

BOOK REVIEWS.

PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT, 1789-1918, Prepared in the Division of International Law, Carnegie Endowment for International Peace, under the supervision of James Brown Scott, Director. Oxford University Press, New York, 1923, 3 vols., pp. xlv, 2182.

To those familiar with the part which the United States Supreme Court has played in the development of the law of prize, it will not be difficult to realize that it has taken three large volumes to contain the reports of the cases on this branch of law, decided by our Supreme Court.

As Mr. Charles Warren points out, in his recent book, "The Supreme Court in United States History," out of the 400 cases decided by the Supreme Court from 1800 to 1816, one-quarter of them involved questions of prize, or kindred subjects, such as neutrality, embargo, and non-intercourse, and only a scant half-dozen presented any constitutional question.

These cases raised questions of such paramount importance that they were argued by the leading lawyers of the United States. Indeed, as Mr. Warren states, many of the great lawyers of America made their first appearance in the Supreme Court in prize cases—"Thus, Pinkney's first appearance was in 1806 in a case involving capture of a cargo, *Manella v. Barry* (3 Cranch 415); Hopkinson appeared first in 1807 in a prize case, *Rhineland v. Insurance Company of Pennsylvania* (4 Cranch 29); Sergeant, in 1816 in *The Aurora* (1 Wheat. 96); Wheaton, in 1816 in *The Antonia Johanna* (1 Wheat. 159); Wirt (after one case in 1816), appeared in 1817 in *The Fortuna* (2 Wheat. 161); Webster made his first appearance in 1814 in *The St. Lawrence*, and *The Grotius* (8 Cranch 434, 456)." Philadelphia lawyers will be interested in finding that Tilghman, Ingersoll, Dallas, and Rawle appeared in the earliest cases.

The advent of the War of 1812 presented to the judges and lawyers of the time in America a parallel to the situation which was presented to the judges and lawyers at the outbreak of the Great War in 1914. The various treaties between the Great Powers were antiquated, and changing times and conditions and methods of trade presented new questions, so that those called upon to deal with the novel situations involved in prize cases were required to blaze new trails, or, at least, find new applications for formerly declared principles. It is true that Lord Stowell had made a great impression upon Prize Law, but his decisions were found to be not altogether suited to the new concept of international relations held by jurists and statesmen of the period in America.

Early in 1812 Mr. Justice Story saw the importance which Prize Law would play in the development of our international relations, and began the diligent study of it, which resulted in his becoming, as he still is, the foremost American authority on the subject. Writing to Mr. Williams on August 24, 1812, he says (1 Story 228):

"I have been industriously reading Prize Law and have digested into my commonplace books everything I could find. . . . I hope the Supreme Court will have an opportunity to enter largely into its jurisdiction both as an Instance and a Prize Court."

From that time forward Mr. Story devoted himself to the subject and endeavored to explain clearly the principles and practice involved in Prize Law. He wrote two long notes and caused them to be anonymously inserted at the end of the first two volumes of Wheaton's Reports, and he took an active part both in correspondence with Lord Stowell and in the decisions of his court, to illuminate the subject as far as possible.

The court dealt in a masterful manner with various questions which arose. Its decisions on the obligations of neutrals materially affected the foreign relations of the country, and were potent factors in conserving peace between this country and Spain and Portugal, during the serious complications involved in the revolutions in Central and South America, where the Spanish and Portuguese colonists were endeavoring to throw off the yoke of the mother governments. The revolutions involved constant violations of neutrality arising out of the fitting out of ships of war, which cleared from the Customs Houses at Baltimore and New Orleans as merchantmen, and thereafter hoisted the flag of the new Republics of the South and attacked the commerce of Spain. The doctrine which the Supreme Court laid down as to the sanctity of treaties and their strict construction aided largely in the maintenance of the foreign relations of the United States.

There is no better test of the character of the opinions of the Supreme Court, the stable basis of the principles which are laid down, and the reasoning on which they are founded, than the use to which the opinions were put by the English Prize Courts in the late war.

During that time there were as many as ninety-one United States Supreme Court decisions cited by the British and Colonial Prize Courts or by the Judicial Committee of the Privy Council, to which an appeal from the Prize Courts in England lies. Some of the cases were cited several times and the judgments referred to were spoken of in various terms of commendation. For instance, the opinion of Mr. Justice Gray in "*The Lola*" is spoken of as "full of research, learning and historical interest." That of Mr. Justice Story in *Brown v. United States* as "interesting and illuminating." Sir Samuel Evans, the president of the Prize Court, frequently cites opinions of Mr. Justice Story and Chancellor Kent. In "*The Corsican Prince*" (1 Trehern, Prize Cases, British and Colonial), he speaks of Mr. Justice Story as one who "as an exponent in treaties and judgments of matters relating to prize law is hardly second to Lord Stowell himself." Elsewhere (*The Zamora*, 1 Trehern 327) he speaks of Mr. Justice Nelson as "no mean authority upon questions of prize law," and in "*The Kim*" (1 Trehern 405), the English Prize case which attracted so much attention during the late war, and which is said to be the most important Prize case ever decided (generally known as "*The Packers' Case*"), reliance for the judgment is based upon the doctrine of continuous transportation in relation to contraband goods, laid down by our Supreme Court in "*The Bermuda*" (3 Wall. 514) and "*The Springbok*" (5 Wall. 1), a doctrine theretofore new to Prize Law. The Privy Council, speaking through Lord Mersey in "*The Odessa*" (1 Trehern 563), refers to our Supreme Court in these terms: "The considered judgment of the Supreme Court of the United States is entitled to the greatest possible weight."

If this be the opinion of the Bench and Bar of Great Britain on the value of the decisions of our Supreme Court, the work of Mr. James Brown Scott in collecting into three volumes decisions otherwise to be found only here and there in some 250 volumes of reported cases, goes far to serve the purpose which the preface to the work indicates was in the view of the Director of the Carnegie Endowment, *viz.*, first, to aid the labors of the projected International Court of Justice, which may be called upon to decide questions of Prize Law; and second, to bring all the American Prize Cases within a narrow compass for reference by the statesmen, diplomats, and jurists, who may have to consider and pass upon the German Prize decisions rendered during the World War, since, as Mr. Scott points out, the second paragraph of Article 40 of the Treaty of Peace, signed at Versailles in June, 1919, reserves the right on the part of the allied and associated powers to examine the decisions and orders of the German Prize Courts and make such recommendations as they deem proper, Germany agreeing to accept and give effect to the recommendations so made.

It is to be regretted that the preparation of the volumes did not cover more than a chronological arrangement of all the cases, and a table of contents which is merely an alphabetical list of the cases. An analytical arrangement of subject matter, with a reference to the cases dealing with various rules of international law would have better served the dual purpose which was the object of the book, and rendered it more generally helpful.

The index furnished is not very illuminating and without extraneous reference to the subject matter contained, it will be difficult even now to have ready access to the vast store of international law, which, as Mr. Scott assures us is contained in the three volumes.

It is interesting to note before closing that there were but very few cases in prize arising out of the Spanish War, and that the only case of the nature of prize arising out of the Great War and reaching our Supreme Court was that of "*The Appam*" (243 U. S. 124).

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INTERNATIONAL SOCIETY. By Philip Marshall Brown, Professor of International Society at Princeton University. Macmillan Company, New York, 1923, pp. xiv, 173.

This small volume of 173 pages contains thirteen chapters averaging about thirteen pages each. The author's admission in the Preface, therefore, that "this volume is justly open to the charge of superficiality in treating in a cursory manner so many topics deserving separate intensive study" is accepted with his explanation that he desires "to draw attention to certain of the large problems requiring immediate investigation and discussion."

In the field of international relations, brevity of treatment is not to be objected to, provided the reader turns away from his reading with some satisfying conclusions of the subject matter presented; Professor Brown has been measurably successful in leaving one with clear-cut reactions, whether favorable to the author's conclusions or not. The book is written, however,

from the standpoint of the more advanced student, and leaves more for inference and presupposed historical background than the less advanced student has. For example, little is said of the problems which Mr. Root and others had to solve in bringing into existence the Permanent Court of International Justice (p. 132); the actual fact faced was the failure to create the Judicial Arbitration Court at The Hague in 1907 owing to non-agreement on a method of choosing judges. Also more recognition might be given to the other point in which the League of Nations is a compromise: that is, as the author points out (p. 127), the influence of the Great Powers predominates in the Council, but it is not clearly set forth that in the Assembly all are equal. That equality is desired by all nations is a fact which no writer can escape; it is one of the foremost of our actual problems; and the Permanent Court of International Justice owes its existence to the League. Assembly where all nations have an equal voice in finally electing judges. With the Latin-American Republics, China and Japan in the League, and represented on the World Court, which is admitted to be the "greatest triumph" of the League (p. 132), the strength of the statement (p. 130) "that the League is primarily a European concern" is somewhat lessened. In carrying out his idea that international law is *law* despite the "policeman" theory of Austin, Dr. Brown might have stressed more the influence of the League of Nations as a machinery ultimately looking to the improvement of international law through education, organization and actual practice. The World Court itself bears out this statement.

It will be noted that in contemplating the problem of international society the logical order of thinking is first, the units of that society, second, the method of organization, and third, the purposes for organization which dictate the desirability of organizing. The author has either consciously or unconsciously followed this general order of thought. The units of international society are considered in Chapter I and II dealing with "Nationalism" and "Men and Nations." Nationalism is correctly stated to be the most important fact of international society, and as such, it might be added, has its concomitant importance in the problem of equality of nations. These two chapters furnish well the setting for later ones dealing with "International Intercourse," "Diplomacy," "International Disputes," "Self-Help," "War and Neutrality." Finally, the author gives separate chapters to a consideration of "International Organization" and to "The League of Nations," closing his volume with discussion of "International Politics" and "Imponderables."

In the chapter on the "Law of Nations," the author quotes Gareis on the best sanction for international law as "anticipated advantages of reciprocity as well as the fear of retaliation." The reviewer would add that while both of these motives are powerful, there is a third that goes beyond the selfishness of reciprocity and the fear of retaliation. This third motive may be idealistic or ethical in nature; with some it may be religious. At any rate it envisages the majesty of a common international law for all nations; it recognizes a certain community of thought and purpose among men and nations; it is found best exemplified in the ideals of those who advocate the League of Nations and the Permanent Court of International Justice.

National interests are justly given attention by the author; he well shows

their importance on national policies and world order. International intercourse and diplomacy are treated in well-chosen language. The discussion on the settlement of international disputes is excellent. The difference in the problem of the organization of the States of the world and the formation of the Federal Union of the United States is well made (p. 116).

The keystones of international society are international law and international organization. Professor Brown questions the utility of the League of Nations as the best form of organization but seems to favor the development of some sort of international organization. In his interesting and stimulating chapter on "Imponderables" he concludes that "Religion, therefore—defined as 'the personal adjustment of man to the universe'—is to be the greatest common denominator in international society to enable men to understand each other and realize their common brotherhood." (p. 167.) If this be true one may ask why such a common denominator may not be considered as exemplifying one element of sanction behind international law.

This new volume is a distinct contribution to constructive thinking; it is thought-provoking and frank; it manifests much careful and sincere study on the part of the author. It ought to be read by every person interested in the challenging problems of the international society which is looming more and more clearly on the horizon.

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PROBLEMS OF PEACE AND WAR. Transactions of the Grotius Society, Vols. VII and VIII. Sweet & Maxwell, London, 1923, pp. lii, 132.

The publication of the papers read before The Grotius Society in 1921 and 1922 should prove of vital importance to those who are interested in mitigating the horrors of modern warfare, and in removing the more obvious obstacles to international peace. The eminent position of their authors in their respective fields assures the reader of accurate, scholarly contents, and of a calm and judicial, yet progressive, attitude of mind, which is all too rare in an age of unrest and loose thinking.

Most of the papers are concerned with pressing problems of war and peace. From a layman's point of view, the inadequacy of written laws of war, as embodied in the Paris, Geneva and Hague Conventions, renders futile the discussion of breaches involving the use of the submarine and the airplane. Professor Bellot, himself, in *The Right of a Belligerent Merchantman to Attack* (Vol. VIII), admits the difficulty in actual practice (citing the Fryatt case as an example), in drawing the line between attack and the offensive-defensive. In like manner, Mr. Herbert Manisty, K. C., in *Aerial Warfare and the Laws of War* (Vol. VII), draws the conclusion that hospitals and hospital ships to claim immunity from attack must be removed themselves from legitimate objects of attack. Similarly, a town's immunity from air bombardment demands that its occupations and structures be of a strictly civilian nature. According to the rules of warfare, as well as to the considerations of humanity, the efforts of German air forces to terrorize and demoralize the civil population must be condemned. In practice, however,

modern warfare is between nations, not armies. London and the great cities of France were in reality great hives of munition factories, and were the military and economic centres of the resistance which Germany was trying to crush. These points are discussed, with reference to source-material, in Professor de Montmorency's *The Washington Conference and Air Law in Disarmament* (Vol. VII). Despite their barbarity, it is certain that aerial, submarine and chemical warfare will largely displace old methods in future struggles. Only by a stretch of the imagination can the existing laws of war be made to apply to modern conditions and weapons of warfare.

In *The Military Administration of Occupied Territory in Time of War* (Vol. VII), Lieut.-Col. de Watteville considers the recent plight of Belgium from a soldier's point of view. Articles 42 to 53 of the Fourth Hague Convention of 1907 were professedly written to cover short occupations. The idea of occupation itself assumes harshness and severity as dominant features, while the soldier's idea of security, especially when in proximity to the fighting zone, is equivalent to the application of martial law. While Mr. Claud Mullins, in *Private Enemy Property* (Vol. VIII), gives a clear and forceful defense of the wholesale confiscation practiced during the late war, the reviewer is convinced that this policy can be justified only by success. Otherwise there must be payment of heavy damages.

The recent struggle has emphasized the impossibility, under existing conditions, of bringing culprits to justice. The very nature of submarine and aerial warfare makes it difficult to fasten responsibility on individuals, while there is difference of opinion as to the guilt of men who were acting under the orders of military superiors. It does not seem desirable that war criminals be tried in belligerent national courts; the subversive effects of the trials of Fryatt and Cavell are obvious. After the conclusion of peace, these courts no longer possess jurisdiction to try the cases; also, Article 112 of the new German Constitution states that "no German may be handed over to a foreign government for prosecution or punishment." Nor is it advisable that this be done. Lord Cave's informative address on *War Crimes and Their Punishment* (Vol. VIII) exposes the failure of the Allies to bring their culprits to trial, and of the Germans to impose serious sentences on their own guilty. Unstable political conditions and the absence of definite penalties are cited as further obstacles to securing justice.

The need, therefore, for a Permanent International Court of Justice is imperative. The punishment of war crimes should be divorced from the fever and bias of national patriotism, and from the politics of such a super-state as the League of Nations. As Sir Graham Bower states in *Peace Versus the League of Nations*,

"no political body, by whatever name it be called, could carry the weight or command the obedience which experience shows to be possessed by a juridical body, and so we come to this—that the road to peace is to be found in the reign of law and justice rather than in the conflicts of politicians, or in the dictation of the strongest or more numerous body of partisans, or in the selfish advocacy of class, of national, of racial, or of religious interests." (Vol. VII, 105.)

Mr. Ernest A. Jelf, Master of the Supreme Court, in *Justiciable Disputes* (Vol. VII), distinguishes between cases which may come before this Court,

and matters proper for arbitration. He very properly limits the former to disputes of a justiciable nature. But if this Court can properly interpret

"some Labour convention, if it can adjust simple boundary disputes, and if its decisions on these matters, are accepted and carried into effect—it may have thereby healed sores which were potential sources of immediate trouble. If it can attain prestige by its obvious impartiality and by the weight of its judicial pronouncements, its power will be the kind which *crescit eundo*, and something much graver may be entrusted to it in the years to come." (Keen, *The Duties of Nations*, Vol. VII, 69.)

A radical departure from pre-war conceptions of international relationships is indeed necessary, if civilization is to survive and progress. Mr. Keen (Vol. VII) believes that the first step toward this end may well be through the gradual extension of the existing field of international law, by the definition of principles and rules, and by their expansion into complete and unified systems. This work the individuals of the most progressive countries must initiate, in the conviction that national freedom cannot be enjoyed "except under such common limitations as are required in order to secure the same measure of freedom for all" (Vol. VII, 58). The advisability of the codification of international law is suggested by Mr. Frank Gahan, in his *Codification of Law* (Vol. VIII). While such a code should be flexible, and make provision for equity, wide discretion should not be left to judges, as long as there may be suspicion of their national bias.

If Mr. Keen's conceptions of the duties of nations were adopted, a treaty for mutual defense could be signed by all nations, leaving a signatory free to refrain from action, if aggression seemed justified:

"There are no means by which a nation can hope to secure peace for itself or effectively help to prevent war unless it is willing to share the responsibility of defending the peace of other nations. That is the price which individuals have to pay for the social order which they enjoy, and nations can not expect to obtain peace any more cheaply" (A. A. Jacobs, *Neutrality*, Vol. VIII, 42).

This would mean a formal abandonment of the international attitude of neutrality, and a formal recognition of the necessity, under modern conditions, to co-operate for the prevention of war. While discussion of these changes may lead to practical results in the future, it is interesting that an embryonic code of the air is gradually taking form. Mr. Wm. Lately's *The Law of the Air* (Vol. VII) informs us of its development through 1921. There remain to be settled questions of trespass, damages, admiralty jurisdiction, dangers of low flying, nuisance from noise and smoke, registration, nationality and infringement of patents. On the other hand, Maj. Victor Levebure, in *Chemical Warfare: the Possibility of Its Control* (Vol. VII), warns his readers that this arm of the service is too inexpensive, too potent and too secret to be left out of armament schemes, and that even now governments are entering a mad race for supremacy in this field. He offers practical suggestions for abolishing this inhumane method of warfare—a step which must be taken in a sincere program of disarmament.

Aside from technical discussions of points in international law which will

interest specialists in this field, many of the papers in these two volumes contain information and suggestions of paramount value to all who are interested in humanity and in the maintenance of peace. Peace can be obtained only by a reign of law and justice which will dare to rise above national self-interest, and racial and religious prejudice. Its decrees can be evolved only through the co-operation of statesmen, scientists and lawyers, and their observance only by the education of the masses of all nations to the conviction that war does not mean progress, even to the victor. The Grotius Society, through the publication of its papers, is doing invaluable pioneer work in a limited sphere. Its appeal should be wider than the circulation of these volumes indicates. Newspaper and periodical writers, high school teachers and university professors, lecturers, and other members of the *intelligentsia* who are influential in the molding of public opinion, should not fail to avail themselves of these guides to a higher standard of international relations.

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THE DEVELOPMENT OF INTERNATIONAL LAW AFTER THE WORLD WAR. By Otfried Nippoldt. Translated from the German by Amos S. Hershey. Carnegie Endowment for International Peace, Division of International Law. Oxford University Press, New York, 1923, pp. xv, 241.

This volume, written in the spring of 1917 and published under its German title, *Die Gestaltung des Völkerrechts nach dem Weltkriege*, was originally intended by the author to form the concluding part of a forthcoming book on *Deutschland und das Völkerrecht*, and thus it follows the sections on *Die Grundsätze der deutschen Kriegführung* and *Die Verletzung der Neutralität Luxemburgs und Belgiens*, both published in 1920. The content of the larger explains certain departures from the legal into the political aspect of international relations, especially with reference to the German position with regard to freedom of the seas; it also accounts for omissions, chiefly of corroborating facts, in the present section of the greater work. Otherwise the book holds well to the legal viewpoint, while not becoming too legalistic for the subject in hand. Professor Nippoldt, although German by birth, is Swiss by adoption and has in this book and in his earlier writings endeavored to harmonize German conceptions of international law with those less affected by biased motives. An introductory note is supplied by James Brown Scott.

The author's contention seems to be focused in his statement that "the real goal of international development is the setting of international law on the pedestal now occupied by war" (p. 127). The law of war and International Law are to be kept clearly separated, and the author seeks the closest possible approximation of the dynamic law of war to the static position of self-help in municipal law. "For the efforts of international law in the last analysis are directed at naught else than the unconditional reign of law in the life of states and peoples, and if this goal is to be reached, then we will have to fight against self-help and war, which is the antipodes of right, and seek

in the course of time to banish it utterly" (p. 93). This can be only through a gradual absorption of the law of war into international law as enforced by means of a league of nations, to the point that the employment of self-help by a state will become either impossible or superfluous. Since the Great War has left international law in better repute and higher esteem than ever before, now is the time to plan for the substitution of international coercive measures in place of war.

In dealing with his subject, Professor Nippoldt divides it, therefore, into the two parts, "International Law" and "The Law of War." The former is taken up under the two headings of "Old" and "New Postulates." From his consideration of the comparative ineffectiveness of the older "peaceful" means of preventing war, such as mediation, arbitration and the like, he advances to the new postulates, which set up a league of nations united on grounds of solidarity and co-operation, and provided with "real guarantees" as international law sanctions. The latter must ultimately create a jurisdiction to which subjection will be assured, and they take the form of economic coercive measures, pursued by all the Powers. A summary recapitulation of the author's conception of the needs of the new international law is his "fourteen points," which, he believes, contained even in 1917 all the essentials required for a league of nations. In short, as is said in its introduction, the book is "a commentary on the League of Nations before its birth." Whether its chief value may lie in its foretelling of what later occurred, as is suggested in the introduction, one is not sure.

The most interesting discussion of "New Postulates" is concerned with the economic coercive measures of the proposed league; these include the giving of securities by states concerned in a case, the economic boycott, seizure of the properties and claims of the offending state in foreign countries, award of an indemnity to the injured state, payment of a sum of money to the league as fine or punishment, and the so-called warlike measures of self-help (retorsion, reprisal, embargo and blockade). Boycott can be made unquestionably effectual by the help of pacific blockade, and as such it has received much attention and approbation in this study. Professor Nippoldt does not condemn it as a backward step because of its tendency to draw private parties into the war, since, he says, it does so no more than the direction of naval warfare against merchant vessels, and, as a matter of fact, it is always the individual who suffers in the end. As to military coercive measures, there might be need to resort to force, but these should be only in the background and used as an *ultima ratio*. Their exact nature is a matter more of military technique than of International law. The proposal for an international police force or army is discarded in favor of the co-operation of different national armies. Of greater menace to international law and peace, however, is the "military system," which must be abolished in such particulars as the policy of preparedness, excessive armaments, the "militaristic mentality"; international supervision of all means of waging war is suggested.

The effect of the law of war (Part II), as seen from the lessons of the Great War, Professor Nippoldt sums up in the sentence, "In the future we shall have to seek to continue the progress of International law even *against* the will of opponents, and to enforce its observance by the creation of sub-