

BOOK REVIEWS

JURISDICTION IN MARGINAL SEAS WITH SPECIAL REFERENCE TO SMUGGLING. By William E. Masterson. The Macmillan Company, New York, 1929. Pp. xxvi, 423.

The firing upon and sinking on March 22d, 1929, of the British auxiliary schooner "I'm Alone," by the Coast Guard Patrol boat "Dexter," and the consequent exchange of notes of justification and protest between our Government and the British and Canadian Governments, and the questions of international law involved in the controversy, lends emphasis to the timeliness of the publication of this very excellent book.

Examined in the light of the questions raised by the incident above-referred to, the merit of the book as the depository of a very thorough and logical research, is made more markedly apparent. Before the advent of this work, a student of the questions involved would have to search among many sources of international law, including British and American statutes, and under various headings such as "Territorial Waters," "Right of Seizure Under Revenue Acts," etc., before being able to arrive at a synthetic idea of the subject-matter involved.

The difficulty of finding the law on the questions covered by the book is pointed out by the author in his preface, where he states that it has been necessary for him to trace the history of smuggling itself, in order to properly explain the laws passed to end smuggling. Background has had to be established, necessitating a research extending through centuries, in order that a proper understanding of various statutes and treaties, dealing with the subject-matter, might be understood. New sources of diplomatic correspondence have been examined and in some cases fully set forth.

The author is well equipped to make the study, having been an active practitioner in New York and having done graduate work at Harvard and the University of London, the latter University having conferred upon him the degree of LL.D. He has also assisted the committee of experts for the Progressive Codification of International Law, appointed by the Council of the League of Nations.

Even a cursory examination of the book will demonstrate that its preparation has been scholarly and thorough, and that its existence will prove to be a great aid to students and practitioners of the subjects which it covers, and careful reading causes unhesitating commendation. Beginning in the 17th Century, when no seaward limit existed for seizure of vessels violating Revenue Acts, the author takes up the distances set at different intervals, principally by the English Government and our own, tracing the changes and the reasons for the changes as developed by the needs of time, until the author reaches the recent treaties having to do with the enforcement of the liquor law. These treaties, with the various cases which have arisen since their passage, are exhaustively and learnedly discussed, and the position taken by our Government and that of Great Britain in the interpretation of the treaty between them, and the rights claimed thereunder, clearly indicated.

The author is most sparing in arriving at general conclusions from his research, and most cautious in his statements as to the law, and leaves the subject, as it were, in a state of flux, a situation in which it may fairly now be said to be.

The index is rather ample, but might well be more so. The list of statutes and table of cases render the use of the book by the practitioner much more facile and give ready access to the wealth of information which the book contains. On the whole the book, for authoritative sources of the subject which it covers, cannot be too highly recommended.

William J. Conlen.

Philadelphia.

FEDERAL APPELLATE JURISDICTION AND PROCEDURE. By Elijah N. Zoline. (Third Edition.) By Alexander Holtzoff. Clark Boardman Co., Ltd., New York, 1928. Pp. xcvi, 792.

The third edition of this book, it having originally appeared twelve years ago, is a one-volume work of nearly eight hundred pages and, therefore, is evidently intended for the use of the busy lawyer in presenting the essentials of the subject treated. It does not assume to go into the subject with the same detail as more voluminous works. It is the handy kind of work which a lawyer having a case in a federal court, appealed or to be appealed, may use to point out the way in which it should be handled on review. It is rather a preliminary guide than a determining or deciding and final instructor. The lawyer using it, therefore, if the exigencies of his case require it, may have to amplify the information he obtains from it, by consulting some more comprehensive work on the points in which he is interested.

The book has the merit of brevity. It was written by a practitioner familiar with the federal practice. I have been able to find in it references not to be found in any other work on the subject. On the other hand, unfortunately, it has some inaccuracies which should be guarded against. For instance, it is stated that "appeals to the Supreme Court from the Court of Claims as of right have been abolished. Appeals may now be taken by permission only and solely in two classes of cases."¹ The section of the United States code referred to in support of this statement provides not for "appeal," but for review by the Supreme Court, on certification of questions by the Court of Claims and upon certiorari. Besides, several Acts of Congress give jurisdiction to the Supreme Court on appeal in claims against the United States by different bands of Indians.² Again, unfortunately, the book went to press before the passage of the Act of April 26, 1928, modifying the Act of January 3, 1928, which abolished, but as a form of procedure only, writs of error in the federal courts.

An appendix, which contains the rules of the Circuit Courts of Appeals, will be of value to practitioners. I know of no other recent book which contains

¹ ZOLINE, FEDERAL APPELLATE JURISDICTION AND PROCEDURE (3d ed. 1928) 134.

² See *The Sisseton and Wahpeton Bands of Sioux Indians v. U. S.*, 277 U. S. 424, 48 Sup. Ct. 536 (1928).

them. The book also contains a table of cases, always useful in a work of this kind.

It was the ambition of the author, Mr. Zoline, to revise the second edition of his work and bring it up to date. His untimely death, which cut off one of our ablest federal practitioners almost in the prime of life, prevented this. Mr. Holtzoff, with the exception of the minor defects above noticed, and some typographical slips, has done his work well.

Wm. J. Hughes.

Washington, D. C.

CONGRESSIONAL INVESTIGATIONS. By Ernest J. Eberling. Columbia University Press, New York, 1928. Pp. 452.

This work is styled by the author, "A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt." The subject is quite a timely one inasmuch as Congressional investigations have been unusually frequent during the past eight years and some of them have been of such importance as to arouse and long sustain an absorbing public interest. By what right may the Houses of Congress make such investigations and to what extent may they use coercive methods in obtaining information? No doubt this question has frequently come to the minds of many thoughtful citizens of our country during the past few years. The author answers in a way that is truly enlightening. He has done his work thoroughly and well.

The treatment of the subject follows the historical order and this is a highly commendable feature of the work. Only by following out its historical development may we adequately appreciate the nature and scope of a constitutional power of Congress that is not possessed by express grant and is therefore either inherent or implied. After tracing the origin and development of inquisitorial power in the British Parliament and in the Colonial Assemblies prior to the adoption of our Constitution a following chapter treats of investigation procedure up to and including the year 1827 when the House of Representatives in summoning witnesses for the purpose of acquiring information for their guidance in legislation vested its committee with the power to send for persons and papers. The next division is from 1827 to 1876 when an unwilling witness carried his appeal to the United States Supreme Court, and the final one is from the centennial year to the present time with its vivid recollections of much investigated oil land transactions.

That Congressional investigations may be quite necessary is beyond question. That the power to make such investigations may become but a useless vacuity if it be not accompanied by the power to force the disclosure of necessary information, is a fact that both reason and experience plainly manifest. Yet, whether the imprisonment of a recalcitrant witness be regarded as punishment, or as a coercive measure to compel disclosure, it bears unmistakably the external features of judicial proceeding. Surely it was the purpose of those who framed our Constitution, to separate the legislative from the judicial functions. But just as surely has experience taught us, the separation cannot be absolute and complete. The legislative, executive and judicial functions are so correlated and interdependent that contact may at times become conflict by unavoidable necessity.

The question is much like the relation between federal and state authority which occasions the outstanding irrepressible conflict of our national life. We have more than one irrepressible conflict and we must expect them, resign ourselves to them, meet them with courage. Since our fathers have met the great problems of the past and left to us a rich inheritance of guiding principles, we have no reason to fear the problems of the future, if, inspired by the example of our forebears, we meet new issues as they arise, with frank justice and charitable consideration.

The power to punish for contempt is one that may be easily abused even when employed by the courts, and its use postulates in the most exalted jurist the finest exercise of his wise and unselfish discretion. Just when does a Congressional investigation cease to be a warranted quest for needed information and when does it become "a fishing expedition into private papers or the possibility that they may disclose evidence of crime," or "a search through all the respondents' records, relevant or irrelevant, in the hope that something may turn up"? Perhaps through patient endeavor and wise forbearance we may come in the near future to more definite and specific regulation, which, while safeguarding the essential powers of Congress, will leave to citizens of our republic undiminished enjoyment of the rights protected by the Fourth Amendment.

Linus A. Lilly.

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THE LANCE OF JUSTICE. A Semi-centennial History of the Legal Aid Society 1876-1926. By John MacArthur Maguire, with a foreword by William D. Guthrie, Harvard University Press, Cambridge, 1928. Pp. xi, 305.

Legal Aid is a term applied to the task of supplying a poor person with the services of a lawyer without cost to the client. The words are also used to include a whole field of activity in the administration of justice, by which the man without money is given, in practice, a position before the law, equal to that of any other man. The justification for such activity lies in our state and federal constitutions, in the various bills of rights which promise the individual the "equal protection of the law."

As the work is designed to give a lawyer's services without a fee paid by the client it has become substantially a part of the administration of justice which is now generally under the control and supervision of the legal profession. While the average person retains his own lawyer, special provisions must be made for perhaps half of the people of the United States who cannot afford the luxury of a law suit, but who are none the less confronted with legal problems of great magnitude to them.

Under conditions of a hundred years ago I find no mention of legal aid organizations. Professor C. R. Fisk in his *The Rise of the Common Man 1830-1850* mentions the labor and various humanitarian movements, but leaves one with the impression that legislation and not administration was then the major problem of the law. Thus he says:

"Trade in rural communities was represented by one or two store keepers who performed some of the functions of bankers; the professions by two or three ministers, several lawyers, a physician and a school teacher . . . Legislative bodies of state and church, and the practice of law in circuit courts, state and national, had been almost the only means of bringing people from different localities into personal contact; almost the only national reputations had been those of political leaders and clergy, lawyers and military heroes."

The courts occupied a different position in those days—closer to the people—easier of access—less of a mystery.

It would appear that there were fewer lawyers in those days, that they perhaps accepted fees in kind rather than in money and that as life moved at a more leisurely pace a lawyer would not object sometimes if asked to spend fifteen minutes talking over a legal problem with some impecunious client. It is also probably true that people at large did not have incomes so divergent as now separate the multi-millionaire from the pauper. There were fewer paupers as well as fewer millionaires. The client probably was less hesitant then than now in asking free service.

Add a hundred years to this life and several million people and we meet the spectacle of the great modern city.

Division of labor makes the legal profession the absolute custodian of the law. The individual is lost in the mass of his fellows and few have the time to turn aside from their own struggle to hear the lament of their neighbor, who may be denied justice and unable to pay for redress. Life runs along outside of the law for many people in a large city. The logic in ponderous law books does not always come home to poor people in time of need. For such persons justice is an empty name, they come to believe that the law is for the rich and not for the poor. So we need not be surprised when men like John W. Davis say:

"It must always be borne in mind that our system of democracy could not long endure if the poor in our populous and congested cities became convinced that they were being denied redress, protection, and equality before the law because of inability to pay for legal services, and were in consequence being oppressed and placed at an unfair disadvantage before our courts of justice in securing their legal rights. Such a conviction would inevitably generate a bitter feeling of intense resentment and disloyalty, and the existence of this feeling would be a constant and terrible menace to society."

To avert what might well have been a national catastrophe came the legal aid society—the poor man's law office—the "arm of the bar outstretched in helpfulness" to insure the "equal protection of the law." While such societies now exist in many cities our interest here is in the oldest and largest, the New York Legal Aid Society, 1876 to date.

The Lance of Justice is the story of this society and the courageous men who built it up to its present position as the largest law office in the world. The years of growth have meant struggle. The Society had little more money than the clients it represented and only the devoted labor of its officers and over-worked staff enabled it to make headway. It is close to genius to handle law cases on an average expenditure of \$1.00 a case, for office rent, salaries,

telephone and other overhead charges. Figures, however, tell us nothing of the human elements in the story.

Mr. Maguire's book describes dramatically struggles between the Society and enterprising persons who called themselves legal aid societies as a cloak for widespread swindling operations. Imprisonment for debts, war cases, crimps, cranks, instalment dealers, small loans, domestic relations, personal injury claims flood the pages, with matters of the most personal human interest.

Names of splendid men appear in connection with the work. Charles Evans Hughes, Carl Schurz, Theodore Roosevelt, Joseph H. Choate, Robert W. DeForest, Elihu Root, Lyman Abbott. But above them all is the personality of Arthur V. Briesen, the great philanthropic leader of the bar, who was president of the Society from 1890 until 1916.

The men on the firing line—the attorneys of the Society from Mr. Lexow to the present incumbent, Mr. McGee, are also worthy of note. It takes courage to fight bucket shops, instalment sale frauds, inactive city marshalls, the loan shark, the officers of a ship where two men have been shanghaied. Yet the attorneys for the Society did this as part of their daily work and thought nothing of taking their lives in their hands. The public today would not know of this work but for Mr. Maguire's book. As one reads the pages, all too short for the subject, the practice of the law ceases to appear merely a contest according to rigid rules with a fee as a reward. Instead it becomes a glorious adventure, such as Drake or Hawkins might have sought; Robin Hood's life was no more adventurous than that of Mr. McGee, the present attorney in chief.

Too often now-a-days the law student comes to look upon his professional life as something shut in by the covers of his law book. He forgets Launcelot in the ascetic labors of a comparatively cloistered life. Such a man finds pleasant exhaustion in a rude bout with the Rule in Shelley's case or the cy-pres doctrine. Not so the legal aid attorney. He knows not what problem will confront him when the door of his office swings open, and it is constantly swinging open. He does know that he must meet life in the raw with courage, judgment, the fullest sympathy for the client. Mr. Maguire makes us see this. That is why the book is so fascinating. The reader observes a cross section of life as though he were sitting at the interviewing desk of the New York Society. Mr. Maguire has made a distinct contribution to the romance of the practice of law. As one reads these pages the lawyer looms larger than the person who makes stenographers and office boys tremble and who in turn is subdued by the court.

The picture, which the public has too often of a lawyer, as a hired mercenary fighting merely for a fee, fades out. In its place we see a disinterested champion somewhat of the crusader type who fights for the principle of equal justice. The word "Lance" in the title suggests adventure; the reader will find it on every page.

John S. Bradway.

Philadelphia.

STUDIES IN THE LAW OF CORPORATION FINANCE. By A. A. Berle, Jr. Callaghan & Co., Chicago, 1928. Pp. xxvii, 199.

In this brief, but meaty, and fascinating book, Professor Berle has ventured a prophecy, and the commonplace that prophecy is dangerous has an answer in the other commonplace, "Nothing ventured, nothing gained." Professor Berle is an iconoclast, and we suspect he rather enjoys smashing the old gargoyles which decorate the cathedral of finance. Nevertheless, one is impressed by the fact that he has not selected a hammer at random and gone out to break images with the same unintelligent abandon which characterized the late Carrie Nation. He takes as his thesis the proposition that the constantly changing situations in corporation finance demand frequent revisions to determine which of the old rules are worthy of preservation and which should be altered or deleted in the interest of progress.

The initial attack is upon the entity theory of the corporation. Professor Berle insists that the idea of paternal control which the state claims over the corporation arose initially because of the ambitious greed of the Stuart kings, and acquired strength by reason of the ecclesiastical theory of mystic control imported from the Roman Catholic Church, which used it to govern subordinate units within that great organization. Professor Berle insists that in the evolution of corporation finance it is becoming more and more apparent that the entity theory must retire in favor of the far more business-like theory of contractual relationship between the stockholders, subject of course to regulation by the state as to matters in which it is directly concerned. In other words, he regards a corporate charter merely as a permit to do business and not as a creative grant from the Commonwealth.

One may ask legitimately why the author stresses with such emphasis what appears to many people to be a rather academic distinction. Professor Berle's answer is of interest because it clearly demonstrates the point of view which he employs throughout the entire book. In stating the importance of the distinction which he makes regarding the entity theory, the author asserts that if the essence of a corporation lies in its contractual character and not in the fact that it receives a charter grant from the state, the function of the state is limited to regulating matters which concern itself and in consequence the rights of stockholders are radically changed and they possess the power to alter many of their rights without first obtaining the permission of the state through charter amendments or other evidences of governmental consent.

It is quite true that a strong argument can be made, and Professor Berle makes it, in favor of emphasizing the contractual nature of the corporate agreement rather than the paternalistic grant of power from the state; but the weakness is the difficulty in adducing concrete confirmation on the basis of established precedent and present practice. But he is able to cite two or three cases, notably *Daimler v. Continental Tyre and Rubber Company*,¹ where it was held that the character of a corporation could be determined from the living members of the group who constituted the corporation for business purposes and that that character was not merely the fictional personality which a logical application of the entity theory would result in finding it to be. This decision, however, seems to

¹ [1916] 2 A. C. 307.

the reviewer to have been controlled by war conditions in that the majority of the stockholders of the company were Germans, whence it seems that its value as a precedent is open to question. In the United States, Professor Berle cites *United Mine Workers of America v. Coronado Coal Company*.² Again it would seem that the decision was a result of opportunism. The technical objection was raised that as the United Mine Workers of America were not incorporated it would be necessary for the coal company to serve notice of the suit on each one of the union's two million members in order to start proceedings legally. But the Court seemed to feel that the case should be tried, and for that purpose, regarded an association of individuals as a legal entity, since they were associated for common purposes and had a common fund of property to further such purposes. Such a decision would not seem to derogate from the general applicability of the long recognized theory that corporations are created by the state. The reviewer, however, believes that the entity theory has more advantages than dangers, for unquestionably the state must have more power over corporations than merely to permit them to do business and to tax them.

In subsequent chapters Professor Berle discusses in detail, and in the same stimulating and scintillating manner in which he attacks the entity theory, such interesting and timely topics as the present position of corporate management, the control of corporations through the use of non-voting stock—particularly on the part of investment bankers, and the use of no-par value stock to further the designs of those who control the corporate destinies. Towards the end of the book the author includes a stimulating chapter on holding companies which, however, bears the rather unilluminating title of *Subsidiary Corporations and Control of Credit Resources*.

All through these latter chapters the dominant idea seems to be that, in the present stage of development, corporation finance is deeply affected by a certain unity of purpose on the part of many powerful men who own and operate the country's largest corporations. The author evidently believes that such men desire to fortify the right of an intelligent minority to direct and control the destinies of a constantly increasing majority and he seeks to show that the legal rights of such majorities are being constantly limited with the idea of protecting the interior leadership and making a permanent plan of corporate development not merely a possibility but as nearly as can be a certainty. There is no question that there is a great deal of truth in the foregoing statement. Nevertheless, it does not follow that an extreme position can be fully justified, and Professor Berle does seem to the reviewer to be extreme.

Quite evidently the author is constantly seeking weapons to use in behalf of his theory, and he has apparently selected as his favorite blade the well-tested maxim of fiduciary responsibility. True it is that in order to wield it effectively he is compelled to go beyond the present state of the law and to describe legal situations rather as he thinks they should be than as they are, but after all this is one of the features which makes the book so vital, interesting and alive.

Professor Berle desires to make it imperative that in the absence of voting power the unrepresented majority shall automatically become the *cestui que trustent* of the inside voting crowd. It may be suggested that under the law as it stands today, the rights of minorities are well protected against deceit and

² 259 U. S. 344, 42 Sup. Ct. 570 (1922).

fraud and the same protection may readily be applied to non-voting majorities, but it may well be doubted that Professor Berle's theory of extreme fiduciary responsibility will receive much judicial support for some time to come.

Probably the most interesting and stimulating chapter in the book is that which deals with no-par value stock. Seldom before has a treatise been written which shows so clearly the problems and difficulties which have developed in connection with such stock and the possibility of using it cleverly and effectively to defeat the interests of the ultimate owners of the corporate property. No-par value stock was conceived as an instrument of reform, but we agree with Professor Berle that it has now become one of the best weapons in the armory of corporate reactionaries.

Considered as a whole, this book is a welcome addition to the library of every student of corporation finance. It seeks to do in a thoughtful and technical way what Dr. William Z. Ripley attempted with much skill and wit to accomplish in a popular vein. It is provocative, delightful and stimulating. It is well documented for a book of this kind, but the proofs used do not always seem to substantiate the statements made. The book is either well in advance of its time or it is a brilliant tour de force which the years to come may fail to justify. It is almost feminine in its quality of constant change. It is often logical but as often illogical. At one point the reader vigorously dissents from the author's conclusions, and two pages later the impulse arises to cheer vigorously. Certainly it is a book which no person interested in the legal and financial development of American corporations can afford to be without, and the author should be congratulated upon the performance of a fine piece of work which is unusually debatable and in many places truly instructive.

Theodore J. Grayson.

Philadelphia.

RIGHTS OF MINORITY STOCK AND RAILWAY SECURITY HOLDERS. By R. S. Harvey. (Second Edition.) Baker, Voorhis & Co., New York, 1929. Pp. xxviii, 452.

Twenty years ago Mr. Harvey produced a book which then interested the bar dealing as it did with the rights of minority stockholders. It was an outline of the subject only; and in view of the dearth of case law on the subject, the book purported only to expound a few general principles, drawn mainly from English chancery decisions, sometimes more than a century old.

A second edition of this book has just come out. Unfortunately, it takes little, if any, note of the tremendous development in case law, statute law, and corporate mechanisms within the last two decades. The case material is substantially untouched; the general principles have not been revised in the light of the more modern approaches to the subject matter; nothing has been done toward working out the application of these principles to present-day situations. Yet it is precisely in that application that lawyers, judges, and financiers, find their major difficulties. In many instances Mr. Harvey cites rules which once were true, and now have become practically obsolete, or perhaps remain law in only a few jurisdictions; *e. g.*, the statement that the rights of the preferred stockholder are "inviolable"—a statement which is approximately true in New

Jersey, much modified elsewhere, and almost thoroughly nullified in Delaware.¹ The entire discussion of non-voting stock in Mr. Harvey's book revolves around the remarks of the Interstate Commerce Commission in the Nickel Plate Unification case,² although the storm center of this controversy has lain in New York banking houses, in the Stock Exchange rules, and in the now famous Goodyear litigation.³ There are some interesting suggestions in the latter part of the book which deals with railway security holders; but these are scattered and incomplete.

The lay reader will get a few interesting impressions from this book. But he will be a sadder and wiser man when he attempts to make them practically effective. The lawyer will find that its generalizations leave to him the job of inserting the necessary qualifications, discovering situations to which they apply, and finally, making them enforceable. This was a fair book in 1909. It is an historical survival in 1929.

A. A. Berle, Jr.

New York City.

CASES AND OTHER MATERIALS ON WILLS AND ADMINISTRATION. By Philip Mechem and Thomas E. Atkinson. The Lawyers Co-operative Pub. Co., Rochester, 1928. Pp. iv, 703.

The old adage that "two heads are better than one" is amply borne out in the joint preparation of this new casebook on wills and administration. Whenever a new casebook appears in a field in which there are already two excellent outstanding works, by Warren and Costigan, the question at once is presented why it ventures into the territory. Of course, the law in any field is continually expanding, with new problems being presented for solution by the legal order, so that casebooks must be revised and new material added, with rearrangement of older material. But this is not the only excuse for this new casebook on wills, for its entire organization justifies its appearance. It is packed with footnote material, usually in the form of questions on cases briefly stated, with their citations. This arouses the interest of the student to read the cases themselves, and thus encourages collateral reading, as well as application of the principle of the principal case to those stated in the footnotes.

In the six hundred ninety-eight pages of text are to be found slightly over three hundred cases, most of them drawn from American jurisdictions; in fact, among the first ninety-three cases are to be found only some twenty-two from English jurisdictions. And in that part of the book where administration of estates is dealt with, no English cases, as principal ones, are found. In my opinion, this virtual omission of the English cases is probably justifiable, in view of the fact that the law of wills is largely statutory. There is, on the other hand, much to be gained in tracing the evolution of the law of wills through the great

¹ *Davis v. Louisville Gas & Electric Co.*, 142 Atl. 654 (Del. 1928), Note (1928) 77 U. of Pa. L. Rev. 256.

² 105 I. C. C. 425 (1926).

³ See BERLE, *STUDIES IN THE LAW OF CORPORATION FINANCE* (1928) 63, n. 25.

landmarks of the English decisions. This method is probably overdone in many casebooks of the past, originating as they do from an era when the Historical School was dominant in American juristic thought. The authors have probably solved the problem in the fashion of presentation they have followed.

Going through the volume very carefully during the past several months, in order to do justice to the compilers in reviewing it, I have been impressed with the accuracy with which treatment is afforded of the cases in my own jurisdiction, namely, Illinois. Such variations, usually given in footnote form, relative to advancements, the right of the slayer to inherit from his intestate victim, the revocation by subsequent marriage of the testator even though he provides for his intended wife, are all correctly treated with reference to Illinois holdings. I was disappointed, however, that equally brief consideration of Illinois holdings was not given with reference to disinheritance of testator's children, and survival of death actions, both of which have had some odd variations in our State. However, these are minor matters and must be left to the individual instructor to develop in class instruction and collateral reading. The same can be said also, probably, of the brief treatment in a footnote, of the old principle of *executor de son tort*, which still flourishes in such a staid common law jurisdiction as Illinois.

The convenient size of the volume, due to its thin paper and the enormous labor spent on footnotes in compact form, gives additional value to the casebook. In my judgment this volume is at present the best in existence due to its modernity and its excellent treatment of the entire field.

E. F. Albertsworth.

Law School, Northwestern University.

OPPENHEIM'S INTERNATIONAL LAW. VOL. I. PEACE. Fourth edition. By A. D. McNair. Longmans, Green & Co., New York, 1928. Pp. 827.

Among all the jurists who in the last half century have contributed to the development of international law few, if any, would be deemed more worthy than Oppenheim to stand in the great succession of Grotius, Pufendorf, Wolff and Vattel. No man ever gave himself more wholly to the work or, in doing so, commanded greater devotion among collaborators and disciples. The two editions of his general treatise which have appeared since his death, that by Mr. Roxburgh in 1920 and the present one by Mr. McNair, owe more than a little to this *pietas*. The editors have dealt gently with features of the great man's work which others, not bound to him by the same ties, might have frankly rejected. It happens thus that serious imperfections are being handed on with sometimes a mild footnote, sometimes nothing at all, to warn the many elementary students who resort to this book as *ratio scripta*.

As a catalogue of significant events in the intercourse of States, illumined by the benevolence of a truly international mind, this treatise has scarce been surpassed. It savours of ingratitude, almost of heresy, to criticize. But Oppenheim's general theory seems at many points not merely out of date but doubting and confused.

Who, for example, can follow the logic of his exposition of the sources of international law? As everybody knows, he declares that custom and treaty

are the sole sources. Custom he describes as a fact through which common consent comes into existence, whereas surely it is a result of, and therefore presupposes, common consent. If he had said "through which common consent becomes known" or "in which common consent manifests itself," the statement would have had some meaning and would have assigned to custom its true significance, namely that it is the generalized practice proving the consensus without which no rule can exist. His use of treaty as the other source leads him into the inconsistency of "particular international law." Once law has been defined, as Oppenheim defines it, as "a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power," it becomes logically impossible to talk of "particular law." The consent of States A and B is not the common consent of the community of nations, and it is inaccurate to say that their agreement that A shall admit B's products under an intermediate tariff makes such admission any part of the law of the community. What the law prescribes is that if A agrees to perform a service in the interest of B he shall be bound to perform it. A and B, by taking advantage of this law, impose legally enforceable duties upon one another. Naturally, a treaty joining all civilized States as parties would form part of international law, because its provisions would constitute rules adopted by common consent. Failing this ideal unanimity, it is only by narrowing the conception of community to the parties actually concerned that contracts between States can be called law, and the result is merely to add further complexity to an already complex term.

As for those time-honored slogans, the fundamental rights of States, Oppenheim takes them away with one hand and gives them back with the other. What does it profit to deny their existence as rights and to set them up as legally protected qualities inherent in international personality? No sooner has the author asserted "the fact, involved in the very membership of the Family of Nations, that equality, dignity, independence, territorial and personal supremacy, and the responsibility of every State are recognized by every other State," than he must begin undermining the proposition by exceptions. His difficulty is that the alleged fact is simply not a fact. The equality of States means nothing more than that the law accords them equal protection for such rights as they have been endowed with by the circumstances of situation and growth. As a premise to the conclusion that "whenever a question arises which has to be settled by the consent of the members of the Family of Nations, every State has a right to a vote, but to one vote only," this "fundamental right" or "quality," constantly taken out of its proper sphere, has proved a stumbling block to progress. When it has been said that certain rights, accorded to States by the common law of nations, are more vital than others derived from the same source or from treaty, and therefore justify more drastic action for their protection, there is nothing of substance left for formulation as a doctrine of fundamental qualities, and even this measure of distinction becomes doubtful in a system which admits the enforcement of quite ordinary rights by such an instrument as pacific blockade.

It has not been forgotten that this is a review, not of Oppenheim, but of Mr. McNair's Oppenheim. My point is that this edition would have been a better text book if more had been done to avoid perpetuating defective doctrine.

With all its incongruities, the treatise has always been decidedly useful, and its usefulness is maintained and enhanced by notes, additional sections and appendices which acquaint the reader with new theory and contemporary international organization.

Out of all the additions, I can do no more than select a few which I have found most interesting. A great deal has been done to clear away the difficulties that cling to the question of recognition. In the first place the editor has defined and emphasized the difference between recognizing a State and recognizing a government. Secondly, his treatment of *de facto* and *de jure* recognition, which reinforces the stand taken by Noël-Henry in his invaluable monograph, "*Les Gouvernements de fait devant le juge*," will go some way to dispel current illusions upon a matter which has assumed special importance in connection with Russia.

Two features of Mr. McNair's discussion of the status of the British Dominions merit attention and gratitude. They are the repudiation of the personal-union theory which is so constantly paraded in the political arena, and the insistence on the legal unity of the Empire in time of war. On the other hand § 496, on the treaty-making power, calls for a *caveat*. As Keith has pointed out in the recent edition of his "Responsible Government in the Dominions"¹ the Imperial Government still plays an important part in the conclusion of Dominion treaties. Advice to ratify comes primarily from the Dominion, but it has to pass through the hands and receive the counter-signature of the Secretary of State for Foreign Affairs. This fact leaves a possibility of control which has not been mentioned by Mr. McNair, but which is essential to any accurate appreciation of the position.

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¹ At pp. 900 and 1252.