

BOOK REVIEWS

THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT OF THE UNITED STATES. By Charles E. Morganston. U. S. Government Printing Office, Washington, 1929. Pp. xv, 224.

Dr. Morganston has rendered a service in assembling and summarizing the data with reference to the power of the President to appoint and remove officials.

As to the power of *appointment* there has never been any serious question, even though Article 2, Section II, has not the same clarity as other portions of the Constitution. While its classification of officials, some of whom are denominated as "inferior" and others, by inference, as "superior", is not clearly indicated, but few serious questions have arisen under this clause of the Constitution, and these have been settled by the great rule of practical construction.

Dr. Morganston's brochure has its real interest in its compilation of the historical data and judicial decisions in respect to the more difficult question of the right of the President to *remove* officials. The origin and basis of this right of removal has been one of the great historic controversies of American politics. It has always been of vital interest, for it concerned the equilibrium of power, which the Constitution vainly sought to maintain between the executive and legislative departments of the government. While the framers affected to follow the doctrine of Montesquieu as to the division of government into independent departments, the influence of Montesquieu's philosophy was far less than is generally supposed. While they intended to create a strong executive who would not be merely a political vassal of Congress, yet, fearful of this objective, they sought to limit his power so that the President would not be in fact, as he was not to be in name, a King. Their attempt to reconcile *independence* with *inter-dependence* resulted in the long controversy, which continued for over a century, as to the power of removal.

The text of the Constitution is silent as to this power. It nowhere either expressly vests it in the President or expressly withholds it from him. This vexed question first arose in the First Congress of the United States and it was ably and vigorously argued for many weeks. On the one hand, it was contended that the right of removal was a part of the executive prerogative and incidental to the President's duty to see that the laws were faithfully executed, and, on the other hand, it was contended that the right of removal could only exist either by the sufferance of Congress or by its direct grant of power. When the question was first discussed in the First Congress, many of its members were among those who drafted the Constitution of the United States, and the long debate in that session is among the ablest debates in the history of Congress.

While the question of removal was temporarily disposed of in the First Congress, it was revived with bitter acrimony in the great party battles of the Jackson era. Webster, Clay and Calhoun were of one mind in asserting that the power of removal could only exist by the sufferance of Congress and was not a Constitutional prerogative of the executive. Later on, in recon-

struction days, the question again flamed up when the Republican Party attempted to cripple Andrew Johnson by denying him, in the *Tenure-of-Office Act*, the power to remove any official without the consent of Congress. The controversy culminated in impeachment proceedings against Johnson, and while the failure of his enemies to secure two-thirds of the Senate defeated his impeachment, yet the fact remains that a majority of the Senate were in favor of removing the President of the United States for removing one of his own Cabinet. The Johnson impeachment is a shameful episode in our history. Had his enemies then triumphed the President would have been little more than a vassal of Congress, for no President could be a true Chief Executive of the American People if he could not remove one of his own Cabinet when such official was guilty of a treachery towards his Chief quite worthy of Iago.

This great question, although it had been the subject of constant controversy from the beginning of the government, was never settled until October 25, 1926, in the notable case of *Myers v. United States*.¹ It is interesting and significant that the Chief Justice, who delivered the majority opinion for the Court, was himself a former President of the United States.

It is true that that decision may hereafter be regarded as having left undecided some minor questions as to whether quasi-judicial bodies, like the Federal Trade Commission, the Interstate Commerce Commission, or the Comptroller General, are within the scope of the decision, and therefore the question in all its possible phases may not be wholly at rest. But as to all executive officers who are not quasi-judicial, it now seems clear that the power to remove, while not in terms granted by the Constitution, is, nevertheless, vested in the President as a part of his executive prerogative and as a necessary method of discharging his duty to see that the laws are faithfully executed.

While this great question of Constitutional law is thus now happily at rest, Dr. Morganston's brief is not less useful in assembling and summarizing the available data. This gives his work a value as a reference book. However the work has little value as a philosophic commentary upon the President's power of appointment and removal. In this respect it is less valuable than the brochures of Professors Corwin and Hart, of Princeton and Johns Hopkins respectively, upon the merits of the great question and the exact scope of the decision in *Myers v. United States*. Each of these learned commentators is somewhat critical of the very able opinion of Chief Justice Taft in the *Myers* case. It might seem to be an impertinence for students of Constitutional law, even if they are professors in renowned universities, to sit in judgment upon an opinion of the Supreme Court. However, the development of the Constitution is an evolution which is largely influenced by public opinion, and as no decision of a Supreme Court is in all respects a last word upon any subject, it serves a useful end that men who are really profound students of the Constitution should express independent judgment upon the reasoning of the Supreme Court in any Constitutional case.

Such opinions serve the same purpose as dissenting opinions of the Court. The writer of this opinion is a believer in dissenting opinions, especially in

¹ 272 U. S. 52, 47 Sup. Ct. 21 (1926).

Constitutional cases.² They serve a real purpose in the development of the Constitution, for it must always be remembered that, in this class of litigation, the Supreme Court sits, in a very qualified and restricted sense, as a continuance of the great Convention of 1787. In interpreting the Constitution the Supreme Court adapts it to the changing needs of the most changing nation in the world.

Moreover, decisions in this class of cases are in the highest sense political in nature and, as previously stated, in the long run are influenced, and properly so, by intelligent public opinion. For this reason it is desirable that if any Justices of the Supreme Court are of opinion that the majority of the Court has rendered a wrong decision, or given a good doctrine an excessive application, they should say so, for when the controversy again arises in a different form the opinions of the majority and minority Justices are equally parts of the Record, and their relative soundness is again considered by that august tribunal which is the final interpreter of the Constitution.

While the opinions of learned commentators on the Constitution, such as Professors Corwin and Hart, are manifestly of far less value than dissenting opinions of Justices of the Court, yet they serve the same purpose in directing the minds of the nation to a consideration of the question involved, and this leads to an orderly and intelligent development of Constitutional principles. For this reason it is a regret to the reviewer that Dr. Morganston, who quite evidently understands the premises of the subject, has not given his own impressions as an independent thinker upon many of the questions involved in the subject that he discusses. However, we can at least be grateful to him for his industry in assembling so much valuable material and reducing it to a form that makes it readable and not too ponderous.

While the reviewer has justified the value of dissenting opinions and even the study of independent thinkers upon great questions upon which the Supreme Court has expressed a comprehensive and deliberate judgment, the reader must not infer that the writer in any way shares the doubts which the dissenting Justices and the students of the Constitution, such as Professor Corwin, have expressed as to the *Myers* decision. As the writer of this review argued this great case for the Government in the Supreme Court and had the satisfaction of having his contention sustained by that great tribunal, it is natural that he believes that the decision of Chief Justice Taft—one of the most notable in the history of the Court—had its full justification not only in the practical construction given to the Constitution by the First Congress and by many of those who helped to frame it, but also by the philosophy of our institutions and the practical necessities of our, or any, government. As the writer observed in his argument in the *Myers* case, to deny to the President the right to remove an executive official, unless Congress assented, would be to put a "To Let" sign upon the White House.

James M. Beck.

Washington, D. C.

² In the *Myers* case there were three dissenting opinions, two of which, one by Justice McReynolds and the other by Justice Brandeis, were lengthy and exhaustive.

AVIATION LAW. By Henry G. Hotchkiss. Baker, Voorhis & Co., New York, 1928. Pp. xvii, 492. U. S. AVIATION REPORTS. 1928. Edited by Arnold W. Knauth, Henry G. Hotchkiss, and Emory H. Niles. United States Aviation Reports, Inc., Baltimore, 1928. Pp. xi, 670.

Development of any new means of transportation has been accompanied by a new means of communication, each necessitating new laws and regulations. Now we have aviation with the radio. "Law, which has concerned itself in the centuries of the past with matters on the ground and the oceans, has been compelled to add an entirely new field," writes W. Jefferson Davis.¹

Commercial aviation and the airplane industry have become a major phase of our business structure as well as an integral part of our transportation system. Within the past five years distinctly commercial aircraft has been developed. No greater tribute to the genius of the common law can be found than the manner in which the law of this recently developed science has fitted itself into the existing body of principles without any perceptible change or enlargement.

Heretofore, most of the articles on aviation law have been, to a large extent, theoretical and speculative, proposing different and conflicting policies and conjectures. Five years ago, the interested lawyer expected conflicting decisions. But as cases have come before the courts there has been a most satisfactory uniformity of decision which should satisfy not only the legal theorist but the business man engaged in aeronautical activity as well. This aspect of aviation law is also reflected in recent publications. The one hundred pages of text in *Aviation Law* is a comprehensive and concise presentation of the subject. *U. S. Aviation Reports* is a source book for Mr. Hotchkiss' text. It is intended to include all aviation cases to date, although *Application of Gettysburg Flying Service, Inc.*, where the Pennsylvania Public Service Commission held that it would assume jurisdiction over aircraft for hire, the only known case on the subject, is omitted. The editors propose to follow by supplements and additional volumes. It contains an excellent and comprehensive index. Just as there are reports for Admiralty, Banking, Bankruptcy, Public Utilities and the like, reports for the aviation specialist are quite appropriate.

That each nation has complete and exclusive sovereignty over the air space above its territory and territorial waters is now the generally accepted doctrine. There is no "freedom of the air" in this respect. That principle is embodied in the 1919 International Flying Convention of Versailles, the Havana Pan American Convention of 1928 and the Air Commerce Act of 1926. The United States is not a party to the International Flying Convention of 1919. A recent news item states that ex-President Coolidge favored the view of those who believe an aviation treaty should be promulgated but that the Department of Commerce advised further study before a final decision should be made.

Perhaps more words have been written and more *dicta* inserted in opinions on the absolute right of the owner of the soil to the air space above, without having any practical effect on actual decisions, than upon any other situation having to do with aviation law. It is now definitely settled by the authorities

¹ *Air Law—The New Field* (1929) 15 A. B. A. J. 107.

that the owner has no absolute right such as would sustain an action in the nature of trespass *quare clausum fregit*, although he does have a qualified right on which an action for low or dangerous flying or nuisance would lie. As Mr. Hotchkiss points out, "the spread of aviation will more and more establish rights of flight that encroach upon the rights of others judged by pre-aviation standards."

It is generally agreed that absolute liability is properly imposed on the owner or pilot of aircraft for damage done in descent or by objects thrown or dropped from the craft while in flight. *Guille v. Swan*² imposed absolute liability for any and all damage incident to and resulting from flight on the ground that a balloon is an inherently dangerous instrument. Proponents of this theory find support in *Rylands v. Fletcher*.³ But it cannot be accepted. It is needlessly severe and tends to retard development of aviation. The established rule as to damage incurred by descent or by falling objects should be sufficient protection to the helpless groundsmen. Modern aircraft is no more an inherently dangerous instrument than the automobile. Nor would the *res ipsa loquitur* doctrine be satisfactory; its application would result in a situation midway between the theory of absolute liability and ordinary negligence, with the confusion that has resulted from its application to other situations in tort. It is as reasonable to apply the assumption of risk doctrine to shippers and passengers, if there are any extraordinary risks, as it is to impose absolute liability on the aircraft. Some propose compulsory insurance. There is no greater reason for compelling this from aircraft than from any other carrier or transportation agency. Until insurance actuaries meet aeronautic development, such insurance would be prohibitive.

The tendency of all courts has been to hold anything having to do with flying as *engaging* or *participating* in aeronautics when applied to limitation clauses in life or accident insurance policies. There are no reported cases on liability insurance policies. Pennsylvania, Minnesota, and California have held airplane pilots and mechanics to be within their workmen's compensation acts.

Prior to the adoption of the Air Commerce Act of 1926, several theories for sustaining federal regulation were advanced. All are reflected in the act itself. Mr. Hotchkiss agrees with the majority and generally accepted view that the commerce clause is quite sufficient to sustain all regulation. The theory, once urged and officially sanctioned by an American Bar Association Committee and the War Department's legal adviser, that a constitutional amendment is necessary because any rights assumed in the overhanging air space would be a taking without due process from the owner of the soil, has been practically abandoned with failure of the *cuius est solum, eius est usque ad coelum* maxim itself to attain support.

Both Mr. Hotchkiss' volume and *U. S. Aviation Reports* contain, in full, all treaties, federal and state statutes and regulations pertaining to aviation.

For general reading, the report is as exciting and interesting as a novel. It contains the leading cases that will undoubtedly become landmarks in our jurisprudence. For example, Chief Judge Cardozo held that a seaplane moored

² 19 Johns 381 (N. Y. 1822).

³ L. R. 3 H. L. 330 (1868).

in navigable waters was subject to admiralty jurisdiction. The Supreme Court of Kansas approved municipal acquisition of an airport under public park statutes. A Pennsylvania court of quarter sessions reversed a conviction for criminal trespass for flying over posted lands. A landing airplane stampeded cattle. A reckless pilot landing on a crowded California bathing beach, killed two young women and was convicted of manslaughter. The Appellate Division of the Supreme Court of New York in 1914 took judicial notice of the machine *aeroplane* and in 1928 that aviation is no longer an experiment. There are important Wright patent cases, a history of heavier-than-air craft. *State v. Cleveland*⁴ justifies municipal acquisition of an airport (which has been developed into one of the best and busiest in the world) as an emergency measure. Noise from a flight of ten airplanes excused failure of plaintiff's intestate to hear a locomotive whistle at a grade crossing.

One gets the thrills of the old balloon ascension days, as well as the passing barnstorming tramp fliers. There is the woman who survives after catching her finger in a rope and being carried several hundred feet in the air; the twelve-year-old boy who tried to steal a ride, did, rose three hundred feet, but did not survive. A bad landing at a New York fair in 1914; the North Carolinian whose foot caught in a rope, was jerked so quick his head never hit the ground, rose 150 yards feet first, pulled himself up until his pants slipped and his head went down again, finally climbed the rope in midair, rose 1600 feet, landed safely and was found riding back on a bicycle by the searching party that went after him in an automobile; the harrowing experience of pilot and three passengers on a ship-wrecked seaplane attempting to weather a storm between Miami and Bimini; the tragedy of *North American Surety Company v. Pitts*;⁵ the flier blown from his airplane when a harmless smoke bomb turned out to be high explosive, who was lucky enough to fall back into the airplane which caught fire but was landed safely; and finally the California motion picture flier for whom the exploding bomb proved fatal.

Harold F. Mook.

Erie, Pa.

FEDERAL INCOME TAXATION. By Joseph J. Klein. John Wiley & Sons, Inc., New York, 1929. Pp. xxii, 1749, 498, 103.

Although Mr. Klein has written several books on accounting as well as numerous magazine articles on both accounting and tax problems, this is his first book dealing with Federal taxation.

There are, of course, other works on Federal income, profits and estate taxes, notably *Federal Tax Practice* by Montgomery, *Federal Taxes* by Holmes, and *Federal Income and Estate Tax Laws* by Walter E. Barton and Carroll W. Browning, which are comparatively old texts on the general subject of Federal taxation now appearing in new editions to bring the works up to date and in line with the changes brought about by the *Revenue Act* of 1928. Mr. Klein's book, however, is distinctly new and unique both in its scope and treatment.

⁴ 26 Ohio App. 265, 160 N. E. 241 (1927).

⁵ 213 Ala. 102, 104 So. 21, 40 A. L. R. 1171 (1925).

Orienting himself on the *Revenue Act* of 1928, Mr. Klein shows painstakingly and step by step just what improvements and changes have been wrought in American tax law since the Federal income tax became a reality with the passage of the *Revenue Act* of 1913. And he introduces his discussion with an account of the nature of income and a brief but comprehensive statement setting forth the history of income taxation in the United States.

Practically all books of this character are so technical that they make their appeal only to the limited class of lawyers and accountants who are specializing in Federal tax cases, and not to the legal profession as a whole. Mr. Klein's treatment of this all too technical but important subject of Federal taxes is so engrossing, however, that even those members of the profession not particularly interested in taxation, as such, will find his book an invaluable commentary on the many complicated constitutional questions to which the various revenue acts have so frequently given rise. Indeed, the book is so thoroughly documented that it is perhaps the last word in scholarship on the subject. There is hardly a sentence throughout the book that is not vouched for by a footnote reference to the authority or authorities for the opinion or conclusions stated.

Besides pointing out the pitfalls one encounters when endeavoring to interpret revenue laws and explaining the peculiar accounting methods employed for income tax purposes, (Mr. Klein is both a lawyer and a certified public accountant) the author discusses in masterly fashion the difference between taxable and non-taxable income, gains and profits as distinguished from ordinary income, the importance of proper bookkeeping and correct inventories, deductions allowed by law for business expenses, interest, taxes, losses, bad debts, depreciations, as well as the principles governing depletion, valuations, sales, the basis for gain or loss and the far-reaching consequences that may result from a tax standpoint through exchanges and reorganizations, corporate affiliations, tax avoidance and tax evasion. Every substantive provision of the law is fully explained. And within the compass of comparatively few pages the reader may also learn just how to file a tax return, how to file a claim for refund or credit for overpayment of tax, and what procedure to follow in protecting his own or any taxpayer's rights before the Treasury Department, the United States Board of Tax Appeals, the various United States District Courts, the United States Court of Claims and the respective United States Courts of Appeals and finally the Supreme Court of the United States, a subject that volumes have already been written about. The 1749 pages of textual matter are supplemented by a comparison of the *Revenue Acts* of 1926 and 1928, various Treasury Department forms and explanatory memoranda. Not the least valuable part of the book consists of the tables of Court and Board of Tax Appeals Decisions complete to date of publication. As is usual with all such works, however, the index could have been improved upon.

On the strength of this single volume work, Mr. Klein may pride himself on having written one of the clearest and most interesting treatises in an unusually difficult and not altogether inviting field of legal research.

Joseph Conrad Fehr.

Washington, D. C.

INTERNATIONAL LAW AS A SUBSTITUTE FOR DIPLOMACY. By Marcellus Donald Redlich. R. R. Donnelley & Sons Co., Chicago, 1928. Pp. vii, 208.

The past fifteen years have brought to the attention and consideration of the thinking people of the world the necessity of limiting warfare and the possibility of its abolition. Many propositions have been made and many books written to advocate plans for the abolition of war. The book by Mr. Redlich is not like several that have appeared in which fanciful schemes have been suggested—fanciful at least to those who having knowledge of History and Law, discover in the schemes loopholes or contingencies unprovided for.

Mr. Redlich suggests not new nor imaginary means but rather a logical use of means already at hand but not yet sufficiently developed. The title of his book crystallizes his thesis. Quoting from the preface, "It is the belief of the author that diplomacy can never succeed as a substitute for warfare; that the diplomat is the assistant, not the rival of the soldier; and that peaceful settlement of international disputes can only be secured to the extent that both soldier and diplomats yield place to the international lawyer". He proceeds in the course of two hundred pages to reach the conclusion concisely stated, "that the abolition of the use of force in the settlement of international disputes must follow along the same lines of evolution as has the abolition of force in the settlement of private disputes". In the interest of civil society it has long been appreciated that private disputes are less disturbing to a community and to the progress of civilization generally when they are settled by legal and judicial proceedings instead of by battle, ordeal, or self-help of any sort.

As Mr. Redlich's book is intended for the general reader rather than for those who are already familiar with studies in International Law and Diplomacy, he has devoted five of his six chapters to an outline of the history of these two phases of international relations.

The closing chapter of the book gives us the matter for which we waited somewhat impatiently throughout the preceding pages. Some of Mr. Redlich's observations are worthy of noting. "There are three professions to which a country may intrust the settlement of its international disputes—the soldier, the diplomat, and the international lawyer". When the international lawyer was called upon to represent his country in disputes submitted to arbitration, the diplomats of the country were for the time relegated to the background. When the countries of the world created the Permanent Court of Arbitration at the Hague they approved arbitration for all possible occasions. "The Covenant of the League of Nations, whatever else it was or was not, was the triumph of the international lawyer over the diplomat." The greatest triumph of all for the international lawyer would be the complete success of the Permanent Court of International Justice. "Such a victory would relegate the diplomat to a very secondary place (except in the drawing room)".

In this chapter Mr. Redlich asks where the greater advance has been made, in the field of international disputes or in the field of domestic disputes—where settlement has been left to the lawyer and the judge? He notes and

discusses a rivalry between the diplomat and the international lawyer. He refers to the settlement of the boundary between the United States and Canada by seven arbitration commissions and observes that this peaceful frontier was determined by international judges and lawyers rather than by soldiers or diplomats. He praises the United States and several of the South American states for early use of arbitration. Then follows a rather full description of the Permanent Court of Arbitration developed by the Hague Conventions of 1899 and 1907, and of the Judicial Arbitration Court—which never came into existence—and of the Central American Court of Justice.

The concluding sections of Mr. Redlich's book are given to a discussion of the League of Nations and the Permanent Court of International Justice. "As between diplomat and international lawyer, as well as in all other respects, the League of Nations was a compromise and therefore, not entirely satisfactory to anyone." It, however, was "the first widespread attempt to substitute impartial justice as the arbitrator of international disputes in place of the trickery and deceit of the diplomat, and the cruelty and brute force of the soldier." The best thought of the world was fully ready for a plan which would settle international disputes without calling upon the diplomat or the soldier, but the nations were fully as suspicious of each other at the end of the war as during it. Thus, while the general framework of the League was being constructed, all eagerly welcomed the effort, but jealousy and suspicion ruled when details were being discussed, and an organization which should have been controlled by international lawyers became rather an organization of diplomats.

The creation of the Permanent Court of International Justice is the longest step yet taken from warfare and diplomacy toward international law. Mr. Redlich explains in detail the organization and procedure of the court and recites the names of the nations which have accepted the clause for compulsory reference to the court and answers the objection that the decrees of the court have no force for their execution by saying that even the Supreme Court of the United States has not always been able to enforce its decrees, and that the force back of the decisions of the Permanent Court of International Justice will be the same as that back of all national and local courts—general public opinion.

Every war is caused by the assertion by each participant that injustice has been done by the other. As long as the soldier and diplomat contend that each nation must be the judge of the justice of its own cause, force will be the primary method for settling disputes. "War can only be abolished when countries are willing to submit the justice of their position to the judgment of an impartial tribunal. . . . Every step toward compulsory arbitration, every step toward the creation of true international courts, is a step away from the horrors of warfare."

G. E. Fellows.

Univ. of Utah, Salt Lake City.

ITALIAN CORPORATIVE LAW. (*Diritto Corporativo Italiano.*) By Carlo Costamagna. Second Edition. Unione Tipografico Editrice, Italy, 1928. Pp. viii, 622.

The impression given by the average tourist returning from Italy is that of a land where the trains run on time and beggars are no longer to be found on the streets; if he is somewhat more than ordinarily observing he will perhaps add that it is wiser while in Italy not to discuss Fascism publicly, or to make remarks that might be construed as derogatory to Mussolini. Those of us who have not been in Italy recently, but who absorb a certain amount of world culture from the perusal of *"Time"* or the *"Literary Digest"* are aware that Mussolini and his fascists marched on Rome a few years ago and with little or no bloodshed seized the reins of government and that since then, under Mussolini's dictatorship, some sweeping transformation has been effected in Italy's economic arrangements whereby she has been able to stabilize her currency and increase her production.

Whether we be sceptics or believers in democracy, students of contemporary Italian history or laymen, Mr. Costamagna's thorough-going and exhaustive explanation of the legal structure whereby Italy has been transformed from a political democracy into the Fascist State offers much food for thought. The book is more than a technical explanation of certain statutory laws; it is a philosophical treatise on Industrialism, based on the denial,—or at least the complete subjection,—of all individual personality, and the personification in lieu thereof of the State. This doctrine is set forth logically and with unflinching assurance.

The Corporative State is not an abstraction devised for the greater happiness of all the individual human beings comprising the Italian people; the State is the ultimate reality, and the individual the abstraction; as such he must be conceived of primarily in his relation to the state and to the part he can best play in the efficient economic functioning thereof.

The author's approach to this point of view is historical. In the opening chapters he discusses the "natural laws of association", pointing out that from the earliest times men have banded together to achieve common purposes, and reviews the history of the colleges, guilds, etc., of Roman and Medieval times and the rise of trade unionism and syndicalism in the past century. This increasing tendency toward association has not been confined to the workers; witness the development of trusts, pools and cartels, which are similar syndicates of entrepreneurs,—of capital, in brief. The natural evolution of this concept of syndical freedom under the doctrine of "socialistic liberalism" could lead only to deadlock in the Liberal State, and result in strikes and lock-outs, with capital and labor struggling for advantage to the detriment of national well being. Costamagna is scornful of the sorry plight resulting from the free play of syndical liberty; the theory, he holds, inevitably breaks down because it recognizes rights without corresponding duties, and provides for no intervention by the public power in the general interest.

Italy, in the years immediately following the war was reduced almost to a state of anarchy by the syndicalist struggles; the State was hesitant and powerless to intervene in the class struggle. With the seizure of political power by

Mussolini, the Fascists undertook a complete economic and political reorganization of Italy. The present book deals with the "*Corporative Law*" of April 3, 1926 and the regulations for its enforcement promulgated in July of the same year, which cover the economic aspects of this reorganization.

Perhaps the fundamentals of the philosophy underlying this legislation can best be understood by quoting two significant passages from the "*Charter of Labor*":

"III Organization whether by syndicates or by trades is unrestricted, but only the legally recognized syndicate, subjected to the control of the State, has the right legally to represent the whole category of employers or employees for which it has been formed . . . to draw up collective labor contracts binding upon all belonging to this category."

"XI The trade associations are charged with the regulation, by collective contracts, of labor relations between the employers and employees whom they represent. . . ."

The *Labor Charter*, while not a part of the *Corporative Law*, sets forth the general principles of the Fascist State as regards labor-capital relations in philosophic rather than legal terms.

Signore Costamagna discusses in detail the structure and functioning of the Corporative State,—through some 600 pages. The book is divided into six parts, dealing respectively with "General Notions"; "The Trade Association"; "The Collective Contract of Labor"; "Jurisdictions of Labor"; "Offenses and Penalties", and "The Corporative Arrangement."

Obviously, to do justice to so monumental a work in a brief review is impossible; I must content myself with comment on a few random passages that seem to me to bring out the central idea in this elaborate structure.

"The corporative principle is understood, as regards the individual, as the subordination of the individual to the integrated and directed action of the group to which he by trade belongs; as regards the State, as the subordination of the same group to the general interests that the State personifies with, at the same time, recognition on the part of the State of the exclusive representation in the group of the trade category that it individualizes.

"The direct antithesis between the individual and the State that threatens the downfall of the individualistic regime, is eliminated by the intervention of a third subject of public law, which is destined by its very nature to exercise a great influence in all orders of public functions, attaining an organic and integrated collaboration between the citizen and the State." (Article 172.)

One feels here very clearly the complete submergence of the individual. The State, far from being conceived as a mechanism devised for the convenience of individuals, seems to be looked on as an end in itself; the corporative principle is a felicitous device to prevent the individual, or groups of individuals, from giving the State too much trouble.

My hope is that I may have placed before the reader a few sound bits of the kernel;—to compress this book into a nutshell so that the reader of this review might fully understand the *Corporative Law* is not my intention. The book is

exhaustive and the history and theory supporting each cog in the legal machinery of the Fascist State is well developed, but I can here attempt only to give the net impression Signore Costamagna has left in my mind as to what has happened in Italy,—with a surmise as to why it has happened.

The picture we get is of a modern state founded *de novo* since the March on Rome in October 1922, on the principle of mass production, and the realization that economic considerations are increasingly more important than political. The logic is remorseless; the Fascist philosophers have not allowed the sentiments of the deeply scorned schools of individualistic democracy, or of socialistic liberalism, to cloud their thinking. In the modern highly industrialized world national success depends upon mass production, and the state that aspires to hold the rank of a Great Power must develop its organization of production at all costs. Friction between the various factors of production cannot be tolerated, hence—runs the Fascist argument—the individual, be he employer or employee, must be subordinated to the group; the groups must be integrated into National Confederations and conflicting interests must be subjected to the control of the State through the Ministry of Corporations and the Labor Courts, to the end that production in the Corporative State may flourish like the green bay tree.

Speculation as to underlying motives may seem gratuitous in discussing a legal structure so carefully reasoned and logical as the Fascist State, but it is after all a human institution and those of us who still adhere to the finer traditions of American political democracy have so deep a respect for the human will for freedom that we may perhaps be pardoned if we question the permanence of the surrender by the Italian people of their individual will and aspirations to control by a logical but artificial economic State. One wonders whether a closer study of the Fascist movement might not reveal as the corner stone of this whole edifice a very old and very powerful emotional urge—national aggrandizement. Such a motive might conceivably supply to the organism of the Corporative State a life-giving blood stream of which it would seem to be deprived by the restriction of individual freedom. It is not possible that this whole structure, with its limitations on human freedom and its substitution therefor of loyalty to a superimposed economic state, is a rationalization of the Fascist leaders' vision of Italy as a perfectly integrated industrial machine, dominating Europe by her economic power, and dominated in turn by the Fascist Party—and by the "Head of the Government"? Through it all does not one hear too frequently the sinister echo of the old phrase "*l'Etat, c'est moi!*"?

E. Lewis Burnham.

Philadelphia.

THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS. By Harry D. Nims. Third Edition. Baker Voorhis & Company, New York, 1929. Pp. cliv, 1293.

It has been twelve years since the second edition of this widely known and oft-cited book was published. The rapid developments of important parts of trade law during that period amply justify a new edition. The present edition

contains 400 more pages and cites and discusses many more cases than the second edition. The general plan of the book is the same and the section numbering remains the same. Many new sections are inserted but they are indicated by adding a letter suffix. Therefore section references to the old edition are also good to the new. The mechanical arrangement of the book is highly satisfactory. It contains a complete table of cases, a minute index and the table of contents is annotated to both sections and pages. The appendix contains the trade-mark statutes, the rules of the patent office for registering a trade-mark and forms.

On some of the newer questions involved in the subject of trade law Mr. Nims gives his readers the benefit of intelligent and lucid comment. The author is to be commended for his vigorous criticism of the doctrine that trade-mark protection does not extend beyond the area of the owner's trade activity. He makes it clear that he is opposed to the principle which permits the use of another's mark in new localities. Modern rapidity of communication and travel, he says, have destroyed whatever validity there ever was in such a principle.

In his section, "Threats to Good Will", the author approves of the doctrine that use of a trade-mark upon goods dissimilar in kind from those sold by the first user of the mark, should frequently be restrained because, although there is no diversion of patronage, the reputation of the first user is placed in the hands of the second user and is a continual threat to his good will. This view seems sound and the more recent decisions are inclined to support it.

The author condemns as unsound the arbitrary placing of goods into classes and limiting trade-mark protection to use upon goods falling within a class. He quite accurately says:

"The test of infringement is not to be found in arbitrary distinctions between goods, based upon the character of the goods. It can be found by determining whether, quite regardless of the character of the goods, the result of the defendant's use is to confuse, deceive or injure or to threaten to confuse, deceive or injure the consumer, and hence to injure the plaintiff." (P. 579.)

There are, however, many trade law problems which the courts have been unable to satisfactorily analyse, toward whose solution I fear Mr. Nims does not offer a great deal of help. There is too much quoting of opinions and not enough of comparing, contrasting, weighing and analysing the court's decisions. Mr. Nims is too often satisfied with the reasons stated by the courts without testing them in the crucible of jurisprudence. Is a trade-mark property? What is the difference, if any, between the scope of protection given a name or mark under so-called technical trade-mark law and under the law of unfair competition? These are illustrations of questions that seem to the reviewer inadequately dealt with in this volume.

Mr. Nims says:

"Radical distinctions have been made by various courts between pure trade-mark cases and cases under the general rule of unfair competition. It has been said that a trade-mark has been protected on the ground of property right while relief in cases of unfair competition is based upon fraud." (P. 521.)

The author seems satisfied with this distinction. But are the legal relations in the two cases the same? With respect to whether a trade-mark is property it is not much help to simply assert "If the owner of a trade-mark possesses property rights in his mark they are unlike other property rights. The better term is 'rights'" (p. 522). But in what respect are trade-mark rights different from other property rights? Perhaps the difference is that given in the *Hanover* case and quoted by Mr. Nims as follows:

"Property connotes a right in rem *i.e.* the right to exclude the whole world from any use of the thing in question. A trade-mark owner can exclude only from a use which causes confusion." (P. 522.)

That is, for there to be property according to this view there must be an exclusive privilege of user. But that cannot be the test of a property right. Who would say that a lessor, a bailor, or a remainderman has no property interest? Such a person has many valuable "rights". For example he has rights that the possessor and others shall not commit certain acts of harm upon the "property". He has also power to transfer his interest. He has immunities,—that his interest shall not be divested without his consent, etc. These and other relations constitute his property interest. Yet his present privilege of user is very much curtailed if it is not entirely absent. The privilege to presently use the property is almost entirely in others. A landowner's interest is subject to the privilege of others coming upon his land in certain cases of necessity, and public utilities may acquire, without the consent of the owner, by exercise of eminent domain, the privilege of entering upon and using another's land. Although there is some controversy as to whether it is accurate to speak of the owner of land as "owning" the oil and gas beneath the surface, it has never been denied that the owner of the land has a "property interest" in such oil and gas. Yet others have the privilege of drawing off and taking such oil and gas by sinking wells upon their own land. The owner has a privilege to take, but others have a similar privilege. In all of these cases the privileges of the "owner" are limited by the privileges of others. But despite such limitation the "owner" has a property interest. The existence of such privileges in others does not of itself negative the existence of a property interest in the "owner". Property in a trade-mark in many respects is similar to property in oil and gas *in situ*. The "owner" has a privilege to use, but within certain limits others also have the privilege of user.

It is believed that it makes no difference whether the protection given to a mark comes about through so-called technical trade-mark law or through rules of unfair competition, the result is a property interest in either case. Mr. Nims says that to be guilty of unfair competition is to be guilty of a fraud,—that is, of a tort. But principles of tort play an important part in determining what property it. That another shall not trespass upon my land is a principle of torts as well as of property.

It is submitted that a more precise determination by the author of the exact legal relations involved would have aided materially in clearing up many of the difficulties found in the law of trade-marks and unfair competition.

Another major criticism of Mr. Nims' work the reviewer would like to offer is that the book gives hardly any consideration to the *Clayton* and *Federal*

Trade Commission Acts, or to the many important decisions interpreting the sections of those acts having to do with unfair competition. It cannot be said that these acts and the decisions under them lie beyond the scope of such a book as this. The main title of the book is "Unfair Competition", and the two acts referred to deal specifically with that subject. It seems to me those acts and the decisions under them constitute the most outstanding development of the last fifteen years in the law of unfair competition. Yet for all that appears in this book one would hardly know such statutes had been enacted.

What effect, if any, does section 3 of the *Clayton Act* have upon the validity of exclusive dealing contracts? To what extent may a manufacturer discriminate in his sales to wholesalers, chain stores and retail buyer's associations? Under what circumstances, if any, is it justifiable for a manufacturer or dealer to refuse to sell or to sell only on extortionate terms? Does section 2 of the *Clayton Act* make illegal the seller's increasing of his price to a particular buyer in order to lessen competition among buyers or does it simply prohibit local or special price cutting in order to drive out the competitors of the seller? Mr. Nims does not cite, much less discuss, the important cases involving these problems.¹

Under what circumstances, if at all, is resale price maintenance an "unfair method of competition" under Section 5 of the *Federal Trade Commission Act*? Mr. Nims leaves us in the dark on this important topic. Here again neither citation nor discussion is given to the cases involving this question.²

¹ See the following: *United Shoe Co. v. U. S.*, 258 U. S. 451, 42 Sup. Ct. 363 (1922); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 42 Sup. Ct. 360 (1922); *Fed. Trade Com. v. Curtis Pub. Co.*, 260 U. S. 568, 43 Sup. Ct. 210 (1922); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 47 Sup. Ct. 400 (1927); *Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2d, 1915); *Pictorial Review Co. v. Curtis Pub. Co.*, 255 Fed. 206 (S. D. N. Y., 1917); *Auto Acetylene Light Co. v. Prest-O-Light Co.*, 276 Fed. 537 (C. C. A. 6th, 1921); *Sinclair Refining Co. v. Fed. Trade Com.*, 276 Fed. 686 (C. C. A. 7th, 1921); *Mennen Co. v. Fed. Trade Com.*, 288 Fed. 774 (C. C. A. 2d, 1923); *Pearsall Butter Co. v. Fed. Trade Com.*, 292 Fed. 720 (C. C. A. 7th, 1923); *National Biscuit Co. v. Fed. Trade Com.*, 299 Fed. 733 (C. C. A. 2d, 1924); *Butterick Co. v. Fed. Trade Com.*, 4 F. (2d) 910 (C. C. A. 2d, 1925); *Porto Rico Amer. Tobacco Co. v. Amer. Tobacco Co.*, 30 F. (2d) 234 (C. C. A. 2d, 1929).

For a discussion of the problem involved in some of these cases see Oliphant, *Trade Regulations* (1923) 9 A. B. A. J. 210 and Mechem, *Price Discrimination as Unfair Competition* (1923) 21 MICH. L. REV. 852; (1924) 38 HARV. L. REV. 103. See also the more recent case of *Van Camp v. American Can Co.*, 49 Sup. Ct. 112 (1929) and comment thereon in (1928) YALE L. J. 804.

² See the following: *Fed. Trade Com. v. Beechnut Packing Co.*, 257 U. S. 441, 42 Sup. Ct. 150 (1922); *Hills Bros. v. Fed. Trade Com.*, 9 F. (2d) 481 (C. C. A. 9th, 1926); *Toledo Pipe Co. v. Fed. Trade Com.*, 11 F. (2d) 337 (C. C. A. 6th, 1926); *Cream of Wheat Co. v. Fed. Trade Com.*, 14 F. (2d) 40 (C. C. A. 8th, 1926); *Hubbard v. Fed. Trade Com.*, 15 F. (2d) 274 (C. C. A. 2d, 1926).

See also Dunn, *Resale Price Maintenance*, (1923) 32 YALE L. J. 676; Stevens, *Resale Price Maintenance*, (1919) 19 COL. L. REV. 256; Fausig, *Price Maintenance*, 6 AM. ECON. REV. 170; and for comments upon some of the above cases see (1927) 75 U. OF PA. L. REV. 248; (1926) 21 ILL. L. REV. 389; (1922) 31 YALE L. J. 650; (1922) 22 COL. L. REV. 351; (1922) 10 CALIF. L. REV. 229; (1922) 4 ILL. L. Q. 263; (1928) 13 IOWA L. REV. 324.

What is the difference in regard to resale price control, between a manufacturer's distributing his commodities by means of sales and by means of "agencies"?³ When, if at all, is a "tying" contract an unfair method of competition under the *Federal Trade Commission Act*?⁴

Mr. Nims has a section on "Use of False Advertising", one on "Misrepresentation in Advertising", and one on "Use of Falsehood", yet there is no mention made of the effect of the *Federal Trade Commission Act* on false advertising as a type of unfair competition, nor of the important decisions on this question.⁵ Nor is there any reference to the character or content of numerous state statutes on false advertising.⁶

For some reason, hard for the reviewer to understand, Mr. Nims has seen fit to ignore in his book the mine of magazine material that is available upon the subject of trade-marks and unfair competition. It is unfortunate that the author did not take advantage of this opportunity to make such material more accessible to the profession.

Despite the above criticisms, however, it is the opinion of the reviewer that Mr. Nims has written a valuable and useful book—much the best that has been written in the field of trade law. It should be on the desk of every trade-mark lawyer in the country.

George W. Goble.

College of Law, University of Illinois.

³U. S. v. Gen. Electric, 272 U. S. 476, 47 Sup. Ct. 192 (1926); for a discussion of the problems see Klaus, *Sale, Agency and Price Maintenance*, 28 COL. L. REV. 312 and 441.

⁴Fed. Trade Com. v. Gratz, 253 U. S. 421, 40 Sup. Ct. 572 (1920).

⁵See the following: Fed. Trade Com. v. Winsted Hosiery Co., 258 U. S. 483, 42 Sup. Ct. 384 (1922); Sears, Roebuck & Co. v. Fed. Trade Com. 258 Fed. 307 (C. C. A. 7th, 1919), 6 A. L. R. 358 (1920) (this case, however, cited by the author on another point); Fed. Trade Com. v. Pure Silk Hosiery Mills, 3 F. (2d) 105 (C. C. A. 7th, 1925); Proctor & Gamble v. Fed. Trade Com., 11 F. (2d) 47 (C. C. A. 6th, 1926); Ostermoor & Co. v. Fed. Trade Com., 16 F. (2d) 962 (C. C. A. 2d, 1927); Indiana Quartered Oak Co. v. Fed. Trade Com., 26 F. (2d) 340 (C. C. A. 2d, 1928). See also comment (1926) 26 COL. L. REV. 199.

⁶See comment (1927) 26 YALE L. J. 1155.

STATEMENT OF OWNERSHIP, MANAGEMENT, CIRCULATION,
ETC.

Pursuant to the regulation of the Federal Post Office, revised by the Act of August 24, 1912, herewith is published a Statement of Ownership, Management, etc., of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW, published at Philadelphia, Pa.:

Name of	Post Office Address
Student Editor, Carroll R. Wetzel,	Philadelphia
Business Manager, George W. Keitel,	Philadelphia
Treasurer, B. M. Snover,	Philadelphia

Owners: (If a corporation, give names and addresses of stockholders, holding 1 per cent. or more of total amount of stock.) University of Pennsylvania, Philadelphia, Pa.

Known bondholders, mortgagees and other security holders, holding 1 per cent. or more of total amount of bonds, or other securities. No bonds or mortgages outstanding.

GEORGE W. KEITEL,
Business Manager.

Sworn to and subscribed before me this 17th day of October, 1928.

B. M. SNOVER,
(Seal) Notary Public.
My commission expires April 8, 1933.