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BOOK REVIEWS

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The International Court. By Edward Lindsey. New York: Thomas Y. Crowell Company. 1931. pp. v, 347.

THIS latest book on the World Court—we have already those of Bustamante, Hudson and Jessup—aims to give a complete and compendious account of the Permanent Court of International Justice, providing it at the same time with its setting, the matrix in which such an institution comes into being. The League of Nations, one may say, is an accident, a rhapsody of genius, struck off by a few brains under catalytic conditions, but the statement is true only in respect of the form and circumstances. Whatever one might think of the particular form of the League, as type it came into being as an inevitable expression of growing world organization, with the strength of an institution which represents continuing impersonal forces. Incidentally, one may say that by reason of its correspondence to organic forces, the League itself has organic character and will in time undergo metamorphoses like those of the federal union of the United States of America.

This sort of biological treatment, not yet adequately applied to the League of Nations as a whole, Mr. Lindsey adopts on a modest scale for his book on the World Court. He gives us, therefore, introductory chapters on the germination and growth of international law, and on the development of the international society. These chapters are admirable in their proportion and balance and their selection of significant material. Perhaps there are no longer impartial readers on the subject of world organization, but if there were one he might be convinced that the world had for long been in travail with such an institution as that at the Hague, now only in its infancy.

Introductory material of this sort is usually perfunctory and tedious or unpleasantly didactic in tone. Mr. Lindsey has given too much reflection to his material—he has genuinely incubated it—to fall into the one error, and is too modest a man to commit the other. When he draws attention to the resemblance between the duel (once the codified exception for cases of "honor" to the general rule for the submission of controversies to courts), and the reserved case of "national honor" in arbitration treaties—self-defense of individuals and "vital interests" of nations make an equivalent parallel—he does so without vehemence. As the point is not new, he spills no hot ink over it.

In this moderate tone the author gives an account of the efforts made at the Hague Conferences of 1899 and 1907 towards the Hague Permanent Court of Arbitration, the sketch plan, as it were, of a judicial organism; of the planning of the Court in 1920; of the working out by the jurists of its jurisdiction and authority; and of its sixteen decisions and eighteen advisory opinions, item by item. (The account ends in 1930, and does not therefore include the Anschluss advisory opinion.) This account is simple and coherent for the contentment of the layman; it is comprehensive, accurate and exact enough to furnish a *vade mecum* for members of the bar who do not specialize in international law.

Mr. Lindsey makes the more headway by his moderation. He does not obtrude his own judgments and prefers to let the facts show for him: that the United States now occupies a position in delaying the organization of international judicial procedure like that occupied by Germany in 1899; that the failure of the United States to attend the conference of the Signatories of the Court Statute in Geneva in 1926, and its failure for two years and a half to reply to their communications, do not indicate confidence in its own rightness or international good breeding; that the court's judgments and opinions are as free as those of most appellate tribunals from political pressures and conscious bias towards an end which might serve the purposes of the states whose nationals compose it.

On one point, the feasibility of intensive codification of international law as a means towards world order, Mr. Lindsey's opinion is more explicit and wholly on the side of the development of international law "by the action of a Court in applying general principles of law to the actual facts of concrete cases;" or, if there is to be a conventional law, then "by agreement on specific subjects based on consideration and study of the facts by experts in the various fields involved." [p. 256]. In any case, "the notion that a code of rules is a prerequisite to the functioning of an International Court" is the opposite of the truth; "rather it is the case," as Mr. Lindsey quietly makes clear, "that the existence of the International Court is the most essential prerequisite for the complete development of international law."

The style in which this book is written is lucid and engaging, and its modesty and non-didactic quality has a persuasive effect upon the reader.

Yale University. CHARLES P. HOWLAND.

The Masquerade of Monopoly. By Frank Albert Fetter. New York: Harcourt, Brace and Company. 1931. pp. 464. $3.75.

FOR students of what some pessimists still refer to as the trust problem in the United States the principal usefulness of this volume will probably be found in its economic critique of the handling of the basing point system of prices under the federal anti-trust laws. For the public at large, whose interest it is more deliberately designed to engage than is the case with most books in this field, it has possibilities as a counter irritant for that great itching, manifested at many gatherings of business "leaders," to be done with the "antiquated" federal anti-trust laws. Dr. Fetter, who teaches economics at Princeton University, admires these laws and the general purpose they were supposedly designed to serve. He has no sympathy with the current efforts to secure legislative revision, asserting that "much of the recent outcry against the Sherman Act is like the cry of stop thief by the real criminals joining in the chase." He is not satisfied, however, merely to block those industrialists who, "having brought upon themselves the righteous penalties for their sins against economics and the anti-trust laws" now "have the temerity to launch a renewed attack upon the Sherman Act." He would carry the fight to them, and restore a vitality to the anti-trust laws which he thinks has been lost through a misguided process of enforcement and judicial interpretation. One of the most fatal errors in this process, as he views it, is that of failing to scotch the basing point system of prices—a system which may be very roughly described as that under which the "delivered prices" of goods are ostensibly a compound of a uniform base price at some major production center and the charge for transportation, which may be purely hypothetical, from that center. The

use of this system Dr. Fetter holds to be a manifestation of the exercise of monopolistic local price discrimination which "destroys the semblance of a market"—a conclusion which he fortifies by detailed economic analysis based upon theoretical considerations as well as data generated by the "Pittsburgh plus" case before the Federal Trade Commission. In the process of anti-trust law enforcement, however, he finds that the basing point practice has been very badly "muffed." The fault, one gathers from his extensive review of anti-trust law cases touching the basing point system directly or indirectly, lies largely with the prosecuting agencies for failing to see the system or, seeing it, to understand it, though the courts come in for severe criticism for not having grasped its significance as a phase of monopolistic control when it has been brought within range of them.

The one bright spot which Professor Fetter finds in a dismal record of failure in dealing with the basing point practice under the anti-trust laws is the Federal Trade Commission's decision condemning the "Pittsburgh plus" plan of delivered steel prices. But this decision, for which he argued in an advisory capacity, gives him no great comfort. Partly because it was gingerly rendered and not carried to the courts "those best informed on the subject know well that this subtle device in restraint of trade, 'conceived in sin and born in iniquity', . . . had not really ended its career as an accomplice of monopoly in circumventing the laws of trade and of the nation, either in the steel or numerous other industries." To put a decisive end to this career Dr. Fetter would enforce "publicity for all prices in interstate commerce." This, he believes, would so clarify the rights of buyers and sellers, "that it would no longer be possible to effect the monopolistic price discriminations inherent in the basing point system." From those who approach the questions involved in anti-trust law enforcement primarily from the viewpoint of legal technicians, parts of Dr. Fetter's argument seem likely to draw fire. For example, he applauds a majority of the justices of the United States Supreme Court for being guided "by sound intuitions rather than direct evidence" in two cases involving the basing point system, only to ignore such guidance a little later. This may well have been the case, but for an economist to make such an assault upon the legal craft's conventions is certainly to invite reprisals. While economists generally will, I believe, validate his demonstration that the federal anti-trust laws have failed to remove great obstructions to "free competition," and that the failure to eliminate the basing point practice presents an important case in point, some of them will doubt whether the situation can be saved for "free competition" at this late date or that being saved, as it has been in a substantial degree in certain extractive industries, whether "happy days are here again."

Regardless of how these questions are answered—one suspects that they can only be answered satisfactorily and then temporarily, by reference to a mass of industrial particulars—Dr. Fetter has made a notable contribution to an understanding of the failure of the federal anti-trust laws to fulfill the general purpose for which they were ostensibly designed. And he has done it with a zest and rhetorical dash which seems likely to engender a new and more cheerful conception of college professors of "the dismal science."

Baltimore, Md. DEXTER M. KEEZER.

Graft in Business. By John T. Flynn. New York: The Vanguard Press. 1931. pp. ix, 318. $3.

FLYNN says he is attempting to picture "the sins of the gentleman." This "gentleman" is at least quasi-respectable. He is neither a felon nor a racketeer. He listens with self-righteous complacency to panegyrics on the morality of modern business. He regards politics as rather nasty and permeated with graft. It is Flynn's thesis that this gentleman is no Galahad; that he is subject to the same weaknesses as those who make their living out of politics; that our business organization lacks checks on graft which we have learned to demand in politics; and that the public is more apathetic toward business than political graft. He hopes by his book to do something to shake business men out of their complacency, to arouse public opinion and to stimulate corrective legislation.

Book I, entitled "Commercial Bribery," deals with corruption of subordinates. We are given illustrations of the many forms it takes and told that whole industries are honeycombed with it. Existing legislation is described as ineffective, partly for want of provisions for guaranteeing immunity to informers, partly because of reluctance to prosecute where commercial bribery is a phase of interstate competition and the existing state laws can reach only a few of the competitors. Proposed national legislation has slumbered in committee. The lack of zeal for making and enforcing laws to punish commercial bribery is seen as another manifestation of that same blunted moral sense which makes graft an accepted part of the game to men who would not rob or steal. Flynn attributes this to a general feeling that the higher ups are getting theirs.

He is thus led to a discussion of "Corporation Graft"—officers, directors, and controlling stockholders making use of their control for personal aggrandisement at the expense of their companies. His data is taken from public investigations by Congressional committees or by the Interstate Commerce or Federal Trade Commissions and from litigation. We are given accounts of the managements preceding the receiverships of the Frisco [1] and the St. Paul,[2] of the Dillon Read régime in Goodyear Tire and Rubber Company. Sidelights suggestive of corporate graft are drawn from the "Oil Scandals," the Youngstown-Bethlehem merger controversy, the collapse of the Bank of United States and the Caldwell chain of banks.

The book shows both the virtues and faults of a journalistic treatment. The author has been alert to assemble his material from many sources. He has a shrewd instinct for seeing through elaborate corporate machinery to the danger spots where self-interest may conflict with fiduciary duties. At the same time there is a naïveté, or perhaps nonchalance, with respect to difficulties of finding out exactly what has happened when controversy has developed as to management. There is an apparent scorn of such pedantic devices as precise reference to page and volume of source material. The reader cannot always tell when the author has had access to the record, when he has read an opinion and when he has merely relied on newspaper accounts of testimony.

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[1] 29 I. C. C. 139 (1914).

[2] 131 I. C. C. 615 (1928). Flynn gives a substantially accurate summary of the reports of the Commission on these two investigations. *Cf.* MOODY'S MANUAL OF RAILROADS (1930) 364, referring to causes of the St. Paul receivership. "Mismanagement is also included by certain authorities, notably the Interstate Commerce Commission, but this in the last analysis is always rather difficult to prove."

In one instance he purposely omits the names of the parties "because they are so well known and occupy such high positions in business that I might be accused of throwing mud if I were to revive the little scandal." But we are assured of "all the facts as determined by a high court of law." From the superficial details the case is obviously *DuPont v. DuPont*,[3] but the author's account is at most a fair description of what the plaintiffs claimed, partially accepted by the Federal District Court and later rejected by the Circuit Court of Appeals.[4]

Perhaps it is of only academic interest whether Flynn gives us sufficiently reliable evidence to hang all his villains. This is not his object. He writes an excellent sermon. His illustrations are at least plausible and suggestive of what may have happened, and may continue to happen, all too frequently unless every possible moral sanction and legal precaution is mobilized to curb abuses in corporate management.

For medicine he would have more publicity and less opportunity for divided allegiance, following in general suggestions of Brandeis,[5] Ripley[6] and others. His concrete proposals, such as complete prohibition of holding companies, are drastic and seem to ignore the other side of the corporate management problem—the blackmailing holder of a small minority stock interest. They also ignore the use of other devices where corporate stockholding is prohibited.[7] His suggestions are perhaps intended only as a warning of what may happen if the few lawyers who really know what is going on shirk their professional responsibility and force laymen to assume the leadership of reform.

The book helps to call attention to a social problem of major importance and it furnishes the student of corporation law with at least a salad for his intellectual diet.

Yale University. ROGER S. FOSTER.

[3] 234 Fed. 459, 242 Fed. 98, 246 Fed. 332, 251 Fed. 937, 256 Fed. 129; *certiorari* denied, 250 U. S. 642, 40 Sup. Ct. 12 (1918). Compare especially quotation on p. 242 of Flynn's book with testimony quoted 242 Fed. 98, 123.

[4] Defendants had bought out the largest stockholder in the company. The District Court held that under the peculiar circumstances it was a "fraud" not to give the corporation an opportunity to buy the stock. As a result it could now elect to adopt their bargin, if it so chose, by vote of its stockholders. By voting time enough war profits had been distributed to equal the purchase price of the stock and the corporation could if it chose have the stock for nothing. The defendants managed to muster a substantial majority of votes against the corporation acquiring the stock. The trial judge was satisfied and dismissed the bill. The Circuit Court of Appeals decided there had been no fraud and thus could affirm without passing on the farcical vote of the stockholders. Behind the parade of legal issues marshalled by able counsel, one can smell a family row between equals, no doubt regretable, but not the oppression of the lowly by the mighty with which Flynn is primarily concerned.

[5] OTHER PEOPLES MONEY AND HOW THE BANKS USE IT (1914).

[6] MAIN STREET AND WALL STREET (1929).

[7] See A REPORT OF A SPECIAL COMMITTEE ON UTILITIES, Mass. House Document No. 1200 (1930), disclosing extensive use of business trusts to duplicate the typical pyramided power holding company set up, despite the Mass. statute prohibiting corporations from holding stock in local utilities.

Cases and Materials on the Law of Financing of Business Units. By William O. Douglas and Carrol M. Shanks, Chicago: Callaghan and Company. 1931. pp. 77, 1213. $7.50.

THIS volume is one of a series which approaches in a novel manner the teaching of corporate law. The manner of approach is novel, but it is so sensible and obvious that it is a wonder that it has not been tried before. Perhaps the experiment had to wait for the peculiar combination of theoretical learning with practical experience enjoyed by the authors of this book. Mr. Douglas has for five years been teaching law on the faculties of Yale and Columbia Law Schools, and Mr. Shanks is a very active and able practitioner of corporate law. I know by direct experience his grasp and facility in connection with the practice of that complex and baffling branch. This volume on Finance, like its comrade volumes on Reorganization, on Management and on Losses, arranges its material under the actual operations which a corporate lawyer meets in practice. For instance, it takes up the subject of "Marketing of Securities" and begins its treatment with typical forms of bankers' purchase contracts, forms which have been in actual use. It couples these forms with a brief discussion of the purposes for which they are used and with a collection of cases discussing the underlying theories of law on which the forms are based and out of which the type of transaction has grown. The forms throughout the volume are admirably selected.

It certainly is true that after undergoing the classical course of instruction on corporations even the brightest students find themselves completely lost when they enter practice. I think that a student taught by this newer method would feel much more at home on emerging from the cloister into the field of practical operation.

In my early practice, with all due respect to the fine theoretical works on corporations of Morawetz and of Machen, there were no good practical works on corporate law in general circulation. There was at the New York Bar Association Library one old, battered and much bespoken reprint of a lecture on corporate reorganizations by that brilliant and able practitioner, Adrian H. Joline, and that was all. A few years ago there were delivered at the City Bar Association a series of very able lectures on the practical aspects of corporate law. They have been a boon to all of us. It seems to me that the new series of texts and materials by Douglas and Shanks does for teaching very much what those extraordinary Bar Association lectures did for practice.

New York City. ELIHU ROOT, JR.

Warenzeichen und Wettbewerb in U. S. A. By Walter Derenberg. With an introduction by Edward S. Rogers. Berlin: Carl Heymanns Verlag. 1931. pp. xi, 400. RM20.

AS the title indicates, this is a treatise on the American law of trademarks and unfair competition, the first exposition in the German language of the system of trade protection which has grown up in this country.

In conformity with the usual practice of German scholars in dealing with problems wherein a constitutional question is involved, the author opens the discussion with a consideration of the power of Congress to legislate on the subject. Following this examination, a summary is given of the nature of common law as contra-distinguished from statute law

on the one hand and equity on the other. Chapter II presents a survey of the development of modern trademark law and unfair competition, followed by a chapter on the Federal Trade Commission and its function. In Chapters IV to XIV such problems as: What can be appropriated as a trademark, the "secondary meaning" doctrine, the right to use one's own name, the "same descriptive properties" doctrine, the territorial extent of trademark protection, the acquisition of trademark rights (user), defenses, effects and advantages of registration, and remedies are considered. A final chapter is devoted to international trademark law. An appendix includes a translation of the Federal Statutes of 1905 and 1920, the most important rules of the Patent Office, certain forms, and the classification of merchandise under the Act of 1906.

The entire book is characterized (quoting Mr. Rogers) "by an understanding of conditions in what to him is a foreign country, diligence in collecting material from unfamiliar sources, and a critical sense of the value of the material collected." The reviewer is fully in accord with this view. The book derives a great deal of its value from the varied experiences of the author. Unlike the majority of other writers in the field of foreign law, he has not been confined to a mere library perusal of textbooks and cases. Several excursions to this country have given him the opportunity to become acquainted with the practices before the courts and in the lawyer's office as well as with the adjudicated cases and the special studies made by modern American writers, notably Handler and Schechter. The results of these experiences are reflected in the treatment of the subject.

It should be especially noted that the author carefully distinguishes between what the law is, that is to say, the actual decisions of the court, and his individual opinions on the meaning to be given, for instance, to a code section—a matter so often confused by continental European writers. His statements of law are accurate and amply supported by authority, with the single exception of one instance found on page 144. Speaking of technical trademarks such as, for instance, vaseline, he rightly points out that there is a danger that those marks might develop into names common to the trade, as has been the case in Germany where the Federal Supreme Court has refused to grant relief under those circumstances. [RG 73, 229]. Continuing further, he says (translation mine): "Experience, however, has shown that in the United States such development can be avoided if the trademark owner takes immediate steps, for example, against the word being inserted in a dictionary." No cases are cited in support of this proposition, nor has the reviewer been able to find any. Again: "...in the United States, the inserting of a name in a dictionary is...sometimes considered to constitute a transformation of the mark into a word common to the language." Considered by whom? What is the nature of the author's experience? It is to be hoped that he will satisfy our curiosity on this point in the next edition.

This book, of course, is primarily written for German readers with a view to aid them to understand the American legal thinking in this important branch of business law. The favorable impression with which the book was received in Germany leaves no doubt as to the success of the author in accomplishing his purpose.

In addition, the treatise has a good deal to offer the American scholar. Besides giving an excellent exposition of the law, the author never hesitates to criticize the courts from the viewpoint both of legal consistency and policy. His points are well taken and presented to the reader in a lucid manner; his suggestions for solving intricate problems, if not all acceptable, clarify the issues and stimulate thinking. His treatment of

the origin of the unfair competition suit and the interrelation between the latter and technical trademark cases contains an interesting piece of historical analysis [p. 48ff.]. Likewise to be commended is his discussion of the rights of registrants of foreign trademarks [p. 234ff.] and his attempt to define those much abused terms, abandonment, acquiescence, and laches [p. 254, 275]. Furthermore, the references to the German law add greatly to the value of the book. Although not undertaking a comparative study in its strict sense, the main stress being laid on the American law, the author shows in short but illuminating notes how the problems confronting the American lawyer are approached and solved abroad. On page 293 he points out that the defense of unclean hands is not favored by the German courts. In the attitude of the courts towards this defense is found one of the few differences between American and German law. The reviewer, however, is inclined to question the accuracy of the following broad statement: "Even a similar [to the defendant] unlawful behavior of the plaintiff will not, as a general rule, be a bar to the action." While this is no doubt true with respect to registered trademarks, it is hardly justifiable concerning unfair competition cases. Section 16 of the German unfair competition statute reads: "Any person who in the course of trade uses a name or a firm name...in such a manner as to cause confusion in the names or the firm...which another party *lawfully* employs can be sued for the injunction against such use." Applying this statute the courts have constantly held that an intrinsic misrepresentation in plaintiff's firm name or newspaper head makes the use unlawful; and on this basis relief has uniformly been denied.

With this single objection on a minor point the book is recommended to American scholars and lawyers. Those who have a knowledge of German should read the book in the original. For those unacquainted with the German language let us hope there will soon be a translation.

Columbia University. JOHN WOLFF.

The Inns of Court and Early English Drama. By A. Wigfall Green. With an introduction by Dean Roscoe Pound. New Haven: Yale University Press. 1931. pp. 199. $3.

THE law in its evolution becomes entirely vivid only when to an understanding of developing precedent and statute is added a knowledge of the changing ways of mind and manners of life of the practitioners of the craft. To the lawyer the value of Mr. Green's book will derive from the relief and perspective it can give to his picture of the legal profession during the formative and colorful sixteenth and seventeenth centuries. The aristocratic, feudal and courtly character of the bench and bar during this period is nowheres more clearly revealed than in the account of their part in the spectacular revels of Tudor London. To the Inns of Court went the sons of the wealthiest and most powerful families—only such could afford to go—not only to study law but to receive the training of the diplomat and courtier. The Inns led all the other guilds in the originality as well as in the elaborateness of the dramatic entertainments they devised. The Inner Temple produced the first English tragedy, *Gorboduc*, as part of its Christmas entertainment in 1561. Most of the important early English dramatists—Ben Johnson, Francis Beaumont—were residents at the Inns; while most of the greatest lawyers of the period—Francis Bacon, Edward Coke—had some part in shaping the development of masque and drama.

Here is a relationship worth exploring. Mr. Green has chosen to do little more than point to its existence. From a brief but adequate summary of the organization of the Inns of Court he passes to a chronicling, with full detail and many quotations, of the various entertainments presented by them during the sixteenth and seventeenth centuries. His compilation will be of value to the researcher, who has hitherto had to look for his material in scattered references in histories of the Inns or of the drama. Both students of the law and students of the drama may find here many interesting and relevant bits of information; neither will discover new interpretations. It is not that the task of tracing relationships in a borderline field has proved too difficult, for Mr. Green has simply not addressed himself to the problem. One wonders at his restraint. In every direction were enticing paths. A glance at the history of the masque would have led to an estimate of the force of the influences streaming in upon the English court—and therefore upon the common law—from Italy and France; the whole humanistic movement could have been made part of this story. It is interesting to know, in newly compiled detail, that the lawyers of the sixteenth century contributed largely to the development of English drama; it would be significant to learn something of the process which sweeps forward the interlacing intellectual currents of a fructifying period.

New York City. IDA CRAVEN.

The Criminal, the Judge and the Public. By Franz Alexander and Hugo Staub. Translated by Dr. Gregory Zilboorg. New York: The Macmillan Co. 1931. pp. xx, 238. $2.50.

IN this book, the result of a four year study of the theoretical and practical aspects of criminal cases of medico-legal interest, a physician and a jurist make use of psychoanalytic knowledge in an effort to gain an understanding of the criminal personality. It consists of a theoretical consideration of the problem of criminal behavior, illustrated by a series of criminal histories, and is professedly an attempt to utilize the teaching of Freud to develop a psychoanalytic criminology.

This book might be called "Psychoanalysis and the Present Crisis" because the authors constantly refer to an immediate and present "crisis." No scientific data are adduced to show the existence of this crisis. There is no indication that the courts are any more confused in enforcing criminal law, that there is more crime, that the social order is in more immediate danger of dissolution than it has been at any time since human beings have labored to enforce uniformity of conduct among dissimilar people.

As it is impossible in a short review to consider all of the issues arising from the dogmatic assertions of this book, consideration is given to what may be said to be its high point, a classification of criminality. "The results," say the authors, "arrived at on the basis of facts, which heretofore have been considered, lead us to the conclusion that there exists in all human beings a large reservoir of anti-social or criminal drives, that all human beings have the tendency to carry out these anti-social or criminal wishes, and that the various forms of outlet for these drives or wishes are determined by the degree to which the Ego of a given individual frees itself from the Super-Ego, and puts itself in the service of the instinctual demands within the individual himself. Thus the degree to which the Ego