# BOOK REVIEWS

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS. By Durward V. Sandifer. The Foundation Press, Inc., Chicago, 1939. Pp. xii, 443. Price: $10.00.

This book lives up to its title, both strictly and completely. It is convenient to handle and read. The type is clear and the pages are attractive in appearance. In addition, the author is experienced in his subject, for his work for the past decade or more has been concerned with international causes, both in his academic studies and in his professional practice. He is now a member of the legal staff of the United States Department of State.

The volume treats of the sorts of evidence presented before international tribunals, and the time and method of such presentation. It also deals with the evidence in support of claims against foreign governments which are to be the subject of direct negotiation between governments on behalf of their citizens. Such claims are very much the same, so far as evidence is concerned, as claims presented before formal international courts and arbitral bodies.

While others have dealt with the subject of evidence before international tribunals, particularly Mr. Jackson H. Ralston in his book on the *Law and Procedure of International Tribunals,* no one has hitherto devoted a whole book exclusively to the subject of evidence before such tribunals; nor has anyone else so completely analyzed and classified the available material or presented it so thoroughly. In the opening chapter there are some twenty pages on the function of evidence, the process by which tribunals get at the truth. This brief philosophical prelude is so clear that one could wish it had been treated more at length. Such an introduction is important because international cases differ in many respects from cases before national courts. A lawyer trained in the tradition of the English common law (the author calls it Anglo-American law) would not feel perfectly at home in the procedure which obtains before international tribunals. His familiar rules of evidence do not apply. So little is given orally. The practitioner of Roman or civil law would be more at home, perhaps, but international tribunals are more catholic in their taste for evidence than either of the legal systems established in western Europe, and now spread to the Western Hemisphere. One must often think in terms of the rules of pure logic when one seeks to convince an international tribunal of the truth of a fact. Almost anything of real probative value would be acceptable to such tribunals, the question being "Will this evidence help us to learn the truth?" rather than "Is there precedent or regulation which warrants our acceptance of this evidence?" Let us consider the simile of the navigator of a ship at sea and the driver of an automobile upon the highway. The driver has his familiar road marked out before him. It may not be the shortest way to his destination, but it is the most convenient and he follows its well-known turns. The navigator, by contrast, must choose a point on the wide horizon where all points look alike and then draw a line from where he is to where he would be. That line is his road. There are no familiar landmarks for the navigator until he gets near shore. Similarly the lawyer preparing an international case must think of how he can establish the truth of his facts by any logic which will convince a man's mind. There is no rule to exclude proof of a fact, unless better proof is available.

By far the greater part of the book is given to the analysis and orderly classification of the vast volume of material which the author has gathered. He seems to have examined all the material made available during the last 200 years, whether in English, French, German, Italian or Spanish. He has so arranged it that a lawyer who seeks an answer to a problem can readily orient himself in the subject and see his way to the relevant material. This arrangement has been done exceedingly well, and treats of the order and time of the submission of evidence, the production of evidence, the admission of evidence, and the kinds of evidence. His conclusions are briefly summarized in a single chapter of eight pages. Perhaps beautiful writing is not to be expected in a law book, but this concluding chapter justifies that description.

At the end of the book there are appendices giving the rules of various permanent international courts, a bibliography and an index.

The reviewer ventures the opinion that no lawyer charged with the presentation of an international case can afford to ignore this volume. For the moment it is the last word on the subject. The reviewer thinks that it will be a good word for years to come.

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THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE. By George H. Haynes. Houghton Mifflin Company, Boston, 1938. (2 volumes.) Pp. x, 1118. Price: $8.50.

The two volumes which comprise *The Senate of the United States* are without doubt the most comprehensive study yet published of that venerable institution. The author, George H. Haynes, Professor of Economics and Government in the Worcester Polytechnic Institute, has ranked as an important student of his subject since the publication of *The Election of Senators* in 1906. Hitherto "every other writer upon the Senate has been content to leave many and large sections of the field entirely untilled." Years of painstaking research have produced a monumental survey which touches upon almost every conceivable phase of Senate complexities. Unquestionably the work will stand for decades as an authoritative source of reference which no conscientious student of government can afford to ignore.

In the course of twenty extended chapters Professor Haynes discusses with a wealth of illustrative detail the formation and establishment of the Senate; the election of its members; its organization, procedure, and customs; its influence—and influences which play upon it; its legislative, executive, and judicial functions and powers (including its predilection for investigations); the perquisites and privileges of its members; its relations with the executive and with the House of Representatives; and finally the indications of change in the Senate as an institution. Skillfully he has undertaken "to deal with Senate history and practice in such wise that the reader—from whatever angle of interest he approaches the Senate—may find here the 'leads' to authoritative information upon that particular phase of the subject, set forth in the degree of fullness that can be accorded to it in a balanced study of the Senate." Chronology has rightly given way to topical development, and each division of his subject has not only been illustrated with anecdote and precedent but also extensively documented with the paraphernalia of scholarship. The work of other writers has been utilized with due credit and has been supplemented with a remarkable quan-

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tity of newly-assembled data. Nor is it to be overlooked that the style of presentation is both forceful and readable.

Primarily as a work of reference, of course, these volumes richly merit the fame they are sure to achieve. In that connection it is deplorable that in a number of instances the footnotes contain typographical inaccuracies which will prove distressing to scholars. In particular the citations to the *Congressional Record* do not always correspond with the pagination of the bound edition to be found in most libraries. Moreover, the index (although sixteen pages are devoted to it) omits the names of a number of persons and a few concepts reasonably prominent in the text—an expedient which conserves space but reduces the accessibility of a rich mine of information. Scholars will inevitably differ about the desirable emphasis to be placed upon specific aspects of the Senate as an institution; but few readers, however specialized their interest, will turn away without a contribution of value from this work. One might suggest, for instance, that the Twentieth or "Lame Duck" Amendment to the Constitution should receive more than casual mention; yet in the main, when one considers the availability of material, the author's sense of proportion is admirable. A general treatise of this nature does not supersede specialized studies, nor does it preclude subsequent research. In the field of American politics, however, there are few studies which furnish so comprehensive a key to a great branch of our government as does *The Senate of the United States.*

Professor Haynes is not a "reformer". His study of the Senate is not a polemic. If it were, its value would be less permanent. Suggestions and arguments for change in the Senate are given due attention, and the author displays no hesitation in expressing an opinion. But there is no sweeping advocacy of drastic alterations which will constitute a panacea. "The Senate of the United States has been both extravagantly praised and unreasonably disparaged, according to the predisposition and temper of its various critics. . . . The truth is, the Senate is just what the mode of its election and the conditions of public life in this country make it." These words from the early writings of Woodrow Wilson, quoted on the title page of each volume, are the key to the author's approach. His goal is a picture of a Senate active in our history. For both layman and expert he has assembled a tremendous but well-integrated mass of incident, precedent, and analysis. It is a great work, a landmark in American scholarship.

*Franklin L. Burdette.*†

A TREATISE ON AVIATION LAW. (Second Edition.) By Henry G. Hotchkiss. Baker, Voorhis & Co., New York, 1938. Pp. xviii, 588. Price: $10.00.

It is important to bear in mind, in respect to any new field of business activity receiving concentrated public attention, that the present day body of law is broad enough to afford within its structure answers to many, if not all, of the individual problems presented. One is inclined to forget this in the flurry of excitement attendant upon the spotlighting and publicizing of a business. This is a modern fault, for in the early history of English Jurisprudence one justly complained of the inadequacy of the common law, and lawyers were seriously embarrassed by the gulfs that existed between their profession and business situations. On the contrary, today we find lawyers branding themselves with business titles. Thus there springs up,

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immediately following each stock market crisis, a group of brokerage lawyers; and following a flurry in mining acitvity, mining lawyers are found in abundance. Discounting the advertising value of these handles, and coming to realities, the best one could hope for if one wants legal advice is first and foremost a lawyer, and secondly, only a lawyer whose practice is to a degree specialized.

It would indeed be dangerous to suppose that the ordinary lawyer could not readily and ably qualify himself to handle the average aviation case, and the leaders among the men who have represented aviation clients are among the first to admit this. There are two chief assets to be gained by specializing to some degree in aviation work, and these are: firstly, a certain familiarity with the subject matter of the aviation business; and secondly, a familiarity with the few statutes, regulations and cases that have set up any extraordinary procedure or rules for aviation.

The first asset can be gained through experience, or if necessary, through the employment of what might be termed an interpreter in the form of an expert in the field. The second quality can be readily gained through Mr. Hotchkiss' simple and clear treatment of the little body of law which has accumulated to date dealing with aeronautics specially.

This view can be visualized by comparing the vast body of existing law with the minor amount of space needed to set forth, in as comprehensive a fashion as Mr. Hotchkiss has done, all that need be said on the subject of the law of aviation. This Mr. Hotchkiss has accomplished in one hundred pages, though his book contains another four hundred pages of reference matter, consisting of Conventions, Statutes, Regulations, etc. Mr. Hotchkiss himself agrees with what would seem to be the better thought among the lawyers who handle aviation work—that is, that one should not depart hastily from the existing law and treat aviation specially.

While it is to be regretted that a man as able to express an opinion on the subject as Mr. Hotchkiss has not done so more freely, it is to be noted that in almost every instance where an opportunity presents itself the author has vetoed the necessity for new or specialized treatment. Thus, the proposed Uniform Aeronautical Code, under which, in certain cases, it is contemplated that aircraft operators will have to carry compulsory insurance, and in certain instances will be held absolutely liable for damages, is treated as follows:

> "At the time this is written, in 1938, the text has not been finally settled nor has it in principle been finally adopted. Nevertheless, it has and will continue to be debated as to whether so drastic a change not only from the existing laws applying to aviation but to all other forms of locomotion is necessary. In the writer's opinion the necessity is not apparent."

Again, the author's thoughts in this respect are representative of the vast preponderance of opinion and only cliques of pure theorists are still ardently supporting the passage of the Uniform Aeronautical Code in its present draft form.

The author demonstrates another danger arising from a specialized treatment of aeronautics before the art and industry has grown beyond its infancy, when he discusses the question of Air Carriers—Public and Private. He points to a tendency on the part of the courts to consider an ordinary charter flight as the operation of a common carrier. As he states, he regrets this tendency and is unable to account for it. There is no reasonable basis for this tendency, as the normal rules of evidence are sufficient

to establish negligence or fault without a distortion of the common law under the guise of adapting it to a new art.

In Chapter XII on Criminal Law and Aviation, the author discusses the growing field of Rules and Regulations, the infraction of which constitutes a crime punishable by fine, imprisonment or both. He states:

> "The effectiveness of such compulsive laws is measured largely by the wisdom with which they are administered since all too easily do they lend themselves in the establishment of a bureaucratic tyranny."

It is perhaps to be regretted that the author did not more fully discuss this field of law, as there is a distinct possibilty that if there were more enforcement, the multiplication of rules and regulations, and the resultant "bureaucratic tyranny" feared by the author, might paradoxically be lessened. The fact is that since the passage of the Air Commerce Act of 1926 there have been no figures available as to enforcement of the then simple regulations, which remained in existence for over twelve years, virtually unchanged. Indeed, enforcement was virtually unknown through a combination of lack of personnel, fraternization, and some doubt on the part of the governmental authorities as to the legality of proposed prosecutions. This caused the public to believe that improper flying practices could be done away with through a multiplication of regulations, whereas, tragically enough, no one had really given the simple previously existing regulations a fair trial. Thus, just prior to the passage of the Civil Aeronautics Act of 1938 a vast body of regulations, known as the Civil Air Regulations, was promulgated, and one seriously doubts if they are not honored by their breach more often than by observance.

In dealing with the Civil Air Regulations, it is to be noted that the author has set out this body of regulation in full in the Appendices. Most practitioners keep this body of regulations in a loose-leaf note book, and their secretaries are busy discarding and inserting portions continuously. Certainly if they were to be included in this book, it would be better to have them in some pocket form than as a permanent part of the book. The author has abridged them because of his reluctance to waste space by their inclusion *in toto*. This treatment of them is misleading. For example, in Section 607 of the Civil Aeronautics Act, the Civil Aeronautics Authority has been empowered to regulate air agencies. A simple statement to this effect is found in the text at page 100. However, when one remembers that "air agencies" includes, *inter alia*, all of the Approved Schools and all of the Approved Repair Stations, and that whole sections of the Civil Air Regulations deal with these very important segments of the aviation industry, it seems admittedly dangerous to blow both hot and cold on this subject.

Similarly, the author, perhaps in an endeavor to stick closely to the record, states that no cases have arisen under the Warsaw Convention. This statement is true as far as it goes, but the implication that claims have not arisen and been negotiated and settled is possibly an improper one. Perhaps it should have been mentioned that the Warsaw Convention has been invoked in connection with the settlement of claims in accidents occurring on airlines operated by American interests.

In order not to subject oneself to a welter of kindly patriotic criticism for concurring in a trivial mistake, it is to be mentioned that the Wrights flew at Kitty Hawk in 1903 and not in 1906, as the author infers in the first paragraph on page 1.

After such a trivial note, it is perhaps well to state in conclusion that Mr. Hotchkiss is possibly unique among writers in his ability to set forth

without undue elaboration or unnecessary discourse such an excellent statement of the special law that has grown up about the art and business of aviation.

*Alfred L. Wolf* †

ELIHU ROOT. By Philip C. Jessup. Dodd, Mead & Co., New York, 1938. (2 volumes.) Pp. xviii, 1149. Price: $7.50.

This is a big book, in two volumes, running from Root's earliest American ancestors through 1069 pages of text to his death at ninety-two in 1937. The ancestors—solid middle class people, farmers, inn-keepers and the like, and a disinterested, gentle father who taught natural science at Hamilton College—are early disposed of. Then quite logically comes Elihu, a bright boy, reserved and with a nasal tone. He is tolerably well educated, likes the natural sciences, but determines that his destiny lies in the law. Arriving in New York, he attends Columbia Law School, teaching meanwhile at a girls' school and tutoring among the right families, who like him. He is active in the Y. M. C. A. A law practice begins to build: he gets a case here and there from a pupil's father in business or in a bank, a few criminal cases, including his participation in the defense of "Boss" Tweed. In 1885, at forty, he is married, hard-working, prosperous, and a leader at the bar. He devotes rather less time to the "Y", and more to the Republican Party. He becomes federal district attorney in New York. Then, the mauve decade—the "robber barons", economic ammorality—Elihu Root is at the top; Louis D. Brandeis, at the same time, is beginning his glorious fight. Jessup omits the "barons" and the job Brandeis found to do, and glosses the railroad and New York traction squabbles as well as the Equitable Life Insurance scandal brought to light by Charles Evans Hughes.

Root's fifteen years in public life occupy most of what follows—the bulk of the book. The treatment here is fuller, perhaps because so much of it is international affairs, which are the author's province. The days of Root's years as Secretary of War and of State in the cabinets of McKinley and Roosevelt are meticulously detailed, though as United States Senator from New York he is more cursorily treated. As a cabinet member he was active and able, playing vigorous roles in the more efficient reorganization of the War Department and the creation of the General Staff, in the pacification and reconstruction of the islands won from Spain, in the promotion of Pan-Americanism and of friendly relations with Japan. Root was a strong advocate of international arbitration and did much hard and constructive work to achieve it. We are told that Root's Presidents, particularly Roosevelt, relied heavily upon him and his good advice.

The last pages are given to the Elder Statesman, his support of Taft against Roosevelt, his bitterness toward Germany during and after the war, the resumption of his unfortunately interrupted efforts to make of international law something comparable to municipal law, his part in the general baying of the Bar presidents after Brandeis in 1916, his keen and valuable interest in civic, philanthropic and educational affairs. He devoted more time to the amenities of living, and died serene, full of fame and years.

We are assured that Root never swerved from the ethic of the lawyer——utter devotion to his client's cause,—whether the client was Tweed, a corporation, the Republican Party, the President, or the nation itself. Unfortunately, even a sincere man who has long occupied himself with a par-

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ticular interest may come imperceptibly to see as the general good the familiar narrower advantage. And remember, too, that the Canons of our profession constrain us to consult our own consciences, not our clients', and to impress upon the latter "exact compliance with the strictest principles of moral law". One day we may realize that to serve society well the lawyer must be its servant, as free as the judge from private pay. Then, if our economy be kinder, we shall perhaps end the tragedy of a man of Root's competency wasting his life in a practice which in the main was either futile or anti-social.

Jessup has written an exhaustive work, scholarly is the usual term, I suppose. The book is heavy with letters, diaries, speeches, conversations jotted down by Jessup playing Boswell, and with other source materials. But only one of the three parts of the story is told, and there the many trees often obscure the forest. A biography ought to tell of the man, his work, and his relationship with the world about him. This book does only the second creditably. It gives little more of Root personally than you find of contemporary politicians in the newspapers and Washington gossip columns. Oh yes, we learn that Root was rather crusty to strangers, considerate of his subordinates, a wit among his friends, in love with his wife, a skilled gardener. But there is no warmth in the telling. One doesn't get the picture of a human being; the book has none of the heightened and intensified portraiture of a novel, which is what a biography ought in some measure to have. However, that may be excused; students are not expected to be artists.

A graver fault is the failure to appreciate the social forces focusing through Root and men like him, and the interaction between these men and those larger, impersonal energies. I don't ask Jessup to write like a materialist fledgling; I do want him, when he writes a thousand pages for me to read, to forsake Carlyle's "great man" theory of history and the technique of grade school text-book writers of the '90's, a technique which Turner, Beard, Taine, and a dozen others left behind before I was born. Jessup's worlds of 1865 and 1935 are the same, and neither is very clear; the book is like a house with the blinds always pulled down, and artificially lighted. I want to know more of Root's typical role as articulate and capable aide of the propertied interests which came into their own during his life. I want to see a clearer, more vital insight into the lawyer's share in the creation of the undemocratic mechanisms of corporate control which "we have only just begun to fight".

Root merely epitomized the rampant, rising industrial organizations amid which he lived. The period was, of course, inevitable and I hope, as so many people believe, that it preludes a more sober order. Certain it is, that as part of the tides of history, it can be censured no more than the waters that drown a friend.

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EARLY AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT. By Shaw Livermore. The Commonwealth Fund, New York, 1939. Pp. xxx, 327. Price: $3.50.

This is a study in legal history and is of interest both to the historian and the lawyer. Professor Livermore's researches lead him to conclude that the modern corporation in the United States stems from the free associ-

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ation of the colonies and the early post-Revolutionary period rather than from the semi-political chartered bodies; and that their development finally forced the enactment of general incorporation laws. The study reveals the importance of these unincorporated associations—children of necessity, born of the need which the business men of the colonies felt for an organization in which they could associate themselves for joint activities. Corporations, chartered by the Crown, were difficult to organize and always costly. This was especially true in the distant colonies. Hence colonial business men were faced with a problem which they solved in the same practical and pioneering spirit in which they dealt with most of their industrial, financial, and economic difficulties.

Professor Julius Goebel points out in his Editor's Introduction that one answer to this problem had already been given by the religious bodies which migrated to America. The Separatist doctrine that association alone was sufficient to create a corporation, or a society endowed with all the attributes of a corporation, was for a century the accepted legal doctrine. Professor Livermore, however, has devoted his attentions to the land companies, whose life histories afford the best illustration of the forces at work, the development of new theories, and the hardening of these into legal and economic institutions.

The period between 1750 and 1825 was one of rapid economic change in America, and business men needed a device which would enable them to organize in groups for the purpose of carrying on activities as though they were incorporated. Land merchandizing was such an activity—one of the most important in the colonial and post-Revolutionary period, though not as dominant as some historians have pictured—and required combinations of capital and unified control; yet not one of these early companies ever secured a charter. This idea, that "a unitary business organism, possessing all the traits of a corporation minus its legal sanctions and privileges, could be created at will by any group of men", ran counter to prevailing legal doctrine, and led to a sharp conflict between the courts and the economic necessities of the times. The courts universally refused recognition to this new device, and in many cases opposed it. At the same time they were imposing new restrictions or handicaps upon corporations, which led businessmen to prize the association more highly. Merchants and others gradually realized that they had in their joint stock associations as effective a business tool as the chartered corporation; a charter came to be regarded as a luxury. Legislative restrictions, as exemplified in the Bubble Act (which made charters harder to obtain), and in later banking history, were thus evaded. It was not necessary to obtain a charter to carry on most business activities, for the substitute for the corporation, developed by Yankee ingenuity, served quite as effectively. After about 1800 the legislatures imposed increasing disabilities on corporations, a fact not generally recognized by historians. These various forces finally led, about 1825, to the enactment of general incorporation laws instead of granting special charters.

In successive chapters the author describes colonial business organizations and practically all of the important pre-Revolutionary and post-Revolutionary land companies. In the first group are listed the Lynn Iron Works, the Connecticut Copper Mines, the Principio Company, and the Land and Silver Banks in Massachusetts. For such purposes the corporation was not favored; it smacked of monopoly. Hence the association principle became the main reliance of the business community. The pre-Revolutionary land companies described include the 1748 Ohio Company, the Susquehanna Company, the Transylvania project, the Company of Military

Adventurers, the Mississippi Company, the Illinois-Wabash Companies, the Illinois Company, the Indiana Company, the Vandalia Company, and a few other lesser projects. The opportunities for large scale land merchandizing were particularly numerous after 1789, and these were led off by the Ohio Company, the most important of them all. Other projects of the post-Revolutionary period included the scandalous Yazoo Companies, the North American Land Company, the Asylum Company, and a number of others of lesser magnitude.

As a result of the efforts of practical men to deal with an existing situation there had thus been created, step by step, a clearly defined business association, supplanting the partnership and equal if not superior to the chartered corporation. This, rather than the eighteenth century monopolistic corporations, formed the model for the modern corporation of the nineteenth century. Its success and general acceptance led naturally and inevitably to the passage of general incorporation laws, thus giving legal sanction to existing practice.

Professor Livermore has done a careful and discriminating piece of work and has made a valuable contribution to legal history and to a better understanding of the organization and functioning of early land companies. He was well equipped for the task by previous works in the field of business organization and of investments. Studies in the dark middle zones among the various social sciences are particularly welcome, as they are the most difficult and call for special qualifications. The present work is a successful venture in such a field.

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