

BOOK REVIEWS

CASES AND MATERIALS ON INTERNATIONAL LAW. By Edwin D. Dickinson. The Foundation Press, Brooklyn, 1950. Pp. xxix, 740. \$8.00

This is the testimonial of a satisfied customer. In one full course of application, Professor Dickinson's casebook in international law proved eminently well adapted to the purpose for which it was designed. The editor's aim was "to provide materials suitable for an introductory law school course of not more than two or three semester hours." This appeared the minimum adequate to give law students a grasp of the rudiments of a subject they may continually encounter in practice, as well as to ready them "for the kind of informed leadership . . . which communities . . . expect increasingly of their lawyers."¹

The objective in view governed the method of the book. It is not a bulging repository of source materials; it is not fortified by elaborate doctrinal notes or bibliographies; it does not present the instructor with a superabundance from which to choose. It is, rather, a most judicious selection, limited to what can actually be encompassed in a three-hour course. The result reflects the editor's long experience, and his sense of values. Mr. Dickinson evidently believes that the most important goal in a basic course in the international field is the development of rigorous analysis and hard thinking. Nowadays we are gratified, but also perplexed, when we take account of the burgeoning of international agencies and the profuseness of international documentation. One may be strongly tempted to present a sweeping survey of this widening scene, hoping thereby to achieve quick results. Mr. Dickinson still puts his faith in the tough methods that have been proved in the study of other branches of the law: his collection of materials stresses hard fundamental problems and challenges the student with questions that test principle. This, in the reviewer's opinion, is dead right. Surely the legal problems of the expanding international order will not yield to any less austere methods than have the problems of domestic law. Consider, for example, the present alarming declamation on the subject of treaty-making as applied to current efforts to establish universal standards of just dealing: loose and very un-lawyer-like reasoning, not all on one side, is rapidly producing an appalling confusion. The great need is to think honestly and to keep things straight.

The casebook opens with the "International Community" and the United Nations as the central point in the present system of international law. The materials on this topic include the Charter, the Statute of the International Court of Justice, and the thought-provoking matter of the capacity of the United Nations, as an organization, to claim reparation for

1. P. vii.

injuries suffered in the service of the United Nations—the subject of an advisory opinion in 1949. This suffices to establish the United Nations as the most significant feature in the existing international order—without becoming involved in mere description of its various organs and specialized agencies. Thereafter, throughout the book contemporary developments in the international system are brought to view, but always in a context that keeps touch with enduring fundamentals. Significant state papers, such as unilateral acts, official statements of policies, and national regulations; national legislation on matters of international concern; excerpts from important treaties and conventions; the principal articles from various draft conventions, chiefly from the Harvard Research in International Law; leading passages from standard and recent books: materials such as these, along with decisions of national and international courts, carefully selected and arranged, make up a coherent and effective course of study.

A striking novelty in the organization of the casebook lies in the capital distinction, carried out under each topic, between the law of the international forum and the law of the domestic forum. This is sound and a most significant distinction, and its application throughout the book contributes notably to clarity of reasoning. It is for the public law of each country to say how far the judiciary has authority to declare the law of nations notwithstanding the position taken by another of the branches of government. With us, the judiciary will enforce a later Act of Congress though it be in conflict with an existing treaty.² The international forum, of course, would give effect to the treaty and hold the enforcement of the statute to be a breach of an international obligation. With us, again, there are occasions—this is a matter not free from uncertainty—when the Supreme Court will look to the department of government charged with the conduct of our foreign relations for an authentic indication of the extent of the immunity to be accorded to a foreign sovereign.³ The international court would, of course, have to reach its own conclusions. Clearly it is important, in pondering a decision bearing on a point of international law, to consider whether the court was free to take its stand on the international plane or, rather, spoke within confines fixed by municipal law. In our federal system we observe federal courts and state courts pronouncing upon federal rights and rights under state law: we are familiar with the refinements that are involved in a strict observance of respective jurisdictions. Somewhat comparable, though by no means identical, considerations govern the competence of the international forum and of the domestic forum applying international law. Professor Dickinson's arrangement focuses attention upon these considerations and thereby promotes an acuity of analysis all too often lacking in this regard.

In sum, this is a really useful aid to teaching, notably for qualities Mr. Dickinson has always exemplified—sound judgment, sense of balance

2. The Head-Money cases, 112 U.S. 580 (1884).

3. Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

and proportion, and a progressive outlook that never loses its grasp on the essential and practical. He has been greatly missed by his friends here in the Bay Area where this review is written, since his departure to the law school where the review is to be published.

Charles Fairman †

CASES AND MATERIALS ON CORPORATIONS AND PARTNERSHIPS. By Alexander H. Frey. Little, Brown and Company, Boston, 1951. Pp. xxxv, 1404. \$9.00.

Professor Frey's new casebook is an outgrowth of his *Cases and Statutes on Business Associations* (1935), and the volumes are not dissimilar in organization. Frey reaffirms the philosophy of grouping together all materials bearing on each stage in the life of the business enterprise rather than employing legal concepts as the threads on which to string his cases. The fact that this philosophy no longer sharply marks off Frey's volume from its competitors testifies to a growing recognition of the usefulness of this approach, due in part, no doubt, to the influence exerted by his 1935 book. Though similar in structure, however, the new book is vastly different from the earlier one in content; almost half of the cases, we are told, did not appear in the earlier work, and a changed tone and emphasis reflects the impact of the New Deal's financial reforms.

The "integration" of the law of partnerships and other unincorporated associations into the corporations course has long been an intriguing aim, and Douglas virtually made it an article of faith of the "functional" approach to law. Frey's goes farther than any other casebook in current use to bracket the partnership with the corporation, but in vast areas of the book the corporation still stands alone. As to the limited partnership, the joint stock company, and the business trust, they are encountered as seldom in the book as in practice. I mention this not to criticize Frey, for he has done as much as seems to me possible to achieve the aim of integration. Rather my point is to question whether an attempt to do more would not be the pursuit of a mirage.

The call for integration was, at least in part, based on a false premise: that incorporated and unincorporated associations are alternative devices among which the enterpriser has a free choice to accomplish similar business ends. In fact, for the large enterprise, only incorporation is feasible, and such important legal problems as voting control, the flotation of securities, and the minority stockholder's suit have no counterpart (in any meaningful sense) in the unincorporated association. Only in the case of the small enterprise do the investors really enjoy a choice of devices, and here the comparison of legal characteristics is quickly made. In point of

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fact, choice is likely to be governed these days almost entirely by tax consequences. To the extent that integration was advocated in order to facilitate concentration on the social and economic consequences of modern business, it is even more noteworthy that large-scale business uses the corporate form to the total exclusion of others. I do not suggest that Frey disagrees with these observations, and I do share his conviction that partnership materials should be brought into the corporations course, although it does not seem to me to be a matter of moment whether they are sprinkled through the course or dealt with once and for all at the outset. They are too important to be omitted from the curriculum but not important enough nowadays to warrant a course of their own. In this respect I prefer the Frey book to the Dodd-Baker and Berle-Warren books, both of which use a generic label but are restricted to corporations, and to the Stevens-Larson volume, which gives more, though only a little more, than its title promises. I also like Frey's readiness, when confronted by a plethora of cases, to select one on which to take his stand, instead of giving way to the temptation to use isolated dribs and drabs from many opinions under the pretext that they are being "edited." The publisher also merits commendation for the book's tasteful typography.

Turning to the substance of Frey's book, one finds an emphasis upon such current issues as the stockholders' derivative action, the stockholders' agreement in the closely-held corporation, the fiduciary duty of insiders, and the rights of the minority when fundamental changes are effected. The comments which follow stem from agreement with Frey's aims, emphasis, and organization, and reflect simply the reviewer's wish that he had gone farther in the direction he selected. For example, the treatment of the shareholders' agreement in the closed corporation omits any reference to *Benintendi v. Kenton Hotel*,¹ and to the statutory change (Section 9 of the New York Stock Corporation Law) that it engendered and that may in time be adopted elsewhere. I should also have liked to see *Home Fire Insurance Co. v. Barber*,² or some other springboard for a discussion of the requirement of contemporaneous ownership in addition to the barebones of the Delaware statute and Federal Equity Rule 27. The reprint of the SEC's proxy regulations is helpful, though the troublesome legal issues that have followed in the wake of these administrative rules are only touched on in the one case³ which is reprinted. At the very least, an editor's note with questions would be desirable at this point. The problems posed by *Hall v. Trans-Lux*,⁴ and by *Steinberg v. Adams*⁵ with respect to the right of management and of successful dissenters to charge proxy solicitation expense to the corporation, are surely worthy of a few pages. On the subject of the stockholder's access to corporate information, the lack of any reference

1. 294 N.Y. 112, 60 N.E.2d 829 (1945).

2. 67 Neb. 644, 9 N.W. 1024 (1903).

3. SEC v. O'Hara Re-election Committee, 28 F. Supp. 523 (D. Mass. 1939).

4. 20 Del. Ch. 78, 171 Atl. 226 (1934).

5. Steinberg v. Adams, 90 F. Supp. 604 (S.D. N.Y. 1950).

to the SEC's requirement of annual reports is also unfortunate. Moreover, by-laws conferring on the directors the right to restrict or prohibit access to the corporation's records are so common that *State v. Penn-Beaver Oil Co.*,⁶ holding such a by-law unenforceable, deserves more than the paragraph it has gotten. The casebook's coverage of the regulation of securities by the federal government is better, in my opinion, than that of any other book in the field. It does seem to me, however, that the SEC's Rule X-10B-5 does not get anything like the prominence that it promises to have in the law.

My main complaint, then, is that Frey, although properly turning his back on the quarrels of the past (like the *ultra vires* and *de facto* doctrines), has not devoted enough attention to the growing pains of corporate law. No doubt this is partly because these issues have not yet found their way into "leading cases," and more extensive use of text would be required where cases are unavailable. To be sure, the book is already a long one, but I for one would have been content to sacrifice much of the material on the proper parties to actions and on the authority of corporate officers.

In recording these differences of opinion, I cheerfully acknowledge that no one can please everybody and that one who tried to do so would assuredly please no one. Indeed, I am especially sympathetic to the author's lot, having been recently advised by a reviewer to get busy on a second edition of a casebook even before I had received the initial royalties on the first edition. Moreover, the closer a book comes to the reviewer's ideal, the greater the regret that it falls short in any respect. Frey's is an excellent book, and the materials are ample enough to allow a good deal of tailoring to suit the individual taste and need.

Boris I. Bittker †

DESTINATION UNKNOWN: FIFTY YEARS OF LABOR RELATIONS. By Walter Gordon Merritt. Prentice-Hall, Inc., New York, 1951. Pp. x, 454. \$5.65.

Looking back over half a century of labor conflict in the United States, Merritt recounts his legal battles against the secondary boycott which had been carried on by the Hatters, the Carpenters, the Stonecutters and the Teamsters, as well as his experiences in the building service industry in New York City and in the anthracite coal fields of Pennsylvania. Drawing upon his long career, he sets down his views and opinions concerning labor unions and the various legislative experiments in government controls under such prejudicial chapter headings as "Union Security and Individual Lib-

6. 34 Del. 81, 143 Atl. 257 (1926)

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erty," "Waves of Violence," "Liberties Bartered for Basic Needs," "Onward March of Collective Bargaining," "Call to Battle," "Injunction Phobia" and "Collective Bargaining or Class Conflict."

Viewing the current scene in the light of the development of the law over the past 50 years, Merritt writes an epitaph over the workers' individual liberty. As a realist he turns his full attention to the collectivity, the labor union, in this age of big business, big unions and big government. Little, if any, mention is made of the impact on the lives of the workers by the growing concentration of economic power in an ever narrowing circle of big business; nor does he relate this economic phenomenon to the objectives and activities of labor unions; nor does he concern himself with the forces from which labor unions derive their dynamism. A considerable portion of the book is devoted to an exposition of "confusion" in the development of the law as it sought to apply doctrines of individualism to an era of collectivism.

Ostensibly this book was written for the purpose of uncovering the historic roots of the important issues in the current controversy over the Taft-Hartley Act. As one proceeds through the book it becomes increasingly clear that there is a governing bias, stemming no doubt from Merritt's early experiences in Danbury, Connecticut, when his father fought the Hatters' Union in combination with other manufacturers who adhered to the open shop. The underlying purpose of the book is to arouse and intensify fear of labor unions in the public mind so that the enactment of more stringent labor restraints against unions than those set forth in the Taft-Hartley Act will be acceptable. Though outwardly professing an abiding faith in labor unions, he attributes to them characteristics that are so anti-social and so contrary to our conceptions of democracy and the free enterprise system that one can only wonder upon what grounds Merritt sustains his faith. His presentation of the labor movement in America will not make many converts to his faith in labor unions.

In his view the labor union is a collectivity which has devoured individualism; the only shred of individual liberty left to the worker is the questionable right to speak in the union hall. As Merritt sees it, the worker has forfeited his liberty to a mass into which the labor leader injects hatred of the employer class. Having written the epitaph over the grave of individualism, Merritt explores current labor relations legislation adopted by the States as well as by the Federal Government with a view toward suggesting methods to compel these collectivities to submit to the social will.

Labor unions are committed to the principle that basic needs require abandonment of individual liberty, he declares. Though they may be a great force to assure stability and efficiency in production, they are also the greatest threat to our democracy and the free enterprise system. The greatest internal threat of our day, he says, is "labor's facilities for disturbing the democratic process by disorder, violence and economic prostration." Changing his emphasis, he declares at another point in his long, ambivalent

and repetitious book, that society is dependent upon management, the "creative or creditor class," and that the real danger to our society stems from the propoganda of union leaders who refrain from extolling the virtues and contributions of the "creative class." "The absence of such praise in union literature and union utterances and the constant reference to the employers as a common enemy and as plunderers and deceivers are above almost any other factors the greatest dangers to our system of free enterprise." This is hardly consistent with the conclusions of political scientists and social psychologists who maintain that nations abandon free enterprise and democracy because of the deterioration of the economic system.

His book has many strange and revealing outbursts. Probably personal pique growing out of his experiences in the past, when he engaged in hand-to-hand combat with labor during strikes, accounts for this statement: "If the great body of union members believe that employers are enemies both of the workers and society and that our miraculous war production was merely the result of the patriotism of the workers, there would seem to be no basis for an appeal to treat them fairly, or even to tolerate their existence."

Dividing our society into the "creative class" and the "working class," Merritt says that collective bargaining is one aspect of the class struggle. Despite the facts, he seeks to establish an identity between unionism, socialism and communism. He declares that "the labor movement in the United States, the socialist program of the Labor Party in England and the dictatorship of the proletariat are all born of the emotional force to achieve a greater degree of equalitarianism. The longing is for human welfare and human happiness, not merely economic but spiritual; but dangers lurk in the pursuit of these ideals." Merritt deplores this drive as destructive of initiative and ability and suggests that this forges another link between labor unions and communism.

Fear of labor unions and labor leaders is the strongest current running through this book. As he sees it, labor leaders are stirring up the baser instincts in man and unleashing dark forces of destruction. Labor unions are given to violence. They seek industry-wide patterns which hold producers in a vise and thus achieve power to enforce their demands even against the government. Violation of contract, waves of violence and defiance of law and government are for him the stigmata of the labor union. Going back to the days of the I. W. W. and quoting from current union literature he discerns a stream of radicalism running through the labor movement. Whereas heretofore unions merely threatened the security of the employer, now they threaten society itself. For Merritt, the issue is drawn between collective bargaining and class conflict.

This development, he thinks, is due to a false sentimentality for labor, abandonment of fortitude and surrender by public officials in the face of privations during strikes. But more importantly, it is due to the opening of the gates by the judiciary to a more direct democracy in which "public

officials promptly respond to the will of the voters and we desert policies which develop responsibility and self-reliance among industrial workers."

He reads history through the apertures of the law. For him the Norris-LaGuardia Act, which restricted the power of the federal courts to grant injunctions in labor cases, marked the beginning of the era of class conflict. The Wagner Act, he believes, emphasized class conflict instead of cooperation between the two contending classes and imposed a kind of compulsory wedlock between them. The 30's were the years when "public opinion and the statutes lured them [unions] down the wrong trail." The Taft-Hartley Act, he says, did not grow out of the grapes of wrath but "flowered from fear" of labor unions because of the strikes of 1936 and 1946. It is probably irrelevant to his purposes to correlate these strikes with the depression of the early 30's and the economic readjustments following the end of World War II.

Conceiving labor unions as partaking of the nature of both a spoiled child and an anti-social giant, he advises that society should ignore the protests of labor against stringent restraints as one would ignore the protests of a spoiled child badly in need of discipline. Society, he counsels, must proceed with courage to administer strong remedies. Society must endure privations while it establishes its capacity for self-defense.

The remedies he proposes are directed toward curbing violence, restricting strikes by limiting their objectives, enforcing responsibility by the adoption of the rule of union liability announced by Judge Goldsborough in the government's case against John L. Lewis and the United Mine Workers, by prohibiting industry-wide stoppages in coal and by illegalizing strikes in railroads, utilities and other industries where rates are fixed by government agencies. These remedies do not exhaust his whole catalogue but serve to illustrate his proposals. In those industries like utilities and railroads where rates are fixed by the Interstate Commerce Commission he would vest in that body the power to fix wages, which duty they would perform in a routine fashion. He assumes then that the trains would run on time.

The coal industry receives special attention. Here he would disestablish industry-wide bargaining by legally prescribing agreements covering not more than 25% of the industry for a term of three years with staggered termination dates. He believes that this drastic measure could be safely instituted as a political matter because public opinion has no sympathy for the truculence of John L. Lewis. Moreover, he points out craftily, the United Mine Workers Union has demonstrated its capacity to control its members and has millions in its treasury. He would not apply the same treatment to other industries. Pursuing a policy of caution, or as he calls it, the "case by case approach," he advises that we await further developments in the steel industry before we consider applying to it the remedy he has proposed for coal. He does not explore the probable effects of such action either upon the workers involved or upon our society. Nor

does he undertake to fashion a remedy to meet the situation in which a bottle-neck plant may, because of our highly integrated and interdependent economic system, halt production in a large segment of industry.

He rejects compulsory arbitration as illusory and impractical. Experiences with Railway Labor Act, the Taft-Hartley Act, establish to his satisfaction that deferments or postponements through conciliation, mediation, fact-finding, cooling-off periods or other "peaceful processes" sometimes fail. "If they fail," he declares, "society must have in its arsenal further implements of defense that it may employ in the case of paralysis of its economy essential to health and safety." One might observe that there are other "implements of defense" which have been employed against labor unions in those countries which place efficiency before democracy and which have made the patterns of life in those countries abhorrent to us.

To insure submission to the social will, Merritt relies upon the injunction, the damage suit and the criminal prosecution, even though history has cast serious doubt upon the efficacy of these implements of defense in the field of labor relations.

His suggestions for strengthening the Taft-Hartley Act are interesting, provocative and sometimes frightening. None of them deals with the basic causes of unrest among workers. He relies upon legal compulsions in a field which yields to persuasion and assent. Probably it is too much to expect that the lawyer be also a social engineer but it has been the conclusion of objective observers that the weapons of the lawyer only serve to intensify conflict and deepen the sense of frustration amongst the workers. Nevertheless, Merritt insists that only by such means can society achieve tranquillity and continuity of efficient production.

The book seems to sound a call to arms against unions. He does not urge precipitate action. He counsels a policy of caution with delicacy. The time must be ripe and he thinks the time is now. The tidal wave of "fear and hatred of Russian ideology has greatly retarded the radicals and given us needed breathing time to build our protection against that ideology. If only we would take full advantage of this!" Such an exhortation serves to confirm labor's charge that under cover of the cry against Communism there is a strong and powerful movement to shackle labor.

Merritt titled his book "Destination Unknown" but the book seems to point to Destination Abhorrent.

After travelling with him along the tangled path of his thoughts through an unreal world dominated by fear and populated only by lawyers armed with injunctions, damage complaints and indictments, judges, members of the "creative class" and a few labor leaders, with the "working class" filled with envy and hate surging up from the valleys in waves of violence, one is inclined to ask Merritt, "Where are you leading us?"

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