

REVIEWS

DEMOCRACY AND FINANCE. By William O. Douglas. With an introduction and notes by James Allen. New Haven: Yale University Press, 1940. Pp. xiv, 301. \$3.00.

COLLECTED here in one volume are the addresses and public statements made by Mr. Justice Douglas when a member and Chairman of the Securities and Exchange Commission. Expressed in clear and vigorous English, these addresses set forth the Brandeisian view that "finance moves into the zone for exploitation when it becomes the master rather than the loyal and faithful servant of investors and business," and that "administrative agencies have been given increasingly larger patrol duties, lest capitalism, by its own greed, avarice or myopia, destroy itself." Mr. Justice Douglas questions the advantages of bigness, margin trading, "financial royalism," and acceptance of prevalent practices; distrusts New York as a financial center; is concerned about the submerging of the individual in the impersonal corporation; and favors the democratization of industry, adequate representation of investors (whom he calls the "orphans of our financial economy"), aggressive social controls over finance, and a return to our idealism that makes the "homely virtues living realities."

The addresses range over the function of the investment banker, the place of the stock exchanges in the economic world, the need for integration and recapitalization in the public utility industry, reform in corporate reorganization and the place of the administrative agency in our modern complex society. The author reveals his distrust of advertising and salesmanship in the distribution of securities and urges the need for improvement in current fiduciary standards, with a constant ringing on the theme that man cannot conscientiously serve two masters.

With Mr. Justice Douglas's high ideals, his well expressed aims, his desire for fundamental honesty and plain living, there can be little quarrel. But many of the problems here attacked are not as simple of solution as would appear from these boldly critical addresses. The reviewer shares his belief that once society has decided upon regulation, business should reconcile itself to it so that needed energies are no longer spent in bickering but may be given to a whole-hearted devotion by government and business to solving the crucial problems facing us. "There is no reason why the men of action and idealism in business and in government may not jointly forge the destiny of our economic system on the anvils of reason and in the fires of national ambition."

It is hard for those who have spent their entire life in a field, and who are basically expert in the "know how" but inarticulate when asked to draw workable rules and regulations to define what they do, to realize that all of their actions, even comparatively simple ones, must be governed by rules. To draft these rules, technicians must be called in. Often those who become skilled in formulating and interpreting the rules by which these practical experts' livelihood is governed are not themselves expert in the practical "know how." To know what to do and how to do it, but not to know whether

it violates some rule they cannot understand, is particularly galling to heads of firms who must ask youngsters, lawyers and members of the Commission's staff how to run their business. This breeds a sense of futility and frustration which is not good for society. To Mr. Justice Douglas these growing pains pale into insignificance beside the needs of the people for social reform, the protection of investors and the proper functioning of our economy. Such heartburns will pass with the years and with increased knowledge on the part of the regulators. "Administrative agencies are here to stay, being democracy's way of dealing with the over-complicated social problems."

"The task of the administrator is to offer fairness and reasonableness in fulfilling his oath of office." The task of business and finance is "to provide the progressive leadership which must go hand and hand with administrative government." If "these administrative powers are to be exercised sporadically, enlightened business need only take the lead."

"Effective control calls not for the slower and heavier method of judicial decisions but for the more subtle and more sensitive control of daily administrative direction. . . . It means that adequate and effective methods of administration have never been and can never be fashioned through the judicial process. . . . The battle will be won only by constantly progressive administrative standards quietly and sincerely applied and delicately adjusted to requirements of particular cases."

An interesting, stimulating and provocative book, it is a "must" for those who would know what activates the mind of one of the ablest of those advocating social controls over finance and business. For the author, tradition holds neither charm nor terror. The possibility of errors does not frighten. It is only inaction that palls upon the spirit of one of the most forceful of our generation. With such minds as this, business can and must cooperate lest it perish. Administration by such minds will never be "captured or controlled by those whom they were supposed to control."

Industry and the administrators working together can solve many difficult problems to the advantage of society. The procedure of administrative agencies must be strengthened and improved so that business can work in double harness with them without a sense of frustration. The Attorney General's Committee on Administrative Procedure has recently made concrete suggestions along these lines. But, as Chief Justice Hughes said at the ceremonies commemorating the one hundred and fiftieth anniversary of the first meeting of the United States Supreme Court, "Democracy is a most hopeful way of life, but its promise of liberty and human betterment will be but idle words save as the ideals of justice, not only between man and man, but between government and citizen, are held supreme." And just as businessmen must learn to cooperate, and to recognize that proper regulation is for the social good, so must the administrative agencies. For if they adopt the complacency of business in 1929 and refuse to admit that there is anything wrong, then the feeling of resentment against them, which frustration breeds, may result in measures such as the unscientific and ill-considered Logan-Walter Bill which used a meat axe to fix a Swiss watch.

ARTHUR H. DEAN †

† Member of the New York Bar.

THE BOTTLENECKS OF BUSINESS. By Thurman W. Arnold. New York: Reynal and Hitchcock, 1940. Pp. 335. \$2.50.

THERE is to be found in *The Bottlenecks of Business*, Thurman Arnold's story of anti-trust law enforcement, much that is interesting and entertaining, much that is important, and much, sometimes combining these qualities, that is peculiarly Thurman Arnold. A stickler for detailed accuracy and precision can find a lot by which to be annoyed; for example, such a notation as that "in essence all that capitalism means is that goods are distributed through the payment of money instead of by army quartermasters in accordance with military necessities." The reckless observation that the consumers' committees during NRA days "had no concrete program" is particularly aggravating to this reviewer, who was the executive officer of one of them. General Johnson, on the other hand, is admiringly viewed as trying to restrain a businessmen's stampede for higher prices. The historic fact, of course, is that the General was riding herd on that stampede—in the rear, while the NRA Consumers Advisory Board, with a decidedly concrete program, was vainly trying to hold down the rush along lines which Mr. Arnold, if informed, would have appreciated.

It would be a great mistake, however, to write the book off as inconsequential because it is sometimes casually constructed around the edges. Rather, it should be viewed as the work of a creative artist both in statecraft and literature who paints with broad strokes on a big canvas and is impatient of what seem to him relatively inconsequential details. So viewed, the book is important not only as a chronicle of Mr. Arnold's extraordinary personal accomplishment as Assistant Attorney General in charge of anti-trust law enforcement but as a delineation of what such enforcement can do to remove "the bottlenecks of business."

In Mr. Arnold's view "there are two ways of running industry to capacity and distributing all its product (*i.e.*, removing the bottlenecks). One is to establish conditions under which competitive independent industries can maintain themselves. The other is for the state to regulate the centralized industrial power which has been allowed to develop." He, of course, strongly prefers the first method and, subject to some legislative exemption he thinks inevitable, would give it a thoroughgoing workout by enforcing the Sherman Act which "is aimed to prevent one thing, and one thing only—the private seizure of power over interstate commerce."

Mr. Arnold's enthusiasm for Sherman Act enforcement is grounded upon his faith in the economic beneficence of free competition. Going completely fundamentalist in the expression of this faith he remarks at one point that "in a free market, the displacement caused by even the most revolutionary invention would be only temporary because it is capable of freeing purchasing power to go into other channels." His enthusiasm for the Sherman Act springs also from the fact that it is enforced by the courts rather than administrative tribunals since he believes that "it is the magic of the judicial process which makes the courts, in spite of the clumsiness of judicial procedure, the most effective tribunals to penalize unreasonable restraints of trade."

In fact, so great is his admiration for the courts in this role that he finds that "slow legal procedure of anti-trust cases seems actually to aid in anti-trust enforcement" because "pendency of a criminal proceeding puts such a real hazard on the continuance of the practices which are complained of."

It is easy to see that delays in criminal proceedings can be utilized as a sort of pressure cooker of defendants, but it is the sort of advantage that it is surprising to have a Yale, Princeton, and Harvard man mention. Otherwise, it is anything but clear that in his adoration of the courts which, unlike administrative tribunals, he finds "protected by the reverence induced by judicial robes," Mr. Arnold is not indulging in moonshine. Likewise, it is easy to suspect that Mr. Arnold overvalues the efficacy of Sherman Act enforcement as a means of attaining economic paradise, although this reviewer holds that a sensible democracy would first see whether competition could be made to work in any industry—by enforcement of the Sherman Act if necessary—before trying any of the other schemes of control in the public interest, all of them tortuous, which have thus far been devised.

However, Mr. Arnold's estimate of what might be done through anti-trust law enforcement is entitled to extraordinary respect in the light of the extraordinary record he has made. Because he is essentially a very modest man, his book does not spell out in simple terms the story of how he took a moribund organization and a neglected statute and "gave the Antitrust Division (of the Department of Justice) an instrument to maintain a free market which it never had before." That story is to be gleaned from the book, however, and it is an impressive story of personal accomplishment, made interesting by a salting of shrewd and striking observations, some of which would have to be put down as very courageous politically—if there were any evidence that Mr. Arnold is aware of such a thing as political danger.

With the nation becoming increasingly involved in a deepening international crisis, the future of anti-trust law enforcement is problematical. In conventional economic thought it has found no place in the sort of emergency economic planning which is characteristic of war or frantic preparation for defense. It would not be surprising, however, if Mr. Arnold contrived, as well he might, to have anti-trust law enforcement in the front line of national defense. He indicates the possibilities along that line by remarking that "when all commodities the supply of which is affected by the war were rising, the particular war products under investigation by the Department did not increase in price." At any rate, it is not safe to assume, so long as he is on the enforcement job, that the anti-trust laws will fade out as the international crisis deepens. They did during the World War, but no man like Thurman Arnold was on the job. In fact there never has been. That, at least, is one compelling reason for reading *The Bottlenecks of Business*.

DEXTER M. KEEZER †

† President, Reed College, Portland, Oregon.

ROLLS OF THE JUSTICES IN EYRE FOR GLOUCESTERSHIRE, WARWICKSHIRE AND STAFFORDSHIRE, 1221-1222. Edited for the Selden Society by Doris Mary Stenton. London: Bernard Quaritch, 1940. Pp. lxvi, 791.

THIS volume, the third that Mrs. Stenton has edited for the Selden Society, "completes the publication of all the rolls surviving from the first general eyre of Henry III's reign, held for the greater part of England in 1218-9 and for the western and west midland counties in 1221-2." For editing these three volumes, a laborious task by any standard, the editor deserves, and will surely receive, the thanks of the many scholars who in one field or another will benefit by the now easy accessibility of this valuable material.

In its larger aspects the general substance of the rolls of the justices in eyre in this volume is, of necessity, substantially the same as that in the two preceding volumes. For that reason, paradoxical as it may seem, the contents of these newly published rolls offer more really new information to the student of general history, or of social or cultural history, than to the legal historian. The basic features of all the actions of this period have long been known to us; we are already so thoroughly acquainted with all the facts both of procedure and of substantive law, that no new material of this nature can be expected to throw any further light on fundamentals. Fortunately, however, alike as rolls of the same type may be in their broader outlines, the particular facts of unusual or peculiar cases and the variety of details of circumstance and situation give to each roll an individuality of its own. The rolls before us have their full share of this interesting detail, and enough uncommon or unique items to offset the rather dull monotony of the many typical entries touching *essoins*, *novel disseisin*, *mort d'ancestor*, the writ of right and appeals of felony.

The date of these rolls falls within the period in which the still somewhat new writs of entry are continuing to develop. There are a noticeable number of actions begun by this writ on these rolls, entry *ad terminum qui praeteriit* being especially prominent. Interesting are the many instances of the use of *invadiavit*, rather than of *dimisit*, in this particular writ of entry.¹ Personal actions are not very numerous. Even the action of debt, which has begun to appear more frequently on most plea rolls by this time, occurs but seldom on these. There is one case which involves men of prominence, one which seems to be the aftermath of a recognizance, and one which may be debt in the *debet et detinet*, but more probably is a recognizance.²

There are an unusually large number of cases which bring out the none too well understood fact that though the four knights chosen to select the grand assise generally offer a list of sixteen or more knights, only twelve are actually sworn in to constitute the assise.³ In one of these cases the grand

1. Nos. 256, 657, 682, 683, 1142, 1477; cf. GLANVILL X. 9; Woodbine, *Cases in New Curia Regis Rolls* (1930) 39 YALE L. J. 505, 509-513.

2. Nos. 301, 244, 159a. This last case is indexed erroneously as *detinue*.

3. Nos. 111, 385, 390, 457, 981, 1033, 1071. Where, as in Nos. 386 and 389, *est* instead of *iuratus* or *iuratus est* occurs after the name, it would seem to stand for *est essoniatu*s as in No. 703.

assise in their verdict not only relate the facts of a true medieval love story, but naïvely give us information as to some of the results of the anarchy of Stephen's reign: "At length, after the death of king Stephen, when the peace of king Henry was proclaimed, Warin came and fell into poverty because he could not rob as he used to do, but he could not refrain from robbery and he went everywhere and robbed as he used." The grand assise is usually reserved for cases begun by the writ of right, or by the writ of entry when, as Bracton puts it, the pleadings in the latter action turn it into a writ of right. A *quod capiat homagium* in this collection of cases shows, what we already know from other sources, that the use of the grand assise may be extended to actions other than *de recto* and *de ingressu* when the pleadings raise a question of title.⁴ We are told by the early writers that when the title to a piece of land is being tried by a writ of right, third parties who have an interest in the land should put in their claim. Entries on the plea rolls which bring out this fact are rare. There is a case involving this point among the civil pleas at Coventry in 1221.⁵

Some of the more detailed, or perhaps less obvious, rules of law are often brought out very vividly by the cases on these rolls. For example, and briefly: the common law as to dower does not apply to land held in villeinage; ploughing and sowing common of pasture, or even ploughing without sowing, constitutes disseisin of common of pasture; but, *semble* where the common is a wood and that wood has been destroyed, animals may be kept out until the new trees have grown to sufficient size to be unharmed by the pasturing; where a tenant ploughs *ignoranter* and not by his lord's order land belonging to a third party, such ploughing does not make the tenant's lord guilty of a disseisin.⁶

Interesting variations from usual or normal situations are numerous. Among others: a chaplain found guilty of a disseisin is allowed to pay his amercement by saying thirty masses for the soul of king John; one third of seven shops in Shrewsbury is sought as dower; eight days, instead of the customary four, are allowed for self help where a disseisee ejects his disseisor; wager of law is allowed in the very unusual case where the defendant is accused of having snatched a newly made charter from the hand of a monk who managed to retain the severed seal.⁷

Not the least valuable of the many kinds of information furnished by these rolls is that which they convey as to the power of local custom to override or deflect the common law. It may prevent the use of the king's grand assise in Coventry, or the use of the mort d'ancestor in Bristol or Warwick; among other things it may affect the rules as to dower or sales, distress for debt, rules of evidence, the question of proof of age.⁸

Of all the cases in this volume the two most important, historically, are numbers 728 and 767. Both have been in print for a long time. They are to

4. No. 1495.

5. No. 520.

6. Nos. 227, 69, 598, 250, 599.

7. Nos. 1050, 1144, 293, 427.

8. See index under "Borough."

be found in a footnote at the end of Chapter XLIII in the second volume of Hale's *Pleas of the Crown*. They were later printed by the Selden Society in its *Select Pleas of the Crown*. Their importance is this: In 1166 the assise of Clarendon provided that a man indicted for certain felonies should go to the ordeal of water. This method of discovering guilt or innocence was practiced as long as the use of the ordeal was possible. At the Lateran council of 1216 it was decreed that priests should no longer be permitted to take part in the ordeal. Without the ritualistic assistance of a priest the ordeal could not function, so that method of proof went out of use in England and trial by jury took its place. But the change from ordeal to jury created a problem. What was to be done to the man who refused to plead?⁹ Before the abolition of the ordeal it would have made no difference whether the person indicted was willing to plead or not; it was merely a matter of casting him into the water. But now, because there was a feeling that no man should be convicted without being heard, a man by standing mute might defeat the ends of justice. An even more practical point for the judges of the time was the fact that if by not pleading the indicted felon was to remain unconvicted, his chattels would not be forfeited to the crown and the king would be deprived of the year and day of waste of his lands. In other words, the royal treasury would suffer. It therefore became the practice to put the felon who stood mute to the *peine forte et dure*, and the hideous custom of pressing a man to make him plead cast its blight on English criminal procedure for hundreds of years. The two cases just referred to represent an earlier method of dealing with the indicted man who refused, after the abolition of the ordeal, to accept trial by jury. They stand alone; no others like them have been found on the rolls. The first was an appeal by a woman for the death of her husband. Her appeal was declared null on a technicality; the accused was therefore quit of it. But he, having been appealed, would now fall within the class of those suspected persons who, according to the assise of Clarendon, would have to be indicted. So the trial continued. Though the defendant did not wish to put himself upon the country, the case nevertheless went to the jury of twelve which found him guilty. Yet, because of the refusal of the defendant, the court was reluctant to accept that verdict without further confirmation of guilt. So a special jury of twenty-four — not merely of "free and lawful men of the vicinage," but of knights — was called, and the defendant again was found guilty and sentenced to be hanged.

The second case, that of a man indicted for theft who did not wish to plead, was dealt with in exactly the same way. He was first tried by the jury of twelve and then by a jury of twenty-four knights. If all the other courts had adopted this reasonable procedure in similar circumstances, England would have been saved the disgrace of centuries of pressing, and English criminal law would have arrived at a satisfactory solution on the matter of standing mute, a problem which was not solved, in a creditable way, until

9. The uncertainty created by the abolition of the ordeal in the administration of criminal justice is brought out clearly in a writ addressed to the itinerant justices by Henry III on 26 Jan., 1219. 1 RYMER'S FOEDERA 228.

a statute of George IV (1827) provided that if one stood mute, a plea of not guilty should be entered for him, and the case should go to the jury—which was, in effect, the essence of the procedure in these two cases from 1221.

GEORGE E. WOODBINE†

LAW AS LOGIC AND EXPERIENCE. By Max Radin. New Haven: Yale University Press, 1940. Pp. ix, 171.

THE freshness of the author's mind and the audacious character of his thought make this book, consisting of the Storrs Lectures delivered at the Yale Law School in 1940, a significant contribution to jurisprudential literature. There is an arresting passage on nearly every page; and its themes are high ones: to what extent is the life of the law experience, to what extent logic? how important is law in the life and work of men? what is justice and to what extent does it depend on law and legal machinery? About half of the book is concerned with the problem of the bases of distributive justice: should legal decisions be based on value judgments respecting the past conduct of the parties or on objective determinations respecting their future needs and future social relations?

In the field of industrial accidents, family relations and corporate reorganization, Radin points out, little or no attempt is made to reconstruct the past. The orientation is toward the future. When a worker in a shop has been injured, we are not greatly disturbed by the question how or through whose fault he was injured; we are interested in providing for the future of the worker or his surviving dependents. If a business falls into difficulties, our main concern is how to conserve and improve its value so that it may go on paying wages to workers, salaries to officials, dividends to investors and debts to creditors. In the case of divorce, although the court pretends to be interested in past conduct it is actually concerned with whether the parties, their children and neighbors will be better served by continuing or severing the marital relation.

In other fields, the machinery of the law seems to be set in reverse: the court is asked to judge a past event, often several years old. The impossibility of presenting a faithful reconstruction of the past has led to trial by ordeal, by ritual, by mumbo-jumbo. The relation between the situation as constructed out of the evidence presented and the situation which actually existed is so slight that it seems curious that the pretense of honest reconstruction has not been abandoned.

What is the solution? A shift in interest, Radin says, from the *status quo ante* to the *status quo post*. For the method by which one asks for a precise award determined by a dead-and-gone situation, there should be substituted a method by which parties could ask "for a smoothing and correcting of a difficult and very much alive situation." Instead of judgment, let there be an arbitrament: a distribution of property rights in such a way that while

†George Burton Adams Professor of History, Yale University.

no party gets everything he claims, all parties, who are equitably entitled at all, get something; let there be an adjustment on the basis of the future.

Consider, for example, injuries resulting from an automobile accident. If both parties had been completely careful, the injuries could have been avoided. Probably all persons concerned had failed in some degree to use some precaution. Yet, instead of attempting to remodel an unsatisfactory situation so that it will be more nearly satisfactory, we attempt a reconstruction of past events, which is neither possible nor desirable. Instead of judging such situations on the basis of right or wrong, let them be arbitrated, let the disputes end in a sort of compromise or mutual appeasement. Such an approach will facilitate the future relations of the parties, for it will render unlikely a sense of defeat or triumph.

Could arbitration take the place of litigation generally? "I think so," Radin says, "in all cases where the issue is not clearly between the abused and the abuser, the victim and the wrongdoer."

Although prospective considerations alone are important in the punishment of punishable persons, Radin concedes the importance of the retrospective aspect as to one important function of criminal law: the protection of non-punishable persons: persons of the lowest economic group and persons who hold unpopular opinions on social and economic questions. With respect to them, the function of law should be not that of keeping order but of preserving liberty; they should not be punished for what they will do or might do. To punish such persons, not for what they have done in the past, but on the basis of a prediction that the community will be better off without them, is a practice incompatible with freedom.

This summary of but one of the theses of the book uncovers sufficiently the daring nature of the author's thought. Lawyers, whatever they may really think, will publicly condemn any attempt, such as is made in *Law As Logic and Experience*, to reorient the law and the profession to an approach so vastly different from the one to which they have become habituated and which, by and large, they find congenial and profitable.

Yet, despite the reluctance on the part of the profession, a peaceful revolution has been taking place. Pre-trial conferences in judicial chambers, the creation of courts for juvenile delinquents and of new administrative bodies, the frequent resort to arbitration and conciliation are symptomatic as well as symbolic. These departures from the retrospective character of legal methods are not generally considered revolutionary, largely because their theoretical and methodological implications are not obvious. Had the theory come first, it is likely that the actualities would still rest comfortably in the realm of essences. For a community will sooner receive a fact than an idea. Perhaps this is so because it is assumed that facts are sterile but ideas are propogative. If this assumption be correct, the profession had better beware of one Max Radin. He is a dangerous man. But one day his work will recall Thoreau's saying that "all this worldly wisdom was once the un-amiable heresy of some wise man."

MILTON R. KONVITZ†

†Lecturer, New York University School of Law.

THE CANADIAN LAW OF TRADE MARKS AND INDUSTRIAL DESIGNS. By Harold G. Fox. Toronto: The University of Toronto Press, 1940. Pp. lxxviii, 700. \$18.50.

THIS treatise is the first comprehensive work in the field of Canadian trade-mark law which has been published since the passage of the Unfair Competition Act of 1932. Its publication will be welcome to American trade-mark lawyers, who have long struggled with the many intricacies and obscurities which are found in the Unfair Competition Act of 1932. Indeed, the author admits that:

"As a piece of legislation, it has many imperfections, but it is, none the less, a step in the right direction."

Unfortunately, continues Mr. Fox, the Act was not skillfully drawn:

"It has many contradictions and is difficult of interpretation and its validity has been challenged, though not, so far, successfully."

A striking illustration of the uncertainty which still lingers around some of the most fundamental principles of trade-mark law in Canada is offered by the recent *Peacock* case¹ which is discussed in three places in the book. The case involved the most fundamental issue in trade-mark law: the relationship between the first user and the first registrant of a trade-mark. Contrary to the Canadian law before 1932, the *Peacock* case held that the first registrant obtains a valid registration in Canada even though he may not have been the first user of the mark. Although, under the prior law, the first user could have obtained cancellation of a later registrant's mark, the result of the case is that the first user may lose his rights against subsequent users if he fails to register within the time prescribed in Section 4 of the Unfair Competition Act.

In his discussion of the *Peacock* case, Mr. Fox departs from his usual descriptive, uncritical treatment of the Canadian case law of today to call attention to the "grave questions" arising from this case. If the decision signifies that the first registrant now can bring a successful infringement suit against a prior user who has failed to register his mark, nothing remains of the once sacred common law rights of the first user of a trade-mark. The Supreme Court of Canada has not yet determined whether the *Peacock* decision extends this far, so that American trade-mark owners, even after reading Mr. Fox's comprehensive treatise, will still be at a loss to know the status of their unregistered Canadian trade-marks in the event that they are registered by someone else.

While the book will be of extreme aid in studying the complicated provisions of the present Canadian trade-mark statute, it fails to discuss at any length the peculiar and unsatisfactory relationship which exists between the United States and Canada in regard to mutual protection and registration of trade-marks within the scope of the International Convention for the Protection of Industrial Property, as last revised in London in 1934, of which

1. Canada Crayon Co., Ltd. v. Peacock Products, Ltd. [1936] Ex. C. R. 178.

both countries are members. This inadequacy of background is particularly unfortunate in view of the decision of the Canadian Court of Exchequer in *Albany Packing Co. v. Registrar of Trade Marks*,² handed down immediately after the publication of Mr. Fox's book, which, if it stands unreversed, may have a revolutionary effect upon the trade-mark relationship of the two countries. The court held that the trade-mark "Tenderized," which was registered in the United States under the Act of March 19, 1920, was not entitled to registration in Canada despite the fact that it had been "duly registered in the country of origin" — *i.e.*, the United States, a member of the International Convention. Space does not permit a detailed showing that the decision is clearly untenable in view of the wording of Section 28 of the Unfair Competition Act, and that it was based — oddly enough — on an opinion of an American patent and trade-mark attorney to the effect that the Act of 1920 does not confer any substantive rights in this country at all. Indeed, this attorney stated in his opinion that the United States Supreme Court in the recent *Nu-Enamel* case³ had refused the plaintiff relief against infringement of its mark registered under the 1920 Act. A glance at that decision reveals, however, that the Court was willing to grant wide protection to a mark registered under the 1920 Act, provided only that secondary meaning could be proven.

The effect of this decision, unless it is reversed by the Canadian Supreme Court, seems to be that, despite the provisions for mutual registration and protection of trade-marks between the different Convention countries, the owner of a United States trade-mark registered under the Act of 1920 will not be able to obtain a Canadian registration on the strength of American registration alone. The unfortunate nature of this decision is highlighted by a landmark decision of the United States Supreme Court in December, 1940, holding that the terms of the Inter-American Trade Mark Convention — which stands on the same footing in this regard as the Paris Convention — create substantive trade-mark rights for foreign trade-mark owners which cannot be impaired by domestic legislation, and that the mandate of the Conventions that each signatory must "register and protect" foreign trade marks if they are "duly registered and protected" in another Convention country must be carried out so as to give effective protection to the interests of foreign trade-mark owners.⁴ Thus, relations between the two countries are in a position where, although the United States Supreme Court has declared its willingness faithfully to enforce the various provisions of international trade mark Conventions providing for mutual protection and registration of trade marks, the Canadian court — fortunately not the Supreme Court — has expressly refused to extend such protection to marks registered in the United States under the Act of 1920.

A study of some of the other peculiarities of the Canadian trade-mark law, as discussed in Mr. Fox's book, reveals what the consequences might be if the principle of the "Tenderized" case were applied in analogous situa-

2. 30 T. M. Rep. 595 (1940).

3. *Armstrong Paint & Varnish Co. v. Nu-Enamel Corp.*, 305 U. S. 315 (1939).

4. *Baccardi Corp. v. Domenech*, 61 Sup. Ct. 219 (U. S. 1940).

tions. For instance, as Chapter IV of Mr. Fox's book points out, Canadian law distinguishes between so-called "word marks" and "design marks." In applying for a registration of a mark it must be described either as a design mark or a word mark; a design and word mark cannot be joined in the same application, but must be covered by separate applications.⁵ American law does not make this distinction, thus raising the question how the Canadian Patent Office should treat an application of an American trade-mark, which is in fact a combination of a word and design trade-mark, for registration under the Convention. Moreover, while American law permits a disclaimer of descriptive language in a composite trade-mark, Canadian law does not recognize such disclaimers. This raises the problems whether the Canadian Patent Office should accept the application as one of a word trade-mark although the words may have been disclaimed in the United States, or whether it should be treated as a design trade-mark only, or whether the Patent Office should require two separate registrations. It is quite impossible to predict what the attitude of the Canadian Patent Office and courts will be when questions like these arise.

Mr. Fox's work does not give much information which will help in the solution of these problems. He is not to be wholly blamed for this, because the important cases in the field have been decided since the publication of his book. But it would be of considerable value to the profession if, in a later edition, Mr. Fox would add a special chapter on the status of American trade-marks in Canada and a discussion of the general relationship of the two countries under the International Trade-Mark Conventions.

WALTER J. DERENBERG†

5. CANADIAN UNFAIR COMPETITION ACT §§ 31(1), 31(3).

†Lecturer in Law, New York University School of Law.