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Book Review (reviewing James Hart, The Ordinance-Making Powers of the President of the United States (1925))

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Recommended Citation

Ernst Freund, "Book Review (reviewing James Hart, The Ordinance-Making Powers of the President of the United States (1925))," 20 Illinois Law Review 638 (1926).

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tween that large and important part of international law which regulates the conduct of states in time of peace and that other less important part which undertakes to restrain and regulate their conduct in the abnormal times of war. He commits the error of judging the whole system by its weakest part; because rules of international law are violated by belligerents in time of war, the whole system is subjected to reproach, as if international law were mainly a body of rules for the regulation of the conduct of states which happen to be at war. It is believed that Mr. Edmunds, as others before him have done, has grossly exaggerated the failures to observe the law and its weakness resulting from the lack of adequate sanctions. The late Professor Westlake once remarked that international law is now better obeyed than was the law of England during the early stages of its development, and John Bassett Moore has observed that, on the whole, it is as well obeyed today as municipal law and that in time of peace it is perhaps better obeyed. It would seem, therefore, to be quite as logical to argue that the criminal law is "lawless" because it is sometimes violated and unenforced, as to contend that international law is "lawless" because it may be and sometimes is violated without the offender being punished.

Mr. Edmunds is not the first reputable writer to deny the character and the name of "law" to the great body of rules which "masquerade" under the name of "international law." There may be reasons for contending as he does that it is only "pseudo" law. The question has been much discussed and there is no need here, even if sufficient space were available, to repeat the arguments. We are content to say that for a jurist today to deny the name and character of law to a body of rules which all foreign offices and governments recognize to be law; to which they appeal in their controversies with one another; which has developed by means of conventions, customs, and judicial precedent; which are expounded and elucidated by jurists and text writers and which are recognized as binding upon states and are applied as such by national and international tribunals, is to adopt a conception of international law which is in flat contradiction with the facts and practice of international life.

Mr. Edmunds has written an interesting book, but in our judgment he has failed to demonstrate his thesis. His indictment rests upon exaggeration, misunderstanding and undue emphasis upon legal theories which do not square with actual practice.

University of Illinois.

J. W. GARNER.

THE ORDINANCE-MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES. By James Hart, Ph. D., Instructor in Political Science, University of Michigan. Baltimore: Johns Hopkins Press, 1925: pp. 339.

This essay gives more than the title indicates. It is the fullest treatment to be found in English or American literature of the important topic of administrative regulations. The author under-

takes to examine, in addition to the legislative and quasi-legislative powers of the chief executive, the entire process, function and operation of subordinate rule-making by administrative officials.

This examination involves a good deal of abstract classification and analysis, all of which is stimulating, and much of which is of great value, while a good deal, as is inevitable with wide generalizations, challenges criticism. Original political thinking, which the author does with courage and conviction, is impossible without some measure of original terminology, which will always be to some extent a matter of taste; it may be questioned whether the somewhat difficult terms co-laws and co-ordinances will find general acceptance. The term 'ordinance,' however, as applied to the President's proclamations, executive orders, and other quasi-legislative acts, the author offers on the authority of others, and since it is a fundamental one, it ought not to pass unchallenged. Where a term has, in practise, been appropriated to certain uses, its extension to heterogeneous applications is likely to create confusion where clarification is a prime desideratum. The term 'ordinance' is used in America exceptionally for organic acts proceeding from the legislative power (ordinance of the Northwest Territory), and more commonly for products of the subordinate legislative power of municipalities, and it is because the latter have such a very different range from either rule-making or other powers of the chief executive, that it is misleading to speak of the ordinance-making power of the President—a term never used in actual practice.

The President's powers, whether derived from the constitution or from statute are *sui generis*, and presidential proclamations or orders are not to the same extent a regular part of the machinery of government or legislation as orders in council appear to be in England. Congress calls for presidential action in the main where a matter affects more than one department of the government, as in the case of civil service rules or of the budget; where a matter belongs to the general province of some executive department, the rule-making power is normally given to its head, and the President is called into play in the main where the matter has some political, usually international, aspect, or where it relates to the army or navy, of which the President is commander-in-chief.

Mr. Hart suggests (p. 71) that we are entering upon a period when presidential legislation will in all likelihood be greatly expanded. There is no convincing proof of this; but if true, it will be due to a realization on the part of Congress that discretion which was supposed capable of standardization and hence administratively exercisable, is actually incapable of standardization and must therefore be politically exercised, and this would mean either non-delegation or delegation to the chief executive.

Under these circumstances it must be doubted whether the President's power can be profitably made the nucleus of a general discussion of subordinate law making. Fundamental to a correct appreciation of delegated administrative powers are two distinctions, the one between rules affecting private rights and rules concerning

public property and governmental services (not identical with the German distinction referred to on page 53 of the essay), the other between acts generally and acts individually operative. The author, of course, incidentally adverts to these distinctions (pp. 132, 152, 156, 157, 168-179, 197-200, 204-207, 227, 228), but he fails to emphasize them duly, as he probably would have done if he had not taken the President's power as his starting point. The author may plead that these distinctions are not made fundamental in judicial decisions, particularly not the former one, but judicial decisions cannot be given controlling effect in political science.

The author has undertaken to combine two entirely different things: an analysis of the President's power is one thing, a discussion of subordinate rule-making power another, and the latter cannot be managed against the background of the former. We are indebted to Mr. Hart for the very full and competent treatment of his main theme, and it is to be hoped that the present essay is not his last word on the subject of administrative regulations.

ERNST FREUND.

FAMOUS AMERICAN JURY SPEECHES. Addresses before Juries and Fact-Finding Tribunals. Collected and edited by Frederick C. Hicks. St. Paul: West Publishing Co., 1925: pp. vii + 1181.

This volume contains twenty-five speeches, made by American lawyers between 1884 and 1924. Twelve were delivered before juries, six before courts sitting without juries, four before legislative investigating commissions, and two before a court for the trial of impeachments. Though entitled "famous," it is doubtful if half of them have had more than a local or transitory fame. Among the nationally-known lawyers represented are Joseph H. Choate, Robert G. Ingersoll, Francis L. Wellman, William E. Borah, Martin W. Littleton, and Clarence S. Darrow. The more celebrated trials are the Carlyle Harris murder trial, the Coeur d'Alene riot trial, the Thaw trial, the Sulzer impeachment, the Barnes-Roosevelt libel case, the investigation of the New York socialists, and the Leopold-Loeb case.

The task of making such a large and varied collection must have been long and troublesome, and it would not be fair to find fault with the selections. Some of the speeches are models of clarity, condensation and persuasive force. Conspicuous among these, in the reviewer's judgment, is Mr. Wellman's summation for the People in the Carlyle Harris case. Others are, to say the least, dreadfully long. And among these are the speeches of Mr. Darrow and State's Attorney Crowe in the Leopold-Loeb case. Here was a case in which the plea was guilty, and the only question before the court was whether the defendants should be hanged or imprisoned. There was no jury. Yet Mr. Darrow's speech is 97 pages long, and Mr. Crowe's 77!