

BOOK REVIEWS

A TREATISE ON THE LAW OF BANKS AND BANKING. By John T. Morse, Jr. (Sixth Edition). By Harvey C. Voorhees. In two volumes. Little, Brown and Co., Boston, 1928. Pp. c, 2134.

Morse on Banks and Banking has long been the leading legal treatise on this important commercial subject. The first edition, published in 1870, was a small book of five hundred and forty-two pages citing about twelve hundred cases. The present edition is a work of two volumes containing over two thousand pages and citing some seven thousand cases. The book bears the imprint of several hands. The second edition was prepared by Mr. Morse in 1879 and in it the author thoroughly revised his work. The third edition, edited by Mr. Frank Parsons in 1888, was also a thoroughgoing revision. The fourth edition, by the same editor in 1903, contained some additions but left the book much as it was in the preceding edition. The fifth edition, edited by Mr. James N. Carter in 1917, and the present edition, left the book substantially unchanged except for the new citations and the insertion of new statutes. The net result is that the book is in substance what it was forty years ago except for the insertion of the recent cases and statutes.

A book edited in this way is not an adequate treatise on the present-day law. The law relating to banks and banking has been developing rapidly. The number of cases in recent years has been tremendous. In the Third Decennial Digest there are, under the caption of Banks and Banking, over seven hundred columns of cases. Not only has there been a good deal of legislation but new banking practices have developed and new problems have arisen. It is impossible to deal with these adequately without remodeling the text.

It is illuminating to see how a particular problem is treated in the book, for example the problem of the liability of a bank which has allowed a depositor to place on deposit to his individual credit checks drawn by him as a fiduciary and subsequently to withdraw the deposit. In the section treating this question it is stated that:

"the banker is not justified in refusing to honor the depositor's check because he knows or believes that the check is an appropriation of funds to a person or for a purpose to whom or for which the depositor is not lawfully authorized to appropriate these funds."

Later in the same section it is said that:

"When a bank receives a deposit from one acting in a representative capacity it cannot justify a payment to him of the amount deposited if it knows, or facts are presented which if acted upon, would disclose, that the fund is about to be wrongfully and unlawfully diverted from the true owner."

If both of these statements are correct, the bank is placed in a truly unfortunate position. Under the decisions in England and in the United States neither statement is correct. What has happened is that the former statement first appeared

in the second edition and is based on the English decision of *Gray v. Johnston*,¹ and the latter statement was added in the fifth edition to take care of a *dictum* of the Appellate Division of the Supreme Court of New York in *Parks v. Knickerbocker Trust Co.*² The leading case in New York³ is not cited in this section, although it is cited in a subsequent one and the later decision in *Whiting v. Hudson Trust Co.*⁴ is not cited at all. Even more serious, perhaps, is the failure to cite *Empire Trust Co. v. Cahan*,⁵ although this case was included in the reports which the editor has examined. There is no reference in this section to the provisions of the *Uniform Fiduciaries Act* which has been adopted in eleven states.

So too in other parts of the book there is the same tendency to insert the new matter into text or footnotes without considering its effect upon what is already stated. As a result, it is often impossible to ascertain the views of the author or editor; and frequently cases relating to the same matter are inserted in such diverse places that it is difficult to find the cases. All that can be said is that most of the important decisions are to be found somewhere in the footnotes. The shortcomings of the book cannot altogether be laid at the door of the present editor. They are largely due to the nature of his task of putting the new wine into the old bottles.

Austin W. Scott.

Harvard Law School.

HANDBOOK OF THE LAW OF CODE PLEADING. By Charles E. Clark. West Publishing Co., St. Paul, 1928. Pp. viii, 581.

This book is a welcome addition to the Hornbook Series. The reviewer is beset by the desire to sermonize upon statements drawn from its preface and moved to join in the discussion of certain mooted questions presented by the text itself. If the writing of this book needs justification it may be found in the first paragraph of the preface which seems worth quoting at length.

"Of late years the idea of pleading as a science has fallen into disfavor. This is shown in many ways: By the objection of lawyers to changes from abroad, however thoroughly supported by experience; by the attitude of bar committees, who examine only on minute points of local practice; by the decisions of courts which construe the codes as though they 'speak for themselves,' without reference to their historical background; and, by no means least, the lack of attention paid to the subject by text-writers and students. Except for local and semi-local practice and form books, one must go back to the early days of the codes to find any attempts to set forth the subject as a unified whole. Since this situation is felt to be unfortunate, the present book represents an attempt to alleviate it."

There is reason for dissatisfaction with the progress of pleading reform in America. There is ample ground for the suspicion that very many of our

¹ L. R. 3 H. L. 1, 14 (1868).

² 137 App. Div. 719, 721, 122 N. Y. Supp. 521, 524 (1910).

³ *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759 (1916).

⁴ 234 N. Y. 394, 138 N. E. 33 (1923).

⁵ 274 U. S. 473, 47 Sup. Ct. 661 (1927).

judges either do not know or do not care what it is all about. There is no path through the maze of pleading decisions. Some courts still cling to many of the defects of the common law specifically sought to be remedied by the code. Many others, crediting the original code with an infallibility of expression, are content merely to construe its terms as they would those of some written constitution. Here and there are evidences of the fatal belief that with the adoption of the code we have arrived at a satisfactory stopping point in procedural evolution, and there are accompanying proofs that at these points the ossification of this body of law has already begun. There is today a pressing need for speed and certainty in the administration of the civil side of our law, which, though it has not excited the same clamor, quite matches the need so obvious upon the criminal side. It is unfortunately true that many of our judges need a very definite stimulus toward procedural reform, even where there is granted the power to modify procedure through court rules. Parenthetically it may be remarked that some of us have found our hopes dashed by the reluctance with which courts both in England and in America seem to exercise this power. Even the New York court, which of the American courts seems to have gone the farthest, can not be charged with having used its power recklessly or even freely. But even after a court has promulgated a set of such rules it must not be thought that the need for progressive and liberalized thinking is at an end. Such rules are not a panacea. No mere mechanical device can ever make up for a lack of ability or progressiveness in the legal profession. Professor Clark is, therefore, to be praised for having provided a very definite stimulus in the right direction.

He is quite correct in asserting that no progress can come from merely an intensified study of some local code. The best that such a study can produce is a sort of intensified provincialism. Some one has said that the ideal of a college course should be to teach the student how to live, not merely how to make a living. Similarly, the objective of the study of any branch of procedure should be greater than merely to learn how to use the *existing* tools of the craft. The chief concern should be the improvement of basic processes. Only upon such an ideal can we realize the hope expressed by the author "that code pleading will lose its distinctive characteristics in a general American system applied in practically all the states."¹

The vast labor and real scholarship that have gone into this book will not be apparent to one who has never tried to wade through the problems of code pleading, and it is a matter for sincere regret that the compendious nature of such a work denies to historical considerations the treatment they so much deserve. It is perhaps a valid criticism that Professor Clark has clipped this portion of his discussion even more closely than seemed necessary. The footnotes throughout the book are packed with a wealth of material, the like of which is not to be found in any other book on the subject. The copious references to the law reviews are particularly valuable.

But the very fullness of these footnotes has produced what seems to the present writer to be an undue compression of the text, and leaves the feeling that the book has two distinct objects and that it would have been better

¹ CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (1928) 22.

to have subordinated one of them. That is, the author might have reduced the quantum of the footnotes and might have more fully elaborated his theories, or he might have increased the book to truly encyclopedic proportions. The writer wishes the first of these had been chosen. This feeling will not be shared by those who do not equally feel the need of a detailed and completely fresh analysis of the true functions of pleadings, though it will be generally agreed that few writers are as well prepared for such an analysis as is Professor Clark.

Mere differences in the matter of legal theory can not be considered in any light as defects in this book. The present writer is not willing to go to the lengths to which Professor Clark seems to be willing to go in abandoning the concept of the "theory of the pleading."² Certainly the author does not intend that it shall wholly disappear, for no efficient pleader is likely ever to be satisfied with a mere colorless enumeration of facts. The selection for emphasis and for logical presentation in any stage of the case must always be based upon some theory of right or defense. There may have been in the past an objectionable over-emphasis of this concept, but to abandon it entirely would allow the suit to drift like a rudderless ship veering before chance winds. After such an abandonment what becomes of our ideal of relevancy in allegation and proof? Not that relevancy is an end in itself, but only that expedition and accuracy are possible only with definiteness of aim. It does not seem necessary to say with Professor Clark that the theory of action is necessarily "in contravention of the code ideal by which the pleadings are to set forth *facts* and not law."³ We might seize upon the author's own statement that "the difference between statements of fact and statements of law is almost entirely one of degree only,"⁴ and assert, as a deduction from experience, that the more logical and orderly the pleading is, the greater is the likelihood that a "theory of the case" will be disclosed. With the argument that the pleader should not be held *rigidly* to an announced theory there will be ready agreement.

It is also stated that the pleader "should not be forced to fulfil any requirement of having and maintaining a single legal theory of his pleadings; he should be held only to the ideal of reasonably fair notice of the facts of his case."⁵ What facts? All? Or only the material ones? Which are material? How can you tell except as you test the allegations by some theory of the case? The spirit of the code calls for a concise statement of facts without repetition, and this somehow seems to demand at least a tentative choice of theory. Some middle ground between the hard formalism of the common law and unrestrained procedural fumbling (in which trial lawyers have always been too proficient) must be found. Professor Clark is wholly correct in his insistence that the judge and not the parties must decide when there has been sufficient notice of the respective claims of the parties, but even the

² *Ibid.* 54, 55, 64, 174-177.

³ *Ibid.* 54.

⁴ *Ibid.* 19.

⁵ *Ibid.* 177.

judge is entitled to a disclosure of the theory upon which the party elects to rest.

The same emphasis upon facts as facts seems to color the author's definition of a cause of action under the codes⁶ and his discussion of the problem of splitting of causes of action,⁷ but the limitations of a book review do not permit an exposition of every difference in view. It may, however, be a sufficient testimonial to the stimulating nature of Professor Clark's book that the reviewer with difficulty restrains the impulse to enter upon an extended discussion of these and other topics. Vigorous stimulation of thought is the thing most needed just now and this book provides it.

A general estimate of the book compels one to say that it is fair; it is comprehensive; it is scholarly; it is timely; it is worth the careful study of the schoolman, the lawyer or the judge. Professor Clark is to be congratulated upon its all-round excellence.

Lyman P. Wilson.

Cornell Law School.

CASES ON EQUITY. By Edgar Noble Durfee. The Bobbs-Merrill Co., Indianapolis, 1928. Pp. xxviii, 830.

A review of a casebook prepared by a recognized scholar is apt to be a rather futile performance at best. On the one hand, there is the mathematical or statistical review—an exposition of the table of contents, accompanied by an enumeration of the cases from England, South Dakota, and New York, and of the proof or clerical errors detected by the reviewer. On the other, there is the evangelical review, in which the reviewer expounds his notions of the organization of a totally different sort of casebook, which, it must usually be conceded, the editor under review avowedly did not undertake. The first type adds little to the store of human knowledge, whether of the editor or of the reader; the second, though more interesting, is more or less irrelevant and more or less unfair. In the end, the reviewer is too frequently driven to a few rather obvious comments capped off with the trite and self-evident statement that the true test of the book will come in the classroom.

Even in the face of this counsel of despair, there are, perhaps, a few observations that may properly be made in respect of Professor Durfee's casebook. In the first place, the book evidences long and careful preparation. It is replete with notes, not merely citations and digests of cases, statutes and law review articles, but long textual discussions of related questions. There are further considerable extracts from texts in Part I; an example in point is a ten-page quotation from Langdell's *Summary of Equity Pleading*. These textual notes and extracts are, of course, labor-saving devices which should be especially valuable wherever the course is rather closely restricted in hours. The cases themselves are interesting and well-selected; they tend, perhaps, to the expository, rather than to the problem type. The statements of facts are frequently cut or restated, but enough work is left for the student.

⁶ *Ibid.* 75 *et seq.*

⁷ *Ibid.* 318 *et seq.*

The scope of the book, as indicated by its table of contents, is quite broad; it includes equity jurisdiction, pleading and practice; equitable remedies; and vendor and purchaser. Necessarily, the treatment of some of the topics is highly restricted. Thus, although Part I is devoted in large part to equity procedure, there are no cases (although, as already stated, there is some text material) dealing primarily with equity pleading, nor with equitable defenses; there are relatively few cases bearing upon the problems relating to jury trial, or to appellate review. Professor Durfee has deliberately left the questions arising out of the attempted fusion of law and equity under the codes for treatment elsewhere, although he seems to lament the omission on the ground that the treatment elsewhere may in fact never take place.

The conscious and specific direction of attention to materials on equity procedure seems to this reviewer a chief virtue of this casebook, and the failure to treat the subject more completely, a defect. It may be said, of course, that such materials more properly belong in the advanced courses in procedure. But in fact many of the problems are not considered there at all. Moreover, if it be agreed that a somewhat thorough knowledge of common law pleading and practice is essential to an understanding of modern procedure and practice, must it not also be agreed that considerable knowledge of equitable procedural devices is likewise essential, particularly since so many code provisions sprang full-blown from that source. In other words, might not one first year course properly include a study not only of common law and equitable remedies, but also of the distinctive common law and equitable procedural devices which have survived in the codes, and hence which are fundamental to an understanding of the code cases.

Within the confines he set himself, Professor Durfee has done a thorough, scholarly job. That his book will find a warm welcome goes without saying.

Roswell Magill.

Law School, Columbia University.

LECTURES ON LEGAL TOPICS, 1923-1924. The Macmillan Co., New York, 1928.
Pp. viii, 485.

This is the fifth volume of a series, consisting of lectures delivered before the Association of the Bar of the City of New York. The lectures in the present volume were delivered during the Court Year, 1923-1924. The subject matter of these lectures covers a wide range of subjects. Some of these appeal to the layman as well as to the lawyer, for example, the Reparations Problem by Paul D. Cravath, Collective Bargaining Between Employers and Workers by Morris Hillquit, and Efforts for Divorce Reform by Walter George Smith. Of the addresses that are primarily of interest to the practicing lawyer some deal with such general topics as Reflections of a Trial Justice by Jacob Marks, Justice of the Municipal Court of the City of New York, The Relation of the Practicing Lawyer to the Efficient Administration of Justice by Cuthbert W. Pound of the New York Court of Appeals, The Administration of the Criminal Law by Charles S. Whitman, former Governor of New York State, Progressiveness of New York Law by Frank H. Hiscock, then Chief Judge of the New York Court of Appeals, How Not to Try a

Case by Daniel F. Cohalan, former Justice, Supreme Court, New York County, and *The Utility of Jurisprudence in the Solution of Legal Problems* by Professor Walter W. Cook.

Justice Marks made an interesting suggestion with the view of elevating the legal profession. He thinks that it would be helpful in this direction if those admitted to the bar were allowed to practice at first only in the inferior courts as attorneys, and were permitted to become counsellors only thereafter, upon passing a second examination. Governor Whitman's address contains a very vivid description of criminal trials in England and in France, which brings home the fact that we have to learn a great deal in this respect from England. Professor Cook urged upon the profession the need of better analytical methods for the satisfactory solution of legal problems. "I do not take the view," he said, "that analysis alone will solve these problems. Analysis is necessary but not sufficient. Analysis enables us to see first what our problem is, to discover hidden analogies, or differences which but for the analogies might have escaped our attention."

Especial attention should be called to the three addresses on Banking Institutions and the Law by Cornelius Doremus, Joseph M. Hartfield and Henry Crofut White. These addresses set forth the relationship between the lawyer and the banker and the difficult legal problems with which the modern banker has to deal. Mr. White dealt with the legal problems presented by the modern trust.

Of the remaining addresses, pre-eminently technical in character, Professor Edwin M. Borchard discussed the importance of Declaratory Judgments as instruments of preventive justice. In this country the subject of declaratory judgments is still new, and because of unfamiliarity with its function on the part of the legal profession, it has not always met with the cordial reception it deserves. Professor Borchard said: "The English have had the benefit of this procedure now for over forty years. I am in hopes that this new statute in New York, as it becomes known to the Bar, and as its important functions become more generally appreciated, will open a similar prospect of benefit to the people of this State."

Dean Bogert's address contains a thorough discussion of the subject of Insurance Trusts from the standpoint of New York law. In it he doubted the validity of the ordinary funded insurance trust under the New York rule against accumulations, and suggested as the most satisfactory method of solving the problem the obtaining of a declaratory judgment as to its validity or invalidity under Section 473 of the Civil Practice Act.

Of especial importance to the trial lawyer of New York are the two addresses by Mr. Young B. Smith, Professor of Law at Columbia University and now Dean of the Law School, on the subject of *Motions During the Trial of a Civil Action Before a Jury*, and *The Power of the Judge to Direct a Verdict*: Section 457-A of the New York Civil Practice Act.

Ernest G. Lorensen.

Yale Law School.

CASES ON ADMINISTRATIVE LAW. (Second Edition). By Ernest Freund. American Case Book Series. West Publishing Co., St. Paul, 1928. Pp. xxi, 745.

This second edition of Professor Freund's case book on administrative law is more than what the term "second edition" ordinarily implies. It is a reconstructed edition into which much work has gone, not only to bring the book abreast of the principal developments in case law since the first edition, which appeared in 1911, but as well to point and clarify the subject, and so to make the book a better cutting tool.

Declaring that administrative law can be most effectively dealt with in a law school as a course on the exercise of administrative power and its subjection or non-subjection to judicial control, Professor Freund divides the subject into three parts: (1) administrative power and action, (2) relief against administrative action, and (3) administrative finality. Yet in his actual arrangement of the case material he consolidates the last two. This is but natural, and is explained by their close connection.

It is the last chapter, entitled Jurisdictional Limitations and Administrative Finality, that is certain to attract the most attention, partly because Professor Freund has treated it in a new way and with a new arrangement of cases, but chiefly because the pace with which administrative finality is achieved, the degree to which it is achieved, and the manner in which it is brought about, prognosticates, better than anything else, the future of administrative law. It would seem that Professor Freund endeavors, in arranging his material on this topic, to make clear in just what types of questions finality is accorded. His arrangement is factual rather than philosophically analytical. He does not attempt the functional ascent. Perhaps it is too early for this. And certainly in a case book, the prime object of which is to "introduce" law students to the general subject, the first consideration should be to see that they are in fact introduced, and so are put well in the way of becoming acquainted with it. The realistic treatment has, therefore, much to commend it. This is not say that the functional realism may not be the greater realism, *when it is worked out*, but that is for tomorrow or the day after.

Perhaps the most striking success of the book is in its further pointing, its sharper delimitation of the subject of administrative law. A definite objective is sought in each chapter and a definite objective is attained. And the chapters all together work toward a unity of concept. To achieve this result has required more willingness to confine the subject within restricted limits than most others who have dealt with it have shown. "An effort has been made especially to relieve the course as far as possible of purely constitutional problems, which are taken care of in other courses." It may have seemed an act of self-abnegation to let some of these old favorites go, and perhaps Professor Freund has not parted with them without a pang. But his book has undoubtedly been a gainer by it. Some other compilers of case books might be instructed by this sacrifice.

About a fifth of the cases included in the book were decided since the first edition appeared, a good proportion of them being cases decided by the Supreme Court of the United States. An excellent example of how these newer cases complement or otherwise redress the older ones is afforded by

*Tod v. Waldman*¹ in its relation to *Chin Yow v. U. S.*² Other striking examples might be given. These additions are of signal merit. Yet it has not been found necessary to draw on the newer material at all in treating some of the topics, as witness chapter four, on Summary Action, a chapter containing five cases, only one of which was decided in the present century. And no better illustration of maximum result in minimum compass is to be found in the book.

About contemporaneously with these cases Mr. Freund is publishing a systematic study of Administrative Powers over Persons and Property upon the basis of a comparative study of statute law. "This," he states, "gives an entirely different approach to the subject of administrative law showing that legislation has been an even more important factor in its development than the decisions of the courts." But very little legislative material is included in the case book, and it seems evident that Mr. Freund still regards the case material as the best approach for the law student. In this he would appear to be wise, particularly so long as administrative law continues to be treated as law "controlling the administration." Judicial control, or the absence of it, is the matter of administrative law which is of most importance to the average law student. When he has learned this, and its foundations are still pre-eminently common law rather than legislative, he may then go on to a study of the legislative factor.

Harold M. Bowman.

Law School, Boston University.

APPELLATE PRACTICE AND PROCEDURE IN THE SUPREME COURT OF THE UNITED STATES. (Revised Edition). By Reynolds Robertson. Prentice Hall, Inc., New York, 1928. Pp. xlii, 418.

There are, it is believed, but few practitioners with sufficient self-assurance to carry them to the call of their first case by the Chief Justice at Washington, when they have no more experienced colleague to bear the procedural responsibility, without going through the usual preliminary ordeal: to wake at 3 A. M., bathed in sudden perspiration; to toss sleepless until morning; to rush breakfastless to the office, and there, in breathless anxiety, to snatch down one book after another, until at last the danger which the subconscious demon has suggested is proved either to be imaginary, or, alas, in a few cases, to be a hopeless obstacle to the last chance of having the case reviewed.

It is to prevent such experiences as these that Mr. Robertson's excellent book is primarily designed, and it should so result. The several steps essential in each possible contingency are tabulated, explained and then summarized, with such fool-proof clarity as to allay the fears of the most nervous and to inspire confidence in the most timid.

The book does not purport to discuss the substantive law, nor the history of the present procedure, confining itself to the practice as it now exists. In this limited field the book speaks with authority. One feels that the writer

¹266 U. S. 113, 45 Sup. Ct. 85 (1924).

²208 U. S. 8, 28 Sup. Ct. 201 (1908).

has certainly not forgotten anything. Why should he, when every day or so for the past six years, he has been called on, as assistant to the Clerk of the Supreme Court, to answer the very questions to which we casual federal practitioners think we know the immediate answers, but cannot be quite sure.

Mr. Robertson has the orderly mind which is the first requisite for a book of this kind, as his Table of Chapters and Table of Contents at once prove. He evidently wrote this book himself, which is more than can be said of many modern text books. One need not fear the carelessness of non-understanding assistants.

Among the most valuable and unique features are the frequent practical suggestions, as to what the Clerk will gladly do to save counsel trouble, and to enable him to keep his record straight. Such is the warning to tell the Clerk whether it is desired to have the denied petition for rehearing left in the record; the suggestion as to the early preparation of the statement of points and designation of parts of the record to be printed; the method of submission of a motion to dismiss by the Clerk, saving a trip to Washington by counsel for appellee. A similar suggestion to "Ask the Clerk" is made in connection with Original Actions where the rule is meagre and the practice has developed in the Clerk's office.

In view of the passage of the act of January 31, 1928, and the amendment thereto of April 28, 1928, abolishing writs of error, procedurally but not jurisdictionally, shortly before the publication of the first edition, the author has published a revised edition, discussing these statutes, and including the revised rules of the Supreme Court, adopted June 5, 1928, effective July 1, 1928. The revised edition also contains a new and valuable chapter on the procedure in original actions. The appended forms cover all papers which it is necessary for counsel for either side to prepare in connection with a case in the Supreme Court.

The general arrangement of the book is convenient and careful. It would add to the speed with which the book could be used if the Chapter, Section and Part numbers were given on each left hand page instead of the title of the book, thus facilitating both the location of cross-references and the citation of the text.

Henry S. Drinker, Jr.

Philadelphia, Pa.

JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES. By Charles Pergler. The Macmillan Co., New York, 1928. Pp. viii, 222.

It is hardly accurate to describe all of the opinions considered in this book as judicial interpretations of international law in the United States. In the majority of them the court was interpreting the Constitution, the statutes, or decisions of political organs of the United States on such subjects as the limits of United States territory, the nationality of individuals, the scope of the treaty power, and kindred matters, and anything it may have said about international law was *dictum*. While such opinions give evidence of the way in which the Constitution, the Congress, and the Executive have interpreted the powers of the United States under international law, they can not be regarded as conclusive evidence of the courts' views on international law. It is comparatively rarely

that national courts have an opportunity to apply such law. The most common instance is in prize cases which are excluded from this volume, since it deals only with relations in time of peace. In some of the cases, however, such as those interpreting treaties, defining territorial boundaries in rivers and on the sea, and those recognizing exemptions from and extensions to territorial jurisdiction, the courts have found themselves obliged to make decisions without guidance from any controlling legislative or executive action and consequently have sought light in international law. It would be interesting to examine the extent to which the courts have, in fact, gone to the proper sources of international law and applied rules which would receive the general approval of civilized states when confronted by such situations. Dr. Pergler has not made such an examination. It may be questioned whether the law applied under the name of international law in some of the opinions cited, such as those in regard to the jurisdiction of foreign merchant vessels in port, and in regard to the punishment of extra-territorial crime would be supported by an impartial examination of the sources of that law.

The reviewer emphasizes this because he thinks there is a real danger that books of this type will create an erroneous impression as to what international law is. American jurists have been particularly prone to be led astray by the following argument: "American courts say they apply international law—they follow such and such a rule—therefore such and such a rule is international law." It would be equally conclusive for a lawyer to tell the United States Supreme Court: "Judges of Massachusetts are bound by the constitution—they have interpreted the constitution thus and so—therefore the constitution means thus and so."

While Dr. Pergler recognizes the proper sources of international law, and clearly describes the limitations upon the capacity of national courts to apply that law, he does not sufficiently warn the unwary reader against assuming that opinions of the United States courts are authoritative interpretations of international law, as they are of municipal law. In fact he seems himself to have been led into a confusion of the obligations of international and of municipal law while discussing treaty making. Although it is correct to say that without congressional legislation a treaty which stipulates the payment of money, "is not operative in the sense of the constitution," it certainly does not follow that, "A treaty, standing alone and without the consent of Congress, cannot require the United States Government to expend money." Dr. Pergler himself recognizes this when he later points out that adverse legislation by Congress does not terminate a treaty as an international obligation but merely renders it unenforceable by the United States courts.

While the bibliography as well as the text indicate that the author has not fully considered the relations between international and municipal law, and while readers should be warned against blindly accepting all of the rules which courts have recorded as international law, often in *dicta*, lawyers and students may find it convenient to have in handy form the gist of some five hundred opinions of American courts dealing with international matters.

Quincy Wright.

Law School, University of Chicago.

TRADE ASSOCIATIONS: THE LEGAL ASPECTS. By Benjamin S. Kirsh. The Central Law Book Co., New York, 1928. Pp. 271.

As a result of the rapid expansion of trade associations and of their close interlacement with the business structure of the country, increasing importance attaches to the legal aspects of this phase of American commercial and industrial development. To thousands of American business men the question of what may or may not be done lawfully by collective effort through trade associations is a matter of vital importance and serious concern.

Large scale production, mounting costs, new methods of marketing, and the keenest kind of competition, have produced a situation where the need of co-operation among producers, manufacturers and distributors, for purposes of stabilizing business and of preventing uneconomic competition, is being felt and voiced not only by business men but to an increasing extent also by legislators and the courts. The extent to which the latter, in particular, have taken cognizance of these new developments and needs in our economic life, which were hardly visualized when the *Sherman Act* was enacted, thirty-eight years ago, is a striking illustration of how judicial opinion slowly but surely adjusts itself to the economic changes wrought by time and circumstances. The decisions dealing with trade associations under the *Sherman Act* already embrace a body of law of considerable magnitude. With the advent of the *Federal Trade Commission Act*, the *Clayton Act*, the *Export Trade Act* and those anti-trust sections of the *Wilson Tariff Act of 1894* which are still in force, the volume of cases has been augmented still more.

All this has by no means simplified matters, however, and a mere glance at the variety of problems involved, as well as at their complex character, involving in large measure an intertwining of legal and economic thought, principles and practice, should readily convince one of the need of an up-to-date guide book on this subject.

The author of this book, formerly special assistant to the U. S. Attorney in New York, has had a wide experience in handling anti-trust cases. He combines a thorough knowledge of the law with an intimate grasp of applied economics. This is a decided feature of his book, and stands out very clearly in the chapters on: trade association statistics, uniform cost accounting methods of trade associations, credit bureau functions of trade associations, uniform basing point systems of trade associations, standardization by trade associations, and collective purchasing functions of trade associations.

In these chapters the author analyzes with great acumen all of the more important decisions applying to trade associations, especially the *Maple Flooring*¹ and the *Cement*² cases, which he regards as "basic and epochal in announcing a liberal construction of the anti-trust laws, in their application to the cooperative functions of trade associations,"³ and as "marking a distinct turning point in the judicial attitude concerning trade association activities."⁴

¹ *Maple Flooring Manufacturers Assn. v. U. S.*, 268 U. S. 563, 45 Sup. Ct. 578 (1925).

² *Cement Manufacturers Protective Assn. v. U. S.*, 268 U. S. 588, 45 Sup. Ct. 592 (1925).

³ KIRSH, *TRADE ASSOCIATIONS: THE LEGAL ASPECTS* (1928) 44.

⁴ *Ibid.*

A separate chapter is devoted to foreign trade functions of trade associations. It deals mainly with the *Webb-Pomerene Act* and its application to American export trade, and in connection therewith evaluates the recent development of international cartels. This chapter includes also an illuminating analysis of the cases instituted by the U. S. Department of Justice within recent years under the anti-monopoly provisions of the *Wilson Tariff Act* against the foreign sisal, potash and quinine interests.⁵ In that connection, the author ventures the view that the opinion of Chief Justice Marshall⁶ in *The Bank of the U. S. v. The Planters' Bank of Georgia* may ultimately prevail in the matter, as to the suability of a foreign sovereign under the American anti-trust laws, which was one of the points at issue in the recent potash case.⁷ In the case mentioned, Justice Marshall said, "that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

In this era of mergers, holding companies, foreign subsidiaries of domestic corporations and international patent cartels, the subject of patent interchange, treated in chapter five, is one of timely importance, and the author's analysis of the *Bathub*,⁸ *Addyston Pipe*,⁹ *Hardwood*¹⁰ and other leading cases should therefore be welcomed by students of this modern phase of business interrelations.

Of equal current interest are the subjects treated in chapter ten, code of business ethics and commercial arbitration. A considerable number of trade associations throughout the country are giving particular attention at the present time to schemes of self-regulation. The author's advice on this subject deserves careful consideration:

"The association however must be careful to remain within its legitimate sphere of self-regulation. If it trespass upon the forbidden territory of price-fixing, allocation of territory, limitation of production, blacklist, boycott, or the like, under the guise of beneficent enforcements of its rules, it becomes subject to the punitive provisions of the Sherman Law."¹¹

The author's method of setting off legal problems and court decisions against their economic and social background may be seen to advantage, also, in the final chapter, entitled Restricting Channels of Distribution. After pointing out the growing emphasis attached at the present time to the marketing of goods rather than to their production, he analyzes the two general classes of cases dealing with collective endeavors on the part of members of trade associations

⁵ U. S. v. Sisal Sales Corp., 274 U. S. 268, 47 Sup. Ct. 592 (1927) (Sisal case); U. S. v. Deutsches Kalisyndikat Gesellschaft, S. D. N. Y., in Equity, No. 42-124 (Potash case); U. S. v. N. V. Amsterdamsche Chiniefabriek, S. D. N. Y., in Equity, No. 44-384 (Quinine case). Criminal and forfeiture proceedings are also pending in this matter. See (1928) 76 U. OF PA. L. REV. 891 n. 1.

⁶ 9 Wheat. 904 (U. S. 1824).

⁷ *Supra* note 5.

⁸ Standard Sanitary Manufacturing Co. v. U. S., 226 U. S. 20, 33 Sup. Ct. 9 (1912).

⁹ Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96 (1899).

¹⁰ American Column & Lumber Co. v. U. S., 257 U. S. 377, 42 Sup. Ct. 114 (1921).

¹¹ *Op. cit. supra* note 3, at 239.

to control, restrict and dictate the channels of distribution. Here, as well as throughout the book, the clear-cut way of stating just what the courts regard as permissible or as violative of the law furnishes the reader a fund of instructive and helpful information.

At the end of each chapter are listed the significant features noted by the courts with regard to measures and practices permitted or forbidden. These excellent summaries add materially to the practical value of the book. So also do the copious footnote references to legal, economic and historical literature bearing on the subject matter discussed in the text, a table of one hundred sixty-three cases, and a good index.

William F. Notz.

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