cursory reading of which would reveal that it holds just the opposite. The book:

Although the act appears only to make closed-shop agreements permissible, the Board has taken a different view. In some cases it has held that an employer failed to bargain collectively where he refused to grant a closed shop when the union requested it.

The Board decision, *International Filter Co.*, 1 NLRB 489, 499:

The respondent's position that meeting with union representatives *ipso*

[2] The Falk Foundation granted the funds which made possible the study. The Brookings Institution, in publishing the book, doubtless relied upon the fact that a co-operating committee composed of Lewis Meriam, Meyer Jacobstein, and E. G. Nourse assisted the author and upon the fact that "the manuscript had the benefit of a careful reading by Professor William M. Leiserson of Johns Hopkins University."

facto draws it into a closed shop agreement is too specious to merit serious consideration. Our experience has been that the cry of "closed shop" is constantly being raised by employers who seek an excuse to evade their duty to bargain collectively under the Act and to obstruct and deny the right of employees to do so. There is not an iota of evidence that the union representatives in this case proposed a closed shop as part of an agreement. The respondent never permitted the chosen representatives of its machinist employees an opportunity to propose anything. The Act requires that the employer bargain collectively with the representatives of his employees by entering into negotiations with them in good faith with the *bona fide* purpose of making an agreement concerning rates of pay, wages, hours of employment and other conditions of employment. An unfounded apprehension that employees may demand a closed shop is no excuse for a flat refusal to bargain collectively.

The Board's holding, it bears repeating, was that "An unfounded apprehension that employees may demand a closed shop is no excuse for a flat refusal to bargain." And this is not a case discovered by the reviewer and cited by him to refute the author; it is the very case cited by the author as authority for his statement that the Board does not merely view a closed-shop agreement as permissible, it *requires* employers to make such agreements.

This blunder does not stop here. On page 72 it appears in changed form: "On a number of occasions the Board has held that an employer's refusal to grant a closed shop demonstrated his bad faith." To support this, the author quotes, out of context and with obviously misleading effect upon the uninitiated, the second sentence of the passage I have quoted from the *International Filter* case: "Our [the Board's] experience has been that the cry of 'closed shop' is constantly being raised by employers who seek an excuse to evade their duty to bargain collectively under the act and to obstruct and deny the right of employees to do so." Contrast the implications of this in its new context on page 72, shortly after the sentence quoted at the start of this paragraph, with its meaning when read in its original context, the excerpt quoted above from the *Filter* case![3]

Other cases are miscited (I shall not take time to demonstrate the errors) and the blunder is blown up so that it involves clauses, in col-

[3] There is but one intervening sentence in the text on page 72: "Thus it [the Board] has said that his refusal to grant a closed shop did 'not evidence a serious attempt upon the part of the respondent to come to an agreement with the union.'" This purports to be a quotation from the Board's decision in the *Jackson Daily News* case, 9 NLRB 120, 128. Actually the quoted part of the Board's sentence had a subject very different from that which the author gives it. The incompletely paraphrased first part of the Board's sentence actually is: "The respondent's actions throughout the negotiations, particularly the refusal to meet with a committee of the employees, *and the refusal even to discuss a closed-shop contract* do not evidence," etc. (Emphasis supplied.)

lective agreements, about matters other than closed shops. At page 82, under the heading Conclusions, the following occurs:

According to the National Labor Relations Board, the test of whether the employer bargained collectively is: Did the process of bargaining actually result in a collective agreement? If it did not, then the Board attempts to discover whether the employer failed to grant desirable demands of the workers or whether he demanded the inclusion of undesirable provisions in the agreement. If the employer did either of these things, he is assumed to have refused to bargain. This approach tacitly involves the possibility of compulsory arbitration, whereas the National War Labor Board frankly engages in compulsory arbitration.

So, the WLB is frank, the NLRB is devious! This, if only it were not all untrue, would be a fulfillment by the author of his promise (p. 3) to discover "what agencies actually do, not merely what they say they do."

Large portions of the chapters dealing with concerted action, collective bargaining, and union organization consist of one-sentence digests of NLRB decisions. Interspersed are explicit and implicit condemnations of the Board. It allegedly (the cases cited do not prove the allegations) "chisels" on Supreme Court rulings: "The Supreme Court has held that this practice of the Board is improper [the *Sands Mfg. Co.* case, 306 U. S. 332, is cited], but nevertheless the Board has continued to follow it" (p. 39). "These decisions of the Court [the *Virginia Electric and Power Co.* cases, 314 U. S. 469 and 319 U. S. 533] have only a limited significance, since the Board is generally able to find the existence of coercion by considering employer utterances in connection with his other actions" (p. 36).

The author reads the Wagner Act inexpertly. He castigates the Board for disagreeing with him about its interpretation without troubling to check whether the courts agree with the Board. At page 37 these remarkable statements appear:

The act obviously prohibits actual employer domination of a union, but the Board even considers that an unsuccessful attempt at domination is an unfair practice. . . . The act on its face prohibits only an actual domination of a union by an employer. But the Board has interpreted this provision to constitute a prohibition against any attempted interference with the right to organize.

Fortunately, in this instance, the reader can judge for himself; Section 7 and the first three subdivisions of Section 8 are set forth on page 33. Another illustration, from page 38: According to the Board, Section 8(3)

forbids the employer to affect or change an employment relationship because of the employee's union membership or activity.

This, the author thinks, is outrageous. The Board should require proof, not that discrimination in hiring or firing was intended to encourage or discourage union membership, but that it actually had that effect. Moreover, the Board should not "assume the existence of the intent to discriminate" when it "finds that any action was taken by the employer on the basis of union membership." (It should not assume X when X is proved?) The author believes that

> Such an interpretation certainly makes the prohibition much broader in actual application than the words of the statute seem to warrant.

Sometimes the author misleads uninformed readers by withholding for many pages a qualification he knows must be made of an over-broad statement. At page 40, the right to strike is said to include the "right to return to work if and when" the strikers "so desire." That this is not true of so-called economic strikes and is true only of strikes caused or prolonged by an unfair labor practice of the employer is not disclosed until page 49.

The author's statement (p. 54) of the *Meadowmoor Dairies* case, 312 U. S. 287, in which it was held that peaceful picketing could constitutionally be enjoined when past picketing had been enmeshed with violence, is:

> Where force and violence are a part of a labor dispute, a state may permit its courts to enjoin picketing that contributes to such violence. Though violence has occurred as a consequence of picketing, peaceful picketing cannot be forbidden.

Does the author think that the case stands for the opposite of what it holds? Or has he merely stated its holding ambiguously? The uninformed reader, I suspect, will be misinformed, in either case.

During the war, the War Labor Board successfully resisted judicial review of its decisions by contending that they were unenforceable.[4] Our author, at page 62, makes the uninformed reader think that the court's so holding grieved and perhaps chastened the Board:

> The Board takes the attitude that its decisions constitute binding directives that the employer must obey. The Court of Appeals of the District of Columbia has held that its decisions are unenforceable and constitute only advice.

Minor inaccuracies mar the book's treatment of the Fair Labor Standards Act. That law covers workers engaged in the production of goods for interstate commerce and workers engaged in commerce itself. At page 174 the "in commerce" coverage is ignored. At page 213, a correct statement appears. Imprisonment for 6 months or less is said

[4] NWLB v. Montgomery Ward and Co., 144 F. (2d) 528 (1944).

at page 213 to be one of the sanctions of the act; the section cited authorizes imprisonment only for an offense committed after a prior conviction. The act does not, as stated at page 224, prohibit the employment of underage children "in interstate commerce or in the production of goods for such commerce"; it reaches child labor only indirectly by forbidding interstate transportation of goods produced in an establishment in or about which underage children were employed. (The coverage of the two earlier child labor laws is incorrectly stated on page 12.)

The author has never heard of the huge back log of undisposed cases which has resulted from the near breakdown of the Railroad Adjustment Board. Without a supporting citation, he says, at page 246: "It appears that the Board has performed its function in a reasonably satisfactory manner."

The government seizure of a plant affected by a labor dispute constitutes, in the author's mind, "confiscation." The context (pp. 265-266) suggests to the reader that this really means a permanent taking, without compensation.

The Conciliation Service, the author believes (p. 267), has "sanctions available to compel the parties to accept" its suggestions. No citation gives a clue to how he picked up this fundamental misconception of what is probably the Labor Department's most important function.

Again, "almost any lockout by an employer is prohibited." There is no citation to support this absurd statement on page 273. Lockouts aren't fashionable, or profitable, nowadays, it's true. But . . .

These illustrations should suffice. They could be multiplied. And doubtless there are a great many misstatements just as bad that the reviewer did not catch. He, like other readers, will probably carry through life misinformation picked up from the book and not recognized as such. The Brookings Institution should do something about it. What? Recall the book? Prepare and send to each purchaser extended "errata and corrigenda"? Sponsor, and publish the results of, a study of the same scope (perhaps less ambitious, perhaps descriptive only) by a competent, careful scholar? It is to be hoped that the Institution's governing officials ponder these questions deeply.

DOUGLAS B. MAGGS.

Professor of Law, Duke University.
Former Solicitor, United States Department of Labor.

The Coming of World Control. By Nicholas Doman. New York and London: Harper and Brothers. 1942. Pp. x, 301. $3.00.

Professor Doman has tackled the most difficult problem that any student of world politics can possibly tackle today. And it cannot be said that he has made it any easier by his method of treatment. In the course of 293 pages he introduces so many subsidiary ideas, so many *pros* and *cons* supported by citations from world history and by quotations of everybody from Pope Gregory VII to Dr. Robert Ley, that his main line of reasoning is almost completely obscured. Add to that his involved style, his heavy vocabulary and redundancy, and you have about as indigestible a dish as has ever been served to the innocent reader.

The burden of Mr. Doman's argument seems to be this: world control, or world government, is coming, whether we like it or not; and the second World War is the crucible from which it will emerge. World War II is (or was) not just a war between nations, but a "war *beyond* nations, a war of political, economic and ideological forces functioning without geographic limitation. Its purpose cannot be, and its outcome will not be, a re-revised relationship of nation states, but a new political device to supplant the traditional order." This new device is definitely not a mere League of Nations, or United Nations Charter, but something in the nature of a World State.

So far so good. Since there is no time limit on the prophecy, the writer cannot be proven wrong. But prophesies are nevertheless dangerous. If Mr. Doman had waited to publish his book after the surrender of Germany and Japan, after the Potsdam Agreement, and after the dropping of the atomic bomb, his premises and therefore his conclusions might have been somewhat changed. In any case, he would have saved himself a lot of purely speculative argument.

There is much to be said for the historical approach to a subject which is usually presented on the basis of sheer desirability, or wishful thinking. Mr. Doman points out that the present preponderance of "nation-states" in the world is comparatively new and probably ephemeral. But his conclusion that we are now seeing a decline of nationalism is hardly borne out by recent events. There is accumulating evidence that Soviet Russia is entering its heyday of nationalism; that nationalism in eastern Europe is still on the rise; and that there are budding nationalisms in the Middle and Far East.

Another controversial feature of the book is the author's emphasis on the virtues of war. "Wars," he says, "have been equally responsible for retrogression as well as for the most glorious and progressive pages of history." No paramount issues are ever settled without war or rev-

olution. Is it therefore too much to expect that total war will help to plow the furrow of a freer universal order?

This seems to ignore the less conspicuous but nevertheless great evolutionary changes which have set in motion the emancipation of labor, the redistribution of wealth through taxation, and the beginnings of socialism in Britain and France. It is true that the unification of national and multi-national states has usually been the result of conquest. But the federation of the American colonies did not grow directly out of war. It grew out of the economic necessity for union, duly recognized by the Founding Fathers, who used persuasion and not force.

However, Mr. Doman believes that "only a world war, a total war, can clear the world for the rule of one of the universal systems of life *(sic)*. . . . An easy victory, without full mobilization of resources, cannot lead to the desired objectives of a universal democratic society." "The first World War," he says elsewhere, "had apparently not wrought enough havoc to animate a true and universal political and economic system."

Refreshingly, Mr. Doman does not present a blueprint of such a system. It seems that he means something more than "federal union." Any "limited application" of the federal idea, either in a functional or a geographic sense, would be "unthinkable." In other words, a world union only for the purpose of preventing war is not enough. And the exclusion of the non-democratic states (as proposed by Clarence Streit) would divide the world into two hostile camps.

That is almost certainly true. But Mr. Doman presents no alternative (except coercion) to the likelihood that certain states, like Russia, might refuse to join up. All through his book he deals with Russia as a rather negligible factor. He seems to write off the Russian revolution and consider only the problem of Nazism. "Far from spreading communism all over the world," he says, "the Communists were put on the defensive. . . . Nazism, however, out of a domestic revolution, has risen to the height of a world revolution." (This, even for 1942, seems to me a very bad guess.)

However, Mr. Doman had little doubt that the Allies would triumph; and that they would then possess a virtual monopoly of armed might. But the possibility of a clash of interests among them after the war was only "a possibility worth considering." Yet that is the very nub of the problem today. The Nazis are defeated; the Allies have a monopoly of power—but they are divided among themselves to an extent where we must doubt their ability to make a joint peace.

In those circumstances, how can we accept the prognostication that this total war will be the "mother of universal civilization"?

We can only conclude that Mr. Doman, for all his historical determinism, is another of the great wishful thinkers of our time. As he himself points out, every age has its prophets of universal peace, or the world state: "Projects for perpetual peace come mostly in times of major wars, and in addition when the repercussion of war have wrought adverse changes in the life of the peoples."

At the present writings, the changes following the second World War promise to be definitely adverse.

CÉSAR SAERCHINGER.

New York City.

Studying Law. By Arthur T. Vanderbilt. New York: Washington Square Publishing Co. 1945. Pp. viii, 753. $4.75.

The editor of this interesting and valuable volume writes a delightful introduction and states the book is suggested by the returning veterans, including those who will take up, or complete, their law study, and those who have come back to their law practice. For both of these classes it is necessary that a recurrence to fundamental principles in the law be had and that those who contemplate beginning the study of law should also contemplate seriously the facts of the profession, as well as the course that they must take in order to begin practice. No other editor has collected from the masters such valuable instruction and help for the beginner and the practitioner.

This volume contains an apt and fitting excerpt from Beveridge, with a history of the periods of development of the bar in England from Zane, and a modern discussion of the elements of law, by Monroe Smith. From Smith is taken his discussion of jurisprudence, beginning with the ancient law, with a sensible treatment, in short form, of the developments of the elements of law up to, and including, codification in the United States.

Then follows an introduction to American Law, by Roscoe Pound. This begins with fundamental conceptions and runs through the history of the common law until it became a sceintific system. Dean Pound then gives a survey of the social interests that have grown into the law and the growth of such interests in our present system.

Dean Pound also furnishes a chapter on the interpretation of statutes. Treatises on the interpretation of statutes are usually dry and uninteresting. The practitioner does not often consult them, unless his case sends him there. Dean Pound has made his thoughts on interpretation of statutes, not only clear, but interesting.

The difficult question of determining the ratio decidendi of a case clearly appears from the contribution by Arthur L. Goodhart. This subject is usually referred to by speakers and writers on legal subjects, but a few stop long enough to help either the student or the practitioner in his search for that which determines the applicability and value of a citation. The terms used to explain this difficulty usually make a fog instead of a clear exposition of the ways and means of determining the value of judicial precedent. The subject is full of pitfalls, not only for the student, but for the seasoned lawyer, and this treatise will help guide both students and practitioners.

The use of decisions and statutes in trials, as well as in the office, takes a forward step in Chapter 8, by Eugene Wambaugh.

A prophesy as to what jury-trial rules of evidence will be in the next century, by John H. Wigmore, shows the trend of modern thought. Mr. Wigmore's rules may, or may not, be adopted, but his discussion of them is both helpful and useful.

Were nothing else in this unique volume than the discussion of pre-legal education, by Arthur T. Vanderbilt, and Finding Your Place in the Legal Profession, by Charles B. Stephens, it would be valuable. There are so many vagaries and lay-theories and free advice that are presented to the law student and the young practitioner that he finds himself in a maze in which he cannot determine his way. These articles are safe guides, furnished us by those who have had the experience necessary to qualify them to instruct the student and the young practitioner.

Every student ought to read this book before determining fully and finally upon entering the legal profession. He can, if he will, find out whether he wants to enter a profession of service and not upon a money making scheme.

It will take some time to study this book thoroughly. Both the student and the practitioner ought to read it and re-read it and then keep it for future study. It is well worth its price and all the time that may be used in studying it.

L. R. VARSER.

Member of the Lumberton, North Carolina, Bar,
Lumberton, North Carolina.

Peace Through Law. By Hans Kelsen. Chapel Hill: University of North Carolina Press. 1944. Pp. xi, 155. $2.00.

Professor Kelsen envisages a reign of law which he thinks would necessarily be a reign of peace. It is true that one speaks of the "law of the jungle" which knows nothing but the *bellum omnium contra omnes,* and it is also true that the judicious Hooker discusses with com-

plete gravity, the law prevailing in the community of angels, where not merely war but even coercion is unknown—at any rate, since the events recounted with such particularity by Mr. John Milton. But Professor Kelsen is quite right in thinking that law as we have long understood it, assumes the existence of men who will disturb the peace and means to restrain them. The essence of lawlessness within the separate communities which make up humanity was well enough described in medieval England when this lawlessness was called an act "against the peace of our Lord, the King." The people of North Carolina and other American states will remember the time in their history when lawlessness was an act against the peace of "our Lord, the Proprietor." But the point was the same. It was the business of government to guarantee the peace of the inoffensive citizen so far as his goings and comings and the seclusion of his closed door were concerned. Indeed, it was in a sense the only business of government, after Church and state had separated.

Professor Kelsen starts from there. Peace was maintained in individual states by drastic and forcible suppression of a smaller or larger minority which threatened it. He would extend this idea to a world-community and would clothe what is in effect a world-government with the means of protecting inoffensive communities from being troubled in their lawful concerns by communities which are definitely offensive. For that purpose he presents in his appendix, pp. 127-148, nothing less than the constitution of such a government, called in this case a "Permanent League for the Maintenance of Peace."

On many points, this Permanent League is not fundamentally different from the Dumbarton Oaks project which will be sufficiently discussed in the months that are before us. But whatever other differences there are, the capital difference for Professor Kelsen is the emphasis he places on international courts, rather than on a Council, to secure the goal we seek. He wishes to create a court which will have compulsory jurisdiction over nations, just as national courts have compulsory jurisdiction over nationals. All disputes whether they are called "political" or "judicial" must be made justiciable by this court. Indeed, he offers vigorous and forceful arguments against the existence of "non-justiciable" questions between nations.

This is the general theme of Part I of this little book (pp. 3-67) and in Part II he argues with equal vigor that individuals who have been guilty of acts which would be justiciable by the international court if they had been acts of states, shall be equally subject to this international jurisdiction. But the punishment, if one is decreed, is to be carried out by the state to which the individual belongs and it will be

a state-offense, again to be brought before the International Court, if there is any failure in carrying out the punishment adjudged.

It is hard to say that Professor Kelsen is on the side of the angels, since he predicates force as the sanction of the judgments against which no state can plead to the jurisdiction. But he is very much on our side, that is, the side of men of good will, to whom peace is the second most important thing in the world, the most important being human liberty, which includes a great deal more than voting and the freedom from undue arrest or search. That there should be an international court and that this court should have what no modern international court has ever had, the power to compel the appearance of recalcitrant states and to enforce its decrees against them, on that I should like to believe he has constantly increasing support. Nor can he be successfully refuted in his arguments against maintaining the difference between justiciable and non-justiciable questions. The difference is based, as he correctly states, on the arbitrary refusal of a state to submit a particular question to judicial examination and can no more be naturalized than the refusal of a private citizen to submit an issue concerning him to a court of his own community. But whether those of us who agree with Professor Kelsen on this point, have grown in numbers or in influence to the point that we can reasonably hope for such a result as this compulsory international jurisdiction, is very doubtful.

I should regard it as a great achievement, if we can establish the doctrinal thesis that there is no fundamental difference between a "legal" and a "political" dispute between states, even if we are compelled to accept the fact that this arbitrary difference will be continued in even the most firmly organized League we are likely to see in operation. It will be a substantial advance if the international court will in this matter by subject only to something like a "writ of prohibition" emanating from the Council of the League, and predicated not on an essential lack of jurisdiction, but upon the uncontrollable decision of the Council to deal with a question directly. Perhaps the medieval writ of *rege inconsulto* would be a better analogy. The Council will be charged with carrying out the court's judgments. It is not altogether unreasonable, in, let us hope, rare and exceptional cases, to permit the Council to decide whether it thinks it can undertake the task. I am not one of those who will not take half a loaf, if a whole loaf is hard to come by. Indeed, I should sometimes be satisfied with a slice of bread. Of course, it should be a thick slice.

In the Second Part, my agreement with Professor Kelsen is less marked. I undertook two years ago to set forth in novelistic form some ideas I had on the individual responsibility for war-crimes. Pro-

fessor Kelsen has not quite got what I meant to convey (p. 110.N.). Like him, I see no reason why war-crimes should not entail individual responsibility as well as the responsibility of guilty national groups, and in the very considerable discussion of this matter—a discussion at least as old as the time of Napoleon—I have seen very few objections advanced, other than those which, being technical and procedural, beg the question. These objections are fully and ably analyzed by the author, and the various arguments based on the rule of *nulla poena sine lege, iussu superioris, mens rea* in an excessively subjective sense, or the modern equivalent of the medieval king's irresponsibility in his own tribunals, all these can easily be shown to be less formidable obstacles than they have seemed to those persons—for the most, English lawyers—who would prefer to abandon any attempt at fixing war-guilt on individuals.

If so far, I find myself in accordance with Professor Kelsen's exposition, I see no reason, however, for putting a new hurdle in the way of dealing wtih war-guilt. If the international court can in the last resource do no more than "relax" the condemned person to the secular arm of individual states, and must proceed against the state, if no punishment is applied, we have added serious obstacles which may well render the whole proceedings futile. If a court can try and condemn, it may well enough be trusted with the control of its judgments. I doubt whether the states to which persons guilty of war crimes belong, will be much opposed to granting power to execute such judgments once they have agreed that the international courts shall have power to render them.

The advantage of making certain acts connected with the fomenting and the waging of war individual as well as national crimes, is that it establishes an almost universal standard of conduct which bases itself on an almost universal acceptance of several elementary moral values. The nature of these values is best illustrated by the acts of the Nazi hierarchy in forcing war on the world and the acts of individual Nazis in their method of carrying on the war, both of which types of acts were in equal measure aminated by an arrogant contempt of humanity. That such acts may be punished before they are fully defined and formulated in charters and codes, is in complete accord with the way law has developed in all parts of the globe. We cannot demand of a still nascent international law that it should be firmer and more precise in outline than most national laws were up to yesterday, after centuries of fairly effective operation.

While Professor Kelsen's goal is thus unexceptionable—indeed, thoroughly admirable—it it likely that most readers will find in the book

too great a reliance on crisply phrased propositions that have the air of dogmas. Professor Kelsen was regarded in Germany by jurists who dealt only in dogmas, as an empiric. We, I fear, should find that his categories are still too universal to fit our attitudes to the material of the law, which is the elusive and shifting fact of human conduct and human impulse. We cannot get along without a plan but we must not make the plan out of steel and concrete. Professor Kelsen is quite too easily satisfied by definition and classification. Having declared that the modern state is distinguished by the "community monopoly of force," he disposes of non-communal, but legal, use of force by making those who exercise it "agents" of the community, although the agency is in most instances a transparent fiction.

In the same way, he is eager to get the "guarantees" of peace into the form of statute or statute-like formulation. Unfortunately formulation, however logical and reasonable, will not guarantee peace. It is an ancient difficulty, older even than the Horatian

Quid leges sine moribus
Vanae proficiunt.

And Horace's contemporary, Vergil, who called upon his Rome to impose the *mos pacis* on a literally reluctant world, was well-advised to insist upon that rather than on a *lex pacis*. The creation of the "habit of peace" will come about partly by force and partly by rational understanding of its necessity and it is only after the habit has lasted for a substantial period that we can look upon statute and procedure as a guaranty of anything.

This in no sense means that we must forego charters and formulations until we, or the major part of us, are fully ready for them. Most of us are now at least partially ready for them and that is quite sufficient, provided we leave a good deal to the process of future adjustments. For example, Mexico has proposed, among other things, that a "Declaration of the Rights and Duties of Nations" and a "Declaration of the International Rights of Law" be appended to the Dumbarton Oaks Charter. Will such Declarations have value or effect? I think they may well have both, although the formulation will not of itself guarantee human rights any more than, we must own, our Bills of Rights have quite eliminated the violation of the rights solemnly announced.

But, after all, our Bills of Right have given both a goal and a weapon to those who are engaged in the unending struggle for human freedom. And this struggle would be less successful than it has been, for all its imperfection, if there were no Bill of Rights embodied in our Constitutions, state and federal. If we give to the new world either a Dum-

barton Oaks Charter or such a project as that presented in this book, we shall have the outline of a law within which people who have determined to be at peace can accustom themselves to live. It is not the charter or the plan that will create the determination.

It is, however, a great deal to have a charter even if our grandchildren will scarcely recognize in the scheme of law they will develop, the specific regulations, procedures and formulations to which we ourselves must still look forward as hardly more than a hope and a promise.

MAX RADIN.

School of Jurisprudence,
University of California,
Berkeley, California.

Arbitration of Labor Disputes. By Clarence M. Updegraff and Whitley P. McCoy. Chicago: Commerce Clearing House, Inc., 1946. Pp. xi, 291. $3.75.

Arbitration as the terminal point in the grievance procedure is now generally accepted as the appropriate method of settling labor-management disputes over the application and interpretation of the collective bargaining contract. There is a notable trend, in this connection, toward arrangements for permanent umpires. And agreements to permit arbitration tribunals to determine the content of new contract provisions, after negotiations fail, are more frequent. These developments have increased the need for dependable arbitrators and procedures. This manual, an outgrowth of the authors' experience in government and private arbitrations, will help to improve the labor arbitration process.

It is not a large volume. The authors' text runs to but 154 pages, embracing chapters on (1) General Introduction—Background; (2) Selection of Arbitrators—Their Qualifications, Jurisdiction and Compensation; (3) The Agreement to Arbitrate and the Submission; (4) Procedure; (5) Awards and Their Enforcement; (6) Commonly Recurring Types of Cases Arbitrated; and (7) Enforcement of Contracts to Arbitrate. Appendices, in 76 pages, supply suggested drafts of arbitration provisions for basic collective bargaining contracts and of agreements for the submission of existing issues; specimen arbitration awards, handed down by the authors and by Elmer T. Bell, William M. Hepburn, Ralph T. Seward and Young B. Smith; and classified citations to the state arbitration statutes. A detailed index covers 44 pages.

The book's chief fault is found in the often undiscriminating statements of the law of labor arbitrations, especially on awards and their enforcement, and on these aspects of agreements to arbitrate and submissions: capacity of the parties, future controversies, interpretation,

amendment, modification, waiver, rescission, revocation, and enforcement. Most of the cases and statutes cited in support involved questions relating to insurance, titles to land and other subjects of commercial arbitration. Many are very old, of a period when the courts were unsympathetic with arbitration and when labor arbitrations were relatively unknown. The authors concede that labor arbitrations rarely get into court. Then why all this bland learning, with only occasional speculations as to its transferability to labor disputes, with their unique characteristics?[1]

The chief values of the volume are found in the revealing, critical and provocative discussions of labor arbitrations in action. Sound advice is given on the drafting of arbitration provisions in basic labor relations contracts, and of submission agreements. Significant of the constant concern for the integrity and effectiveness of the labor arbitration process is the emphasis on the arbitrator's responsibility for seeing to it that the issues and his authority are so defined as to enable him to settle completely the basic ramifications of the dispute. And there are thoughtful suggestions on the handling of questions relating to seniority, discharges, working conditions, overtime, wages and other commonly recurring types of cases.

Two recommendations invite comment: (1) that the arbitrator be empowered to award the costs, mainly his compensation and expenses, in proportion to relative fault; and (2) that, in cases where the other members of a panel are officers of the company and of the union, the chairman's decision be allowed to control, unless the panel is unanimous. As to the first, would not such an award irritate rather than soothe

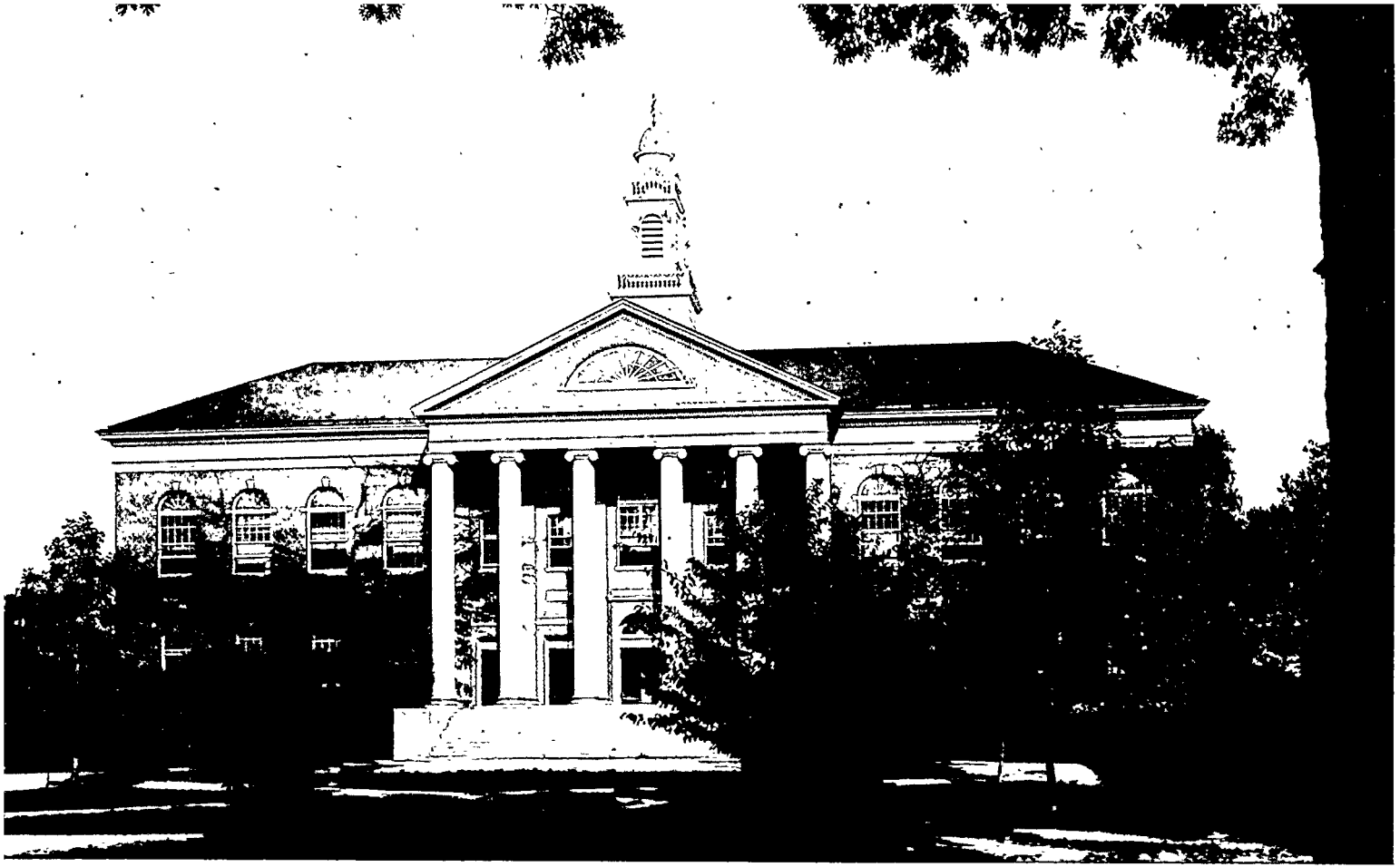
[1] The Uniform Arbitration Act, as adopted in North Carolina in 1927 (Gen. Stats. 1943, Secs. 1-544 to 567) is perhaps general enough to apply to labor disputes. It has, however, been impliedly superseded, for these cases, by the Labor Disputes Arbitration Act of 1945 (Gen. Stats., Supp. 1945, Secs. 95-36.1 to 36.7). This Act is silent as to judicial review. Under the Act of 1927, awards there provided for may be vacated by the courts only for fraud, corruption, undue influence, lack of due process, bias or *ultra vires*. Bryson v. Higdon, 222 N. C. 17, 21 S. E. (2d) 836 (1942), in this connection, may be prophetic for labor arbitrations. In sustaining an award as to the boundaries of land, the court said: "The courts have done all that they could in maintaining the purpose and spirit of this sort of arbitration by liberal construction of pertinent laws. It is, of course, not expected that arbitrators should adopt the precise methods of hearings in court or before referees in making up their decision, and in many respects their procedure is not reviewable by this court, as would be that of inferior courts. . . . The cited cases and references therein indicate the policy of the law and the care of the courts to liberally sustain this very effectual and valuable method of bringing controversies to an end, considering that in many instances the controversy may have a more friendly ending and a speedier determination, and even a greater probability of justice between the litigants than may be afforded by the more belligerent methods of trials in the courts of law."

This case and the two statutes are cited in the text.

future labor relations in the plant? As to the second, would it not be better, especially with inexperienced companies and unions, to provide for such control only where a majority vote cannot be obtained on any issue?

M. T. VAN HECKE.

University of North Carolina Law School,
Chapel Hill, N. C.



MANNING HALL