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BOOK REVIEWS.

THE POWER TO REGULATE CORPORATIONS AND COMMERCE
By FRANK HENDRICK, of the New York Bar. New York
& London: G. P. Putnam's Sons. 1906. Pp. lxxii, 516.

The subject of this book is one that wins immediate attention. The regulation of corporations and commerce includes so many of the political and legal problems of the present time that a book purporting to deal with these problems comes with the presumption of timeliness in its favor. It is particularly disappointing therefore to find the treatment of the subject far from satisfactory.

Apart from the fact that the author is frequently obscure, and that consequently special attention is necessary to arrive at his meaning, the book seems to have been written for the purpose rather of exploiting a theory of the way in

which the institutions of the country might be worked in dealing with corporations and commerce, than of deriving from adjudged cases the limitations and consequently the extent of the powers of the National and State government respectively. In consequence of this apparent attitude of the author, decisions, though extensively cited and quoted, are used apparently with an avowed purpose of supporting a contention, rather than of illustrating the principle they professedly establish.

The author is imbued with the idea that there is a common law of the *United States* and that this common law if properly relied on and utilized by the Federal Courts is adequate to meet the public demands with respect to corporate and commercial matters. This body of the common law is something much more extensive than the principle of the so-called general commercial law established in *Swift v. Tyson*, though the author derives much comfort from the line of cases following that decision. This common law of the *United States* and the right on the part of the various departments of the Federal Government to recognize it "could not be more plainly expressed than it is in the fact of national existence and the assertion thereof." "The common law of the *United States* is of such nature that the powers to enact it cannot be expressly conferred. It is itself the basis of all implications." (p. 247). Though this doctrine is clearly opposed to the generally accepted views of constitutional lawyers and to adjudged cases, the author makes it practically the basis of his entire work. It is regrettable to see a treatise evidencing such manifest ability so open to the charge of unprofitable theorizing. The book does not profess to be adapted to the immediate problems of the practicing attorney, but even as a philosophical discussion of legal tendency in the field it covers, we regard it as failing to attain that correctness of perspective and that clearness of view which alone render such a book valuable.

Undoubtedly the author has exaggerated national power beyond its established bounds, and has unduly minimized State power. Whether a wise policy would result in a different distribution of power in these two agencies of government might possibly be considered an open question, but that the distribution at present existing under the law is that outlined in this book cannot be accepted by anyone familiar with the principles of constitutional interpretation.

The author's discussion of the federal power under the commerce clause is open to less criticism and is in the main satisfactory, and his discussion of the common law with

respect to corporations is valuable and suggestive. His historical introduction is also worthy of special study. In it the effort is made to establish the principles under which political power is established and entrusted to governmental agents, and to show the natural unit of such power. While we may disagree with the conclusions drawn from the facts by the author, this chapter well repays such study as may be given it.

The whole subject receives a treatment that discloses no mean ability on the part of the author. We cannot but regard it as unfortunate however that this ability has been expended in an effort to support what under the present decisions we cannot but regard as an untenable hypothesis. Furthermore we cannot discover in those decisions a real tendency in the direction suggested by this work. Were it otherwise, we should be inclined to praise the author's work. Until, however, a redistribution of National and State power has been made, the book must impress the reader as somewhat quixotic.

THE FEDERAL POWER OVER CARRIERS AND CORPORATIONS.
By E. PARMELEE PRENTICE. New York: The Macmillan Company. 1907. Pp. xl, 244.

It is instructive to take up Mr. Prentice's treatment of this subject immediately after reading Mr. Hendrick's more ambitious work. The point of view, though apparently that of a partisan, is essentially different. A strong argument is made against the extension of Federal legislation in respect to commerce, and this argument is, in the main, fortified by citations of adjudged cases carefully selected.

The author deprecates the modern tendency to regard present-day problems as so vitally different from those existing at the time of the adoption of the Constitution as to require an interpretation of that instrument in the light of supposed modern needs rather than under the instruction of the past. He finds his plea on an historical review of the constitutional principles in point, particularly those, dealing of course, with the commerce clause, and rests his case on the principle that: "The important feature about this history is that the power which was originally given to Congress *in order to secure an unrestrained intercourse between the States** has developed under the decisions of the Supreme Court, subject to the influence of this constitutional purpose only, and with no other end in view. The States have been

*Italics are ours.

deprived of power to interfere with the freedom of interstate communication, while on the other hand the nature of the jurisdiction which Congress has acquired over the avenues of interstate trade, does not in any proper view of the Constitution, authorize it to close those avenues to any person." (p. 137).

The importance of such a constitutional principle is obvious. It is admitted that foreign commerce is not subject to a similar rule. An embargo is possible there, but this, it is said, is due to the necessarily broader power entrusted to the National Government in its dealings with foreign nations and over navigation. On this ground *Gibbons v. Ogden*, 9 Wheat. 1, to which very careful study is given, is explained. The State law, it is said, was invalid, not because it established a monopoly of interstate transportation, but because it amounted to a regulation of the coasting trade, "a subject which had been wholly confided to Congress." (p. 89).

With the principle above stated as a premise, proposed modern legislation as to federal incorporation and restriction of interstate traffic, except under federal license, is regarded as unconstitutional (p. 226). "Transportation from State to State of legitimate articles of commerce cannot be forbidden. Congress is authorized to regulate, not to destroy, commerce among the States." (p. 51). Therefore, it is argued, Congress may not impose restrictions on interstate commerce as a mere commercial measure but may do so in aid of some expressly granted power. So, for example, a tax on freight receipts, as under the War Revenue Act of 1898, would be unquestionably valid.

The argument is clear and forcible, but hardly, we believe, gives due weight to the *Lottery Case*, 188 U. S. 321. It is true that four of the justices dissented from the decision there rendered, and Mr. Prentice may regard the case as so counter to the antecedent tendency of the decisions as to be of doubtful authority. But since the Federal Government has admittedly no police power as such, the prohibition of the interstate transportation of lottery tickets had to be upheld if at all as a commercial regulation. Yet such transportation was prohibited. Such a decision so directly opposed to the central thought of this author should have received most careful consideration. It cannot be disposed of by the suggestion that lottery tickets are not legitimate subjects of commerce, since the Court expressly held (p. 354), "We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the

several States." And while the Court admits that cases might be presented in which prohibitions of interstate commerce would not be sustained (p. 362), upon this decision great reliance would doubtless be placed in an attempt to sustain restrictive legislation as to interstate operations deemed contrary to public policy.

This right to engage in interstate operations Mr. Prentice regards as a natural inalienable right not subject to arbitrary governmental interference. The question will at once arise, however, as to what constitutes such arbitrary interference and whether these questions, so far as federal legislation is concerned, will not be brought within the "due process" clause of the Fifth Amendment as instances of unwarranted interferences with freedom of contract. In this case they, of course, must pass the test of certain established limitations, but passing them may be sustained as an instance of federal activity under the commerce clause.

Careful consideration is given to the Anti-Trust Act of 1890 and the decisions thereunder, since their tendency has undoubtedly been to allow certain forms of prohibitive federal legislation, as that act covers reasonable as well as unreasonable restraints of interstate trade. A review of these decisions, the author contends, "shows that the Court, in construing the statute which is based upon the power of Congress to maintain intercourse among the States, has gone to the verge of Federal jurisdiction. An extension of present doctrines could be made only by sacrifice of State authority essential for efficient local government, and a matter of still greater importance by overturning long established principles of constitutional law."

The cry for effectiveness of regulation and control has tended to obscure the price which would have to be paid for centralizing such control, in the loss of that local liberty which is traditionally dear to the person living under Anglo-Saxon institutions. The tendency to disregard precedents in the effort to establish this centralization of regulation and control, the probable ineffectiveness of such regulation and control if actually attempted, and the avenues opened by it for perversion of purpose, so strikingly evidenced in all tariff legislation, lead us to accord to Mr. Prentice's book a hearty welcome, though we regard it open to the criticisms suggested above.

"Governmental interference with individual activities, accepted because necessary, welcomed by none, demands the completest measure of home rule." That this "home rule" sometimes proves ineffective is hardly ground for expecting more satisfactory results from what will often be largely, if

not altogether, external authority where federal regulation is attempted.

THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS. By E. P. EVANS. New York: E. P. Dutton & Co. 1906. Pp. x, 384.

"The present volume is the result of the revision and expansion of two essays entitled 'Bugs and Beasts Before the Law', and 'Modern and Mediaeval Punishment,' which appeared in *The Atlantic Monthly*, in August and September 1884." A great amount of curious and interesting learning has been collected by the author, most of which the average reader will find very novel, notwithstanding the well-known rules of the Mosaic law and even the familiar doctrine of the Common Law with respect to deodands. But though the title of the work suggests a great part of its contents, and of the material which forms an important element of the author's development of his subject, it hardly leads one to expect the very valuable discussion of Penology in its broader relations, which forms the latter part of the book.

The connection that apparently exists between the idea underlying the attitude of the public towards the criminal responsibility of animals, and the standards of that same public with respect to human responsibility is treated with great thoroughness, and this treatment is, to say the least, very suggestive and convincing. New light is shed on this always important topic. The book, therefore, has a much greater value than that which would attach to a mere collection of curious historical information. Its broad and scholarly treatment merits for it special attention.

THE AMERICAN LAWYER. By JOHN R. DOSPASSOS, of the New York Bar. Pp. iv, 185. The Banks Law Publishing Co. 1907.

In this study of the American lawyer "as he was—as he is—as he can be" Mr. Dos Passos finds many causes for criticism of the profession. Insufficient culture to begin with, superficial study of the law itself, and a growing spirit of commercialism are particularly inveighed against. The author believes serious degeneration has occurred since the days "before the War," but is convinced that he sees here the same tendency appearing in other walks of life. The faults he alleges suggest to a great extent the remedies he offers. It is rather surprising, however, to find a seven-year preparation advocated, though doubtless there is much truth in

the charge that hasty and imperfect preparation is more common than it should be.

The lawyer's part in the public life of the country is treated at length, and the tendency to forget all else but fidelity to the client strongly deprecated. We cannot agree with Mr. DosPassos in his idea that the problems confronting a lawyer are less dignified than his problems of bygone days, or that they make less demand on the highest form of intellectual activity. The business he has lost to title companies and similar institutions has been largely of a routine kind, while the modern questions confronting the lawyer involve matters of the most serious public and national interest.

Considerable space is devoted to a somewhat heated denunciation of the code system of procedure. The threadbare character of this subject might, we believe, have justified its omission.

The book is an earnest plea for the establishment of higher ideals among the members of the bar, and our principal criticism of it is that it contains much trite matter.

INTERSTATE COMMERCE ACTS INDEXED AND DIGESTED. By CHARLES S. HAMLIN, Corporation Counsel of the Boston Chamber of Commerce. Pp. 480. Boston: Little, Brown & Company, 1907.

The original Interstate Commerce Act has been so frequently amended and is so closely related to other supplemental Acts, that the task of determining with certainty the exact provisions of the statutes on any subject such as the regulation of railroad rates or the furnishing of facilities by common carriers engaged in Interstate Commerce is exceedingly difficult. Mr. Hamlin's book will expedite the work of those who are confronted with these questions. It includes the text not only of the Interstate Commerce Act but also of the Elkins, Sherman and Wilson Acts, the Safety Appliances and kindred Acts, the Employer's Liability Act and the various laws relating to procedure under these statutes. The official text of each Act is given in full and is followed by a series of careful reference indexes giving the exact line in the text at which any particular word or phrase occurs. This feature is exceedingly valuable. If the index had been prepared rather more on the line of a legal digest of important subjects it would have added to its usefulness. It is now strictly an index of words and phrases.

R. D. J.

SUPPLEMENT TO SNYDER'S ANNOTATED INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS. By WILLIAM L. SNYDER. Pp. xl. 178, New York: Baker, Voorhis & Company, 1906.

This book, which is a supplement to a more elaborate volume by the same author, is similar in its purpose to Mr. Hamlin's book which has been noted above. However, it is more than an index to the words and phrases. It is rather a digest of the cases relating to Interstate Commerce decided since the publication of the author's original work. The volume includes also the text of the Interstate Commerce Act as amended June 29, 1906, and the text of the Pure Food Act and certain similar statutes. There is an excellent introduction containing a summary of recent Federal legislation affecting transportation questions and a statement of the purpose and economic results of the amendments to the Interstate Commerce Act which became a law in 1906. Included in the introduction is also a careful analysis of the effect of such cases as the Chesapeake and Ohio Railroad Company case in which the Supreme Court has laid down important general principles relating to these subjects. Mr. Snyder's little volume will be of assistance to those who desire a brief legal survey of the important decisions and statutes which have been added to the volume of law relating to the subject of Interstate Commerce in the last few years.

R. D. J.

A HANDBOOK OF CORPORATION LAW AS APPLIED TO PRIVATE BUSINESS CORPORATIONS. By RICHARD SELDEN HARVEY of the New York Bar. The Bleyer Law Publishing Company, 1906.

Mr. Harvey in this "Handbook of Corporation Law" has attempted to collect the great mass of sound common law doctrine relative to corporations, which lies concealed in the dusty reports of some comparatively obscure jurisdictions but which may be used as additional "ammunition" for that warfare on "a system for dispoiling the small investor."

He has not stopped here, however, but has selected from the leading cases and most authoritative opinions what seem to be the unquestioned law as to private corporations, and treating it in an elementary way, has built up a most comprehensive guide, which while valuable to the practitioner is sufficiently lucid and untechnical to be readable by those outside of the profession.

The scope of the work can best be judged from the different headings into which he has divided it.

He first defines a private corporation as being an entity separate and distinct from the members composing it. The situs or corporate home is then fixed and the relation to foreign corporations and comity. Enumeration of rights and powers; power to alienate; corporate property rights; bonds and mortgages; duties, obligations and liabilities of corporations; the charter as a contract; by-laws; stock and stock certificates; change of capital stock; meetings; officers, directors and agents; stockholders *inter esse*; fiduciary relation; inspection of books and papers; amalgamation, combination, consolidation, merger and conspiracy; holding companies, etc.

In treating all of these divisions the opinions of well known text writers are usually given supplemented, however, by citation of the leading cases on the point.

From the nature of the book it is not intended to be exhaustive, but it may prove a caution to those who have not as yet realized that "There is a potency in numbers when combined, which the law can not overlook when injury is the consequence."

G. F. B.