BOOK REVIEWS

Trade-mark Protection and Unfair Trading. By Walter J. Derenberg. Albany: Matthew Bender & Co., 1936. Pp. lxix, 1162. $20.00.

Controlling Retailers. By Ruth Prince Mack. New York: Columbia University Press, 1936. Pp. 551. $4.50.

Economics of the Iron and Steel Industry. By Carroll R. Daugherty, Melvin G. de Chazeau, and Samuel S. Stratton. New York: McGraw-Hill Book Co., 1937. Two vols. Pp. xxxiii, xx, 1188.

"But this is business!" And "business is business." Thus are ethics and humanitarianism put in their place—ostracized from the company which feels only discomfort in their presence. Business is hard? Business is cruel? It must be so in order to achieve maximum economic general welfare. If I conduct my business within the letter of the law, the standard of propriety is only what is good for *my* business, what will increase *my* rewards. Such individual striving for greater individual reward will result in maximum production at minimum cost. Harm which some may suffer as a consequence is a regrettable but inevitable cost of this greater good. Other institutions, private charity, public relief, etc., may alleviate such harms, but business must not be distracted thereby. Of course, the law must place some limits on individual striving; for the alternative is anarchy. The law must protect my "property." It must protect my efforts and investment against piracy by others. It must protect my business against "unfair" methods of competition. But it must not hamper my business. It must not prevent the contribution to general welfare which is surely made by my efforts to serve my own interest. This is a comforting philosophy, both for him who likes to think that his conscience might otherwise be troubled by his business methods and for him who has no conscience. Each may pursue his ends in the sublime confidence that his conduct is beyond reproach. Business is business.

The soothing quality of this philosophy lies, however, in the complete acceptance of its basic premise as a universal. And the devotion of some persons to empiricism makes such acceptance by them difficult. Some, indeed, question whether the result is worth the price; they have different notions on what constitutes general welfare. But others, without questioning the truth of the premise in general, find that, at times, in some phases, under some circumstances or for some periods, individual selfishness conflicts with and does not promote general welfare. They urge empiric verification of the effects of specific business methods; and then urge action based on such verification. Action by the businessmen themselves, for business may be a profession just as surely as a profession is business, and action by law,—to supervise business practices and to eliminate those which are injurious to general welfare even though they may serve the immediate ends of individuals. The public interest is paramount, all agree. The differences bear on those smaller issues, what promotes and what injures that interest.

I put out headache pills which I christen "Merry-go-Round"—thus enabling the sufferer to associate the cure and the illness with the least mental strain. I have ample financial backing; and I conduct extensive advertising campaigns. The investment in

advertising brings great financial return. People have headaches and they instinctively think of "Merry-go-Round." Even when they do not react instinctively, they are quickly told by bill board, newspaper, radio, circular. Any druggist can probably prepare the pills and sell them at one tenth the price or less. Suppose one does. Suppose he labels them "Merry-go-Round Pills." He profits by the sales; his customers profit. But I lose. Which way lies the public interest?

A distributor of gasoline in Middletown finds that he is not selling half of the gasoline that his existing facilities can dispense. He considers lowering his price but fears trouble from his source of supply. He hits upon the idea of a lottery. With each five gallons of gasoline he gives the buyer a ticket. At the end of the year, the holder of the lucky ticket will be given a new automobile "free."

A clothing manufacturer in New York is doing extremely well. His friends attribute his success to his personality. He is very sociable and seems to become a friend of every buyer in his line. He entertains them royally when they come to town, as every good friend should. He is solicitous of their every need. He remembers their birthdays and their wedding anniversaries; and finds a number of other reasons for "remembering" them with a slight token of friendship. His competitors envy his "personality."

A shirt manufacturer in Boonville, Ricardo & Co., is hungry for more business. A representative of a national chain store offers an order for half of Ricardo's capacity, at a stated price. Ricardo remonstrates that the price is 15% less than his price to his other customers and is hardly sufficient to cover his cost of production. The chain store representative starts for the door. He cannot pay more because he must sell the shirts at sixty-nine cents apiece. That is the store's customary price. The shirts are sold almost at cost in order to attract customers. Any increase in the price above sixty-nine cents would destroy its effectiveness as a "leader." He would like to place his order with Ricardo, but if that is not possible, he can place it elsewhere at an even lower price. Ricardo accepts the order. He then starts an intensive search for a means of shaving his costs—a reduction in wages, a speed up of production, elimination of soap or towels for his employees, a little carelessness about his insurance, omission of some operation where possible, use of goods of somewhat lesser quality for customers who are "easy," home work perhaps, a little less attention to the youthful appearance of applicants for work or, perhaps, a purposeful system of apprenticeship, or "learning." Which of these practices constitute "unfair competition"? Is the chain store's hard bargaining immune from the charge?

Once religion supplied the answers to such questions and exercised the control required to steer individual enterprise within the boundaries of current notions of general welfare. Once, also, industrial self government, with and without the aid of municipal law,—the guilds—enforced the group interest in individual activity.[1] But these controls were things of the past, when cases of the kind stated above began to arise. The new philosophy was that free individual enterprise provided its own automatic controls. External legal controls were to be reduced to a minimum. Yet external legal controls of a kind were inescapable. Some were provided by the private civil action in tort; some by special legislation.

Dr. Derenberg set himself a limited task and performed it with distinction. He undertook a "reconsideration and restatement" of the "governing principles"[2] of the law developed by the American courts in the field commonly called, in the language of

[1] See Hamilton, The Ancient Maxim Caveat Emptor 40 Yale L. J. 1133 (1933).

[2] P. ix.

the digests, "trade-mark infringement and unfair competition." The book is written with sustained enthusiasm and is easy to read. The legal analysis is done in a careful and workmanlike manner.[3] The author has not "read and cited more cases in order to make more sentences." He discusses and cites cases selectively,—for their significance as indications of a point of view, of a trend, of a value. While American law is his concern, he gives us frequent glimpses of foreign law for comparison or contrast. The text is surrounded with luxurious trimmings: numerous citations to legal literature other than judicial opinions, an elaborate and useful index, tables of cases and of trade-marks or trade names mentioned in the text, and appendices containing the federal statutes and regulations, the statutes and regulations of the forty-eight states and the international conventions and treaties, relating to trade-marks, and the rules of practice of the Federal Trade Commission.

The author consciously restricted himself to a study of legal doctrine. He did not stray beyond the boundaries of orthodox legal literature. The development of the legal doctrine is not, therefore, integrated with economic history or with social or economic thought outside the law books. There is no investigation of the action and counteraction of doctrine and business practice, of legal principle and business consequences. The study is confined to a small segment of business practices—those used in making and promoting sales. The major portion of the book deals with trade-mark infringement. One relatively short chapter deals with Federal Trade Commission cases which have gone to the courts. The rest of the study is devoted to judicially condemned trade practices, such as "passing off," misappropriation of another's trade values and disparagement. A little is told about resale price maintenance and the "fair trade" acts. The author's standards of criticism are common-sense judgments stemming from a private property orientation. The commercial advantage of one who has expended money or effort to achieve it is a property interest which should be legally protected. Trade symbols should be given the fullest possible protection. And false representations which may injure another's business should be ground for civil action by the other. The effects upon competitive enterprise,[4] the fitness of the judicial machinery for the job of supervising trade practices and the possibilities of other forms of control are apparently beyond the scope of the study.

Given his standards of criticism, the author commends highly the Supreme Court's decision in *International News v. Associated Press*.[5] The pragmatic considerations advanced in the dissenting opinion of Mr. Justice Brandeis do not disturb him. Like Mr.

[3] There are, perhaps, occasional slips, as, *e.g.*, the statement on p. 27 that "with regard to the validity of a patent there is an old established rule that a decision of one federal court is binding upon all other federal courts before which the same question may be brought later." And there may be differences of opinion as to the interpretation of some cases. For example, I do not quite see the alleged conflict between Prestonettes Inc. v. Coty and Bourjois & Co. v. Katzel (pp. 57–72) or between Federal Trade Commission v. Raladam and Federal Trade Commission v. R. F. Keppel Bros. (pp. 166, 179). And while I would not belittle the extent of judicial interference with the Federal Trade Commission, I like to have it recognized that the Commission has itself strayed far from its primary function as an instrument of anti-trust policy.

[4] See *e.g.*, Appendix E, "Some Arguments in Favor of Trade-Mark Infringement and 'Unfair Trading,'" in Chamberlin, The Theory of Monopolistic Competition (1933). See also Cohen, Transcendental Nonsense and the Functional Approach, 35 Col. L. Rev. 809, 814–17 (1935).

[5] [248 U.S. 215 (1918)], pp. 90–96.

Justice Pitney, he does not even refer to the practical problem which faced the International News and caused it to resort to the practice condemned by the Court. Likewise, the author regrets the decisions in *Gotham Music Service v. Denton-Haskins*,[6] *Associated Press v. KVOS* (in the District Court)[7] and *Cheney Bros. v. Doris Silk Corp.*[8] In the *Gotham* case the plaintiff "had revived an old uncopyrighted song [previously known as 'Gambler's Blues'] and had reintroduced as 'St. James' Infirmary Blues'. . . . . One year after plaintiff made the song known again, the defendant also started to publish the song under the name 'St. James' Infirmary or Gambler's Blues.'"[9] The New York Court of Appeals refused to enjoin the defendant. Dr. Derenberg commends the dissenting opinion of Chief Judge Crane who saw no difference between the name of the song and the name "Uneeda" for crackers or "Cremo" for cigars. Judge Crane wrote:

> I know of no reason why a name or a trade may not be built up for a song or bit of literature as well as for any commodity. . . . . The whole secret of advertising is to make a name popular; a slogan sells goods when many times their intrinsic value would create no demand. . . . . Here the copyright on the song had expired, but this did not prevent the plaintiffs from having a right to their rearrangement and the new name which they had given it, especially when through much expenditure of money they had built up a demand for the song under that name.[10]

Neither Judge Crane nor Dr. Derenberg are impressed by the fact that "Uneeda" or "Cremo" are means for identifying not crackers or cigars as such, but a particular *brand* of crackers or cigars whereas the name of a song is a means of identifying the song no matter by whom published. Were the defendant enjoined, he could not sell that song, despite the fact that it was not copyrighted. The desirability of such a result is not self evident.

Nor can the relations between press and radio be determined simply on the basis of an intuitive judgment that it is "unfair" for the radio to broadcast news taken from a published newspaper within twenty-four hours of its publication. One need only place himself in the position of a legislator subject to pressures from the variety of interests concerned to realize the enormous difficulty of the problem.[11] Similarly, the realistic difficulties which deterred the Circuit Court of Appeals for the Second Circuit from enjoining the imitation of a design of a dress fabric can hardly be dismissed with the statement that "it does not necessarily follow from a lack of federal legislation that a court of equity is prevented from recognizing a property right or property interest of the plaintiff in the seasonal designs originated by him."[12] It does not follow necessarily, of course. But it is a very good reason for a court's declining to exercise the legislative function of determining first whether a "property right" is to be created at all and second what safeguards and limitations are required in the public interest. Here, again, the legislative concern with the problem for a number of years is indicative of the complexity of the problem.[13] A common-sense judgment of "unfairness" is not a sufficient

[6] [259 N.Y. 86 (1932)], p. 108.

[7] [9 F. Supp. 279 (Wash. 1934)], p. 109.

[8] [35 F. (2d) 279 (C.C.A. 2d 1929)], p. 105.

[9] P. 108.

[10] P. 109.

[11] See 44 Yale L. J 877 (1935).

[12] P. 107.

[13] See 31 Col. L. Rev. 477 (1931); Handler, Cases on Trade Regulation 873 (1937); Oppenheim, Cases on Trade Regulation 394 (1936).

standard for measuring trade practices. Nor are courts always appropriate bodies for establishing the standards in the first place or for enforcing them in the second place.

In academic classification, *Controlling Retailers* and *Economics of the Iron and Steel Industry* are not legal studies; they are economic studies. The difference is not, of course, in basic subject matter or in relevance; for these are studies of legal controls of business,—the operation of the N. R. A. codes in the two industries. The difference is in the emphasis given to the subject matter by the authors. *Trade-Mark Infringement and Unfair Trading* concentrates on legal doctrine employed in the regulation of business enterprise. The problems of the enterprise are assumed *a priori*. The economic effects of the regulation through the doctrine and the desiderata of the regulation are also assumed. The N.R.A. code studies, on the other hand, concentrate on analysis of the business problems to which the regulation is directed, the desiderata of the regulation and the techniques and practical effects of the controls in operation. Any lawyer who represented a client in the process of code drafting or code administration knows how much such economic studies are part of his business and how impossible it is for him to accept the library classification and disregard economic studies as irrelevant to law.

Dr. Mack's study is in five parts. Part I deals with the history of governmental and co-operative control of merchandising prior to the summer of 1933 and "pictures the attitudes, customs, and institutions inherited by those retailers who were the actors in the N.R.A. experiment." Part II "tells the story of the drafting of the Retail Code." Part III describes the "problems and processes of Code administration." Part IV surveys the effects of the Code and its administration on the several groups involved in the industry. Part V makes an appraisal of the experiment and draws some general conclusions from it. Dr. Mack worked alone and brought to the study her personal experience as a member of the staff of the Retail Code Authority in the City of New York.

Economics of the Iron and Steel Industry is a co-operative study conducted by the three authors with the aid of a research staff. Financial support for the study came from The Brookings Institution, The Maurice and Laura Falk Foundation and the University of Pittsburgh, the Falk Foundation supplying the major part of the support. "In view of the highly controversial nature of the subject of the inquiry," the Director's Preface states, no parts of the manuscript were seen by anyone connected with the Foundation prior to publication. The study was initially "planned as one that would have immediate and practical influence in connection with the determination of public policy toward the Steel Code as one major example of the extensive code system set up under the National Recovery Administration."[14] When the *shochet* killed the N.R.A. eagle (disguised as a chicken),[15] the study was continued for its significance as "an objective analysis of the results of an experiment in industrial self-government." For, as the Director says: "The Supreme Court decision did not solve the problems of this basic industry; the Court merely rejected one attempt at solution. The problems for which solutions were sought through the Steel Code antedate the Recovery Act, or for that matter, the depression itself. For the most part, they remain today to plague both industry and government. It is not unlikely, therefore, that other solutions will be attempted in the future. From the beginning of the investigation it was recognized that what was required in a study of the Steel Code was a comprehensive economic

[14] Vol. I, p. vi.

[15] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)

analysis of the iron and steel industry from the point of view of determining the necessity or the desirability of that Code or any other similar type of control. Consequently, this appraisal of the Steel Code is intended not merely as an historical treatment of a Government experiment but as a constructive contribution."[16]

The study is divided into four parts. Part I, entitled "The Background," describes the industry, its production and distribution "patterns" and its labor conditions, the Steel Code and the administration of the Code. Part II deals with the production and pricing problems under the Code,[17] and Part III with labor relations and labor conditions under the Code. Part IV contains a summary of findings and conclusions. While the study was a co-operative one conducted by a staff of persons, the responsibility for final authorship was divided. Professor Daugherty wrote the labor sections. Professor de Chazeau wrote the sections on price and distribution. Professor Stratton wrote the sections dealing with production, costs and earnings.

Here are two invaluable case studies of two widely different industries. Though neither study neglects economic theory, both seek primarily to know and understand the ways, the habits, and the problems of the enterprises under investigation. Both bring within their focus all of the group interests involved in the industry and seek to ascertain the effects of practices and controls on each of the interests. Both studies, *Steel* to a much greater extent than *Retailers*, make use of statistical tables, curves and charts; but both recognize the possibilities of deception in the seeming accuracy, and the inadequacy of this information for true description or wise judgment.

The immediate objectives of the N.R.A. were industrial codes of "fair competition." This was a technical concept. "Fair competition" in the N.R.A. codes was not the converse of "unfair trading" which Dr. Derenberg studied. The codes were not to be uniform rules of "fairness" imposed on industry generally, as the common law rules of unfair competition seem to be. Each code of fair competition was to be a fairly comprehensive set of regulations for the industry with which it dealt, specially drafted and adapted to meet the peculiar needs of that industry. Labor relations and labor conditions, which were completely excluded from the common law concept of unfair competition, were to be indispensable terms of the codes of fair competition. The codes were not to be imposed from above but were to be the products of the co-operative efforts of those concerned in the specific industries. The problems in steel were not those in retailing; and the steel code, even with appropriate changes of language, would make no sense in the retail trade. Each code is very properly, therefore, the subject of separate study. Yet the two studies contain some lessons in common on the techniques of control.

In each industry, the process of code drafting is described as a tug-of-war between the several groups involved, employers, labor, "consumers," the government. But within each group there was another tug-of-war. Indeed, when one is faced with concrete proposals, the group lines seem to fade and become distorted. In steel, the integrated company, the semi-integrated and non-integrated company, the furnace merchant and the specialized products manufacturer, each has special interests not shared by the others and at times conflicting with those of the others. In retailing, the large and small retailers, the big city and small town locations, the department store, chain-store, speciality, variety and neighborhood store,—each has interests which irk the others. And within each classification, differences in institutional habits, personalities,

[16] Vol. I, p. vi.

[17] This includes an intensive analysis of the basing point system.

and credos disrupt the real or apparent "unity" of interest. Even the initial problem of industrial classification—the question of what businesses the "industry" includes or excludes—turns out to be a problem of incredible complexity. The codes were, then, the resultants of many pressures; and the strength of the pressures depended not merely on financial power, but on the personalities of the individuals in the fray, the degree of organization, astuteness of strategy, sustained perseverance and the turns of fate. Government representatives could do a good deal, but their effectiveness was limited by their resources; and their resources in terms of personnel, time, organization, specialized knowledge and expertness were of necessity not abundant.

Both studies conclude that labor, largely because it was unorganized in both industries, received inadequate compensation for the privileges of self-government granted by the Codes to the employers. Both studies point to the dangers of code administration by interested groups alone. Nominal government representation is not enough. Effective supervision is required to make self-regulation serve the public interest. And both studies warn against the danger of permitting power to become concentrated in fact in the hands of one of the interested groups. The Retail Code, Dr. Mack concludes in frank discouragement, attempted too ambitious a task. She generalizes that "legislation of the N.R.A. variety deals largely with a category of economic phenomena which either cannot be controlled at all or controlled only at an excessive price."[18] The authors of the Steel study are not quite so pessimistic about social control in the iron and steel industry. Their analysis and conclusions are confined to that industry and they refuse to indulge in wider generalizations.

The N.R.A. was a grand effort. If it failed, one substantial cause was the lack of detailed knowledge and information about industrial institutions to guide public policy in the determination of standards and the invention of suitable techniques of control. This need was being slowly supplied by the educating process of experience in the administration of the codes. The N.R.A. at the time of the *Schechter* decision was not the N.R.A. of 1933. The decision did not solve the problems to which the N.R.A. was directed; and it did not kill the spirit of that legislation. We know now, more than ever, the value of detailed knowledge of industrial conditions. Not simply economic theorizing, "on the whole," "other things being equal" and "in the long run"; not alone general figures and general averages which fit nothing in particular; but concrete facts about the habits, practices and operations of specific industries and industrial establishments. Though steel is a basic industry with a high degree of concentration, a relatively small number of firms, a long history of co-operative effort in trade associations, and bushels of statistics, the authors of the *Steel* study repeat many times that their analysis is hampered by a deplorable lack of "accurate data." They labored mightily and well, but with "keen awareness" of the limits thus imposed. The lack is not due to want of interest or to measures of economy. It is quite likely that "accurate data" could be collected without increase of the expenditures now being made for statistical compilations. The lack is due largely to traditions about "trade secrets" and limitations on compilers of statistics. At one time it was hoped that the Federal Trade Commission would fill the need. The N.R.A. made a beginning. But the field is still open for government investigators and for university departments of economics —or of law.

HARRY SHULMAN*

[18] P. 519.

* Associate Professor of Law, Yale University School of Law.