

## BOOK REVIEWS

**PATENTABILITY AND VALIDITY.** By Charles W. Rivise and A. D. Caesar. Michie Company, Charlottesville, Va., 1936. Pp. xix, 755. Price: \$10.00.

As the title indicates, the authors have not attempted to deal with the entire subject of substantive and adjective patent law but have confined their discussion to two phases of substantive patent law, namely, patentability and validity. They use the term "patentability" to refer to the invention, as distinguished from the patent covering it, pointing out that an invention may represent patentable subject matter and yet the patent purporting to cover it may not be valid.

In the introductory chapter, the authors have discussed the common law protection of inventions, the constitutional basis for the patent system, suppression of invention and trade secrets. They have also outlined the prerequisites of patentability and validity and have discussed the effect of the presumption of validity, the effect of public reaction upon validity, the effect of non-use of the invention upon validity, defenses in an infringement suit affecting validity and estoppel to deny validity.

The prerequisites of patentability are then taken up in separate chapters covering patentable subject matter, utility, novelty and invention. Under the heading of "Patentable Subject Matter" the authors have discussed the classes of patentable subject matter, giving illustrations of patentable and unpatentable subject matter in each class. The classes enumerated and discussed are an art, meaning a method or process, a machine, a manufacture or article, a composition of matter, an improvement on an existing art, machine, manufacture or composition of matter, a variety of plant, a design for an article of manufacture. Distinction is made between chemical processes and mechanical methods. Considerable attention with illustrations is given to unpatentable processes, products and discoveries, including mental processes, natural products, printed matter and abstract discoveries.

Under the heading of "Utility" patentable utility is defined, followed by a discourse on evil uses of operative devices, the degree of usefulness, the time for judging utility, inherently dangerous devices, inventions contrary to well recognized law or public policy. Lack of utility as a defense to an infringement suit and non-use of a patented device as evidence of lack of utility are also discussed in this chapter.

In discussing novelty, numerous examples are given of analogous and non-analogous arts together with the citations of the decisions upon which the examples are based. The methods of disproving novelty, including prior invention, prior knowledge, prior use, prior disclosure in a patent and prior disclosure in a printed publication are taken up in detail.

Three chapters are devoted to the subject of invention, in which the authors take up the ways of determining invention, pointing out that the subject matter of invention must be viewed from the standpoint of the art concerned. The question of validity is then discussed in separate chapters with reference to the applicant for a patent, the patent application and its disclosure, the claims, Patent Office prosecution as it affects validity, forfeiture of right to patent protection and double patenting. In each of these chapters, numerous illustrations are given.

The style of the authors makes their book valuable as a reference book, because of the numerous illustrations given, the well defined methods of classification, a discussion of both sides of the question and the authors' analysis and opinion of the correct view. In general, decisions are not quoted abstractly but

an attempt is made to give the specific facts upon which each decision is based. In other words, the authors have followed the general principle of relying upon a decision only for the specific issue involved and have not tried to draw general rules from decisions without regard to the facts therein.

Richard Spencer.†

ADMINISTRATION OF WORKMEN'S COMPENSATION. By Walter F. Dodd. The Commonwealth Fund, New York, 1936. Pp. viii, 845. Price: \$4.50.

This rather ponderous volume is designed for a purpose and should be judged accordingly. The preface disclaims any appeal to the "general reader" and explains the abundance of detail by the desire "to present the issues to those primarily interested in workmen's compensation and in problems of governmental administration". Even the latter are limited severely to the subject in hand, as shown by the meagre discussion of "rule and discretion" in the next to the last chapter. Moreover, wisely enough, Mr. Dodd has not made this a lawyer's book in the narrower sense, although lawyers can learn much from it, including a realization of some decidedly unsavory aspects of their own profession (and much the same thing may be said of the medical profession).

The first two chapters discuss the movement toward and enactment of compensation laws. Although much of this is more or less familiar, the reader cannot help but be impressed by the momentum of the movement. The third chapter outlines the major administrative problems and the following chapters consider those problems at length. No one can read those discourses without being convinced of the careful work done upon them. The criticism of court administration of workmen's compensation is very forceful. The great importance of the uncontested case is recognized by extensive and illuminating treatment. The contested case, including court review of compensation awards, of greatest interest, of course, to lawyers, is by no means neglected—quite the contrary. Then follow informative chapters on medical care, security for payment of compensation, the measure of compensation, accident prevention, and rehabilitation and lump sum settlements. Next comes a chapter on the still important questions having to do with industrial injuries not under workmen's compensation. The next to the last chapter summarizes concerning administrative organization, personnel, cost of administration, rule and discretion, and also discusses the judicial attitude toward workmen's compensation and jurisdictional problems (extraterritoriality and the like). The treatment of the last matter, the only one upon which the reviewer is particularly competent to speak,<sup>1</sup> is remarkably good, as far as it purports to go, although one searches in vain for any reference to the "business localization" theory (somewhat different from employment localization) developed in Minnesota and used, at least as a factor, in a number of other states. The concluding chapter returns to the progress of workmen's compensation with emphasis this time upon the desirability of further improvement and greater uniformity.

A few discussions which struck the reviewer as particularly interesting may be mentioned in passing. The plea against false economy as to field work in connection with uncontested cases is forceful and convincing. The same thing may be said with regard to the objections to hampering the administrative tribunal with rules of procedure and evidence which it was created to avoid. The discussion

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1. See Dwan, *Workmen's Compensation and the Conflict of Laws—the Restatement and Other Recent Developments* (1935) 20 MINN. L. REV. 19.

of the scope of judicial review is penetrating and realistic. The use of interstate compacts as a means of achieving uniformity is dismissed a bit summarily. Of course many other interesting passages are to be found.

It must be obvious that the reviewer is in favor of the book; it accomplishes its avowed purpose admirably. Yet it is a compliment rather than otherwise to suggest that an abridged edition be prepared for the wider group who should study the book but are not likely to read the present edition because of its sheer size.

*Ralph H. Dwan* †

JUDGES AND LAW REFORM. By Sam Bass Warner and Henry B. Cabot. Harvard University Press, Cambridge, 1936. Pp. viii, 246. Price: \$3.00.

The Preface states that the volume is the fourth of the Harvard Law School Survey of Crime and Criminal Justice in Boston. The wrapper has some commendatory notes on the three preceding volumes, giving titles and authors. Otherwise, the book gives no further facts as to the survey itself or the place of the book in the series. Though the title of the book itself does not so indicate, it is confined primarily to criminal law reforms.

The central theme of the book is the duty of courts not only to determine cases but to take active steps to improve the procedure. To use the repeated quotation from another report: "Real administration of justice is a positive thing. It consists of positive powers, positively exercised. It is not the passive thing the public is now receiving. . . . That function is not adequately exercised by sitting on a bench and watching justice float by." The book has many facts and figures about the Boston and Massachusetts courts, setting out the manner in which these courts operate in criminal cases. The authors comment on the specific suggestions of others for the better administration of criminal law and make some suggestions of their own.

The theme is interesting, but the book is somehow hard reading, perhaps because of an apparent gap between a large amount of detail and final deductions or conclusions therefrom. It may become a secondary source book and be used with other crime surveys as a basis for a more general statement of principles, if there by any, or as a basis for comparative study by other crime commissions. The usefulness of the book for these purposes would have been enhanced by a more complete index. It may be of specific local use in Massachusetts. It will hardly become a popular book, even for lawyers and judges. However, the particular courts and problems of Boston are made the basis for general observations, some of which will be mentioned.

The authors believe that part time judges and trials *de novo* on appeal to superior court are the principal causes of the apparent general criticism of the Boston district courts. They would increase judges' responsibility by removing *de novo* trials, give the judges adequate salary for a full time job, and remove the temptations and suspicions that are present when a person is judge in one branch of a court and a lawyer in another. Further, they would separate petty traffic and motor vehicle law infractions from criminal trial routine. These violations are not crimes but public torts; the nature of the wrong is different; the treatment should be different; and the mixed handling of crimes and public torts by the same court makes for wrong disposition of both types of offenses.

Not all faults in criminal trials are assigned to the judges. Some fault is assigned to police, district attorneys and juries. The police fail to prepare for

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trial after apprehension. The district attorney's office is undermanned. The jury selection machinery is inadequate, and jury service is made unnecessarily distasteful to competent jurors. Further, it is said prosecution witnesses are imposed on by numerous hearings and continuances, brow-beaten on cross-examination, and their comfort or convenience disregarded.

The apparently arbitrary exercise of large discretion given to courts in imposing sentences suggests to the authors "A Disposition Tribunal", a separate sentencing court or judge. And just as opinions are written on guilt or innocence, so reasons should be given for the nature of the sentence imposed so as to furnish a guide for future treatment of the defendant, a precedent for other sentences, and a basis for future study. There might also be a revision of the sentence based on conduct after sentence, as reported by a prison or probation officers. One need not go the full way, and yet admit the importance of this general problem.

And now for the positive functions of the judges: the legislature should expressly grant the rule-making power to encourage exercise of this inherent power; a judicial council should suggest proposed changes in rules to the court for its consideration; the judges should, so far as possible, supply deficiencies in statutory regulation of court procedure; the right to comment on evidence should be restored; clerks, and other court personnel, should be appointed by the judges; and rules and procedure should be kept up to date by revisions. Lawyers should have an active part in the nomination of judges and should also be active members of a judicial council.

Though the authors are shrewd and practical in their specific observations, they are almost naively hopeful of improvement at large. The comments on particular problems seem generally sound. The authors do a service in calling attention to the field for judicial reform, which appears to have been overlooked, even though they may have gone too far for the sake of emphasis. Many of the proposals would require legislative action; some would require amendment of state constitutions. As the authors themselves observe, there is now a somewhat general movement toward "positive" administration of justice by the courts, manifesting itself in the granting of rule-making powers and in the creation of judicial councils. Nevertheless, it is a bit strange, but perhaps encouraging, that a volume urging "positive" administration of justice by the judges should appear at a time when even the "passive" determination of particular cases is subject to criticism by high authority.

*F. H. Stinchfield.†*

CASES ON THE LAW OF TAXATION. By John MacArthur Maguire and Roswell Magill. The Foundation Press, Inc., Chicago, 1936. Pp. xxviii, 1034. Price: \$7.00.

This is the second edition of a compilation by the same editors. The first appeared five years ago. In the interim three supplements were published. Those supplements were, as is also the present new edition, in pursuance of a plan announced in the Introduction to the first edition, wherein it was stated: "Proper flexibility, it is believed, will necessitate revisions more frequent than those usually accorded casebooks. American taxation is being subjected to testing scrutiny which may cause profound legislative changes. . . . Hence it is reassuring to know that the publishers of this book are fully prepared to carry on a steady policy of revision."

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It would seem that the imperative of proportioning revenues to the huge increase in the cost of government, with all that that undertaking implies, rather than "testing scrutiny", has accounted for most of the changes in our tax laws, and will continue to do so. However, be the reason what it may, it is safe to predict that taxation, and the law of it, will be major subjects on legislative agenda and court dockets for years to come, and hence that case books on taxation will be serviceable largely in the measure they are kept current with the judicial output. In the present instance, the fact that the revision contains *United States v. Butler*<sup>1</sup>—the *A. A. A. Case*—which was decided January 6, 1936, illustrates the approximate up-to-dateness of the work.

The prefatory notes and assembled cases cover a wide range of phases of the general subject, indeed all phases. The book begins with a fundamental, "Legitimate Purposes of Taxation", that is, the purpose of the levy as affecting its constitutional validity. It then deals with questions relating to administrative procedure, under the general heading "Levy, Return, Assessment". "Taxability and Exemptions", and several other subjects are treated as sub-topics under "Assessment". Then "Collection of Taxes and Taxpayers' Remedies", "Excise Taxes", "Estate, Inheritance and Gift Taxes", etc. The cases are well chosen, appropriately classified, and serve to illustrate in an instructive way the various rules and principles covered.

In any thoughtful reading of a considerable number of judicial opinions relating to the same general subject questions of inherent soundness, consistency with other decisions, etc., are of course sure to arise in the reader's mind. Scanning the cases here reported, two quæres suggest themselves to this reviewer. Since they appear to lend themselves to interesting and worthwhile debate, he submits them.

#### I.

Referring again to *United States v. Butler*,<sup>2</sup> it is suggested that *Carter v. Carter Coal Co.*,<sup>3</sup> decided five months later, be compared with it. In the later case the Court observed:

"The convention, however, declined to confer upon Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to entrust to Congress *by specifying them*, thereby denying all others not granted expressly or by necessary implication. It made no grant of authority to Congress to legislate substantively for the general welfare, . . . and no such authority exists, save as the general welfare may be promoted by the exercise of *the powers which are granted.*"<sup>4</sup>

On its face, the foregoing language seems not to accord with the decision in the *Butler Case*. Since, however, that case was cited by the Court in the immediate connection in which the sentences quoted appear, presumably no modification of the earlier decision was intended. Yet it is difficult to reconcile the passage with the ruling in the earlier case, unless legislation for the general welfare by the exercise of the *taxing* and *spending* powers—held in the *Butler Case* to have been authorized in and by the first clause of Article I, Section 8 of the Constitution—was meant by the Court to be included in the italicized words in the quotation.

1. 297 U. S. 1 (1936).

2. *Ibid.*

3. 298 U. S. 238 (1936).

4. *Id.* at 292 (italics supplied).

The quære, therefore, emerges, Does *Carter v. Carter Coal Co.* modify *United States v. Butler*; and if so, to what extent?

## II.

Under the general head, "The Gross Estate", and the sub-head, "Revocable Trusts", *Reinecke v. Northern Trust Co.*<sup>5</sup> and *Helvering v. City Bank Farmers Trust Co.*<sup>6</sup> are printed.

The *Reinecke Case* involved section 402 of the Revenue Act of 1921. Sub-section (c) of that section requires that the gross estate of the decedent include any transfer "intended to take effect in possession or enjoyment at or after his death". In that case certain trusts were held not includable, because, although the settlor had reserved the power to alter the terms of the trust, the exercise of the power was conditioned upon the assent of the beneficiaries. The Court said: "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by the decedent which might inure to his own benefit as if the gift had been absolute".<sup>7</sup>

The *Helvering Case* involved section 302 of the Revenue Act of 1926. Sub-section (d) provides that the gross estate shall include any transfer in which the decedent at the time of his death had the power "either by the decedent alone or in conjunction with any person to alter, amend or revoke" it. The decedent had reserved such powers, but their exercise was contingent upon the written consent of the trustee and the settlor's husband, the latter being a beneficiary. It was held that sub-section (d) applied and that the transfer was taxable. To reach that conclusion the Court, of course, found it necessary to distinguish the case in hand from the *Reinecke Case*, and undertook to do so.

Assuming that the decision in the *Reinecke Case* on the question of the effect of the provisions relating to revocation in the trust instrument was sound, was or was not the decision of that question as presented in the *Helvering Case* sound also?

Although the two cases involved different sections of the statute, that fact alone would seem not to afford a basis for the distinction drawn, since the underlying and pivotal question in both cases was the same, namely, Is a provision purporting to reserve a power of revocation of any legal significance or efficacy when by its terms the settlor can exercise the power only with the consent of the beneficiary of the trust?

Apparently the philosophy of the holding in the *Reinecke Case*, that it is not, is that the ostensible power to revoke is by such a qualification so neutralized and emasculated that, in contemplation of law and also as a practical matter, the provision is to be treated as though it were not there. From which it would appear to follow as a corollary, that such a provision is unavailable and without efficacy in any connection in which the existence of a power to revoke is essential in order to bring the transfer within the gross estate of the decedent. And whilst the phrase, "any person", in the statute, is a broad one, yet must it, or must it not, be taken as referring only to those persons who are deemed in law likely to assent to the revocation? And in the light of the principle enunciated in the *Reinecke Case*, is it permissible to construe the words as including a beneficiary?

James Quarles.†

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5. 278 U. S. 339 (1929).

6. 296 U. S. 85 (1936).

7. 278 U. S. 339, 346 (1929).

CAPITAL SURPLUS AND CORPORATE NET WORTH. By Raymond P. Marple. Ronald Press Co., New York, 1936. Ppp. viii, 195. Price: \$3.00.

This is a book about the proper charges and credits to the principal corporate net worth accounts, "capital", "capital surplus", and "earned surplus". Under most state laws it is possible for a corporation to return to shareholders as dividends a part of their investment in the enterprise. Speaking generally, that minimum which may not be so returned is "capital", a figure which should be shown on the balance sheet. "Surplus" is the amount by which the shareholders' interest in the corporation exceeds its legal capital. However, creditors, investors and others will be interested in knowing also what part of this surplus represents contribution by the shareholders as distinguished from accumulated earnings of the business, and to an increasing extent corporation laws impose special restrictions on the disposition of the former. It is therefore important to distinguish "capital surplus" from "earned surplus".

One of the chief sources of capital surplus is the practice of issuing no-par capital stock and allocating only a part of the proceeds to the capital account. Another is the statutory reduction of capital, an easy process under many state laws, and frequently resorted to in order to create a fund against which the book value of property may be written down without creating a deficit. Both receive thorough and informative treatment in chapters of Dr. Marple's book. Initiates into the dark magic of corporate accounting will find especially enlightening the lucid analysis of the effect of a reduction of capital upon earnings and dividends. The immediate and obvious effect of such a reduction is to make it possible to pay dividends out of funds which, before the hocus-pocus, were frozen into the business as a protection to creditors. More subtle is the effect of such an operation, when used as the basis for write-downs, in permitting the management to show a sudden improvement in earnings, by reducing the property values on the basis of which depreciation is calculated.

Other sources of surplus analyzed for the purpose of determining the propriety of regarding them as capital surplus are: stock premiums, repurchase of treasury shares at less than par or stated value, write-ups, donations, forfeiture of stock subscriptions. Of particular interest is the discussion of what must be for most accountants as well as most lawyers a purely academic problem, balance sheet representation of the effect of changes in the general price level.

The book is a good elementary text in its restricted field. Lawyers will find it useful less for its occasional tabulations (from secondary sources) of relevant state laws than as an intelligible introduction to a subject with which all of them are concerned and too few are familiar.

*L. B. Schwartz.†*

TRADE-MARK PROTECTION AND UNFAIR TRADING. By Walter J. Derenberg. Matthew Bender & Co., Albany, 1936. Pp. lxxviii, 1162. Price: \$20.00.

This is a refreshing book. The guiding principles of the law of trade-marks and unfair competition are throughout stated with great clarity of thought and language, and care is taken not to obscure the essential by dwelling on minor details. In contrast to the practice still found in many textbooks, reference to cases no longer reflecting present judicial thought has, as a rule, been avoided. Nor is there any attempt to impress the reader with a mass of citations. From the large number of decisions still being cited as precedents those have been selected which best set forth the now prevailing principles.

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Aside from giving an excellent exposition of the law, the author never hesitates to criticize the courts from the viewpoint both of legal consistency and policy.<sup>1</sup> Occasional references to foreign legal systems testify to the author's breadth of vision and greatly add to the value of the book. Although not undertaking, in a strict sense, a comparative study, the main stress being laid on the American law, he shows in short but illuminating notes how the problems confronting the American lawyer are approached and solved abroad.

There is no room here to discuss the contents of the book at length, but special attention should be called to the chapters on State Registration and on the Relation between the Patent Office and the Courts. In view of the recent public debates and the many proposals for new legislation, the author's discussion is both timely and enlightening. As regards the relation between the courts and the Patent Office, he reaches the conclusion that the English law, though not entirely satisfactory, has dealt with this question more effectively than has the American law. In his chapter on State Registration he takes issue with those who would "undermine the basic rules of the common law by the enactment of compulsory state registration statutes." Disagree with Derenberg if you please—but think carefully before you do.

Of course Derenberg has, in many instances, built on the contributions of other writers, in particular those of Handler and Schechter. But it must be said that his is the first sustained effort at a systematic treatment and critical analysis of the *whole* field of trademark protection and unfair competition.

Mr. Edward S. Rogers, the prominent trademark specialist of the Chicago Bar, has written a foreword in which he expresses his appreciation of Derenberg's work. The Supreme Court of Pennsylvania in the recent case of *Quaker State Oil Refining Co. v. Steinberg*<sup>2</sup> has relied on his book as an authoritative exposition of trademark law. There is little doubt that other courts will follow.

John Wolff.†

THE COMMERCE POWER VERSUS STATES RIGHTS. By Edward S. Corwin. Princeton University Press, Princeton, 1936. Pp. xiv, 276. Price: \$2.50.

It was, of course, to be expected that a book on this engrossing subject by so able a writer as Professor Corwin would be very interesting. But the book is more than that—it is actually exciting. And this notwithstanding its rather lame conclusion—a conclusion which must shock the reader who had all along thought he was going somewhere, only to find at the end of the book a signpost reading "No Thoroughfare". But whatever the state of mind of the reader at the end of the book when he discovers that he has been led into a blind alley, the road itself is as exciting as the unraveling of any murder mystery could possibly be. For the book is a grand inquest on the subject "*Who Killed the Commerce Power Granted to the Federal Government by the United States Constitution?*"

That the power was once in existence is taken for granted, and that it was very much alive about a hundred years ago is proved very early in the proceedings by an analysis of John Marshall's great judgment in *Gibbons v. Ogden*.<sup>1</sup> That it is pretty nearly dead, or rather useless for the purpose of advancing the general welfare, is also proved fairly early in the proceedings by contrasting *Gibbons v. Ogden* with *Hammer v. Dagenhart*.<sup>2</sup> *Hammer v. Dagenhart* did not, of course,

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1. See, for example, his incisive criticism of the *Fashion Park* case on pages 433 *et seq.* 2. 189 Atl. 473 (1937).

1. 9 Wheat. 1 (1824).  
2. 247 U. S. 251 (1918).



overrule *Gibbons v. Ogden*: "The Court had prior to this rendered too many decisions of a contrary import" to make that possible. But, says Professor Corwin, the later decision, "*transfers the ultimate discretion in the use of the interstate commerce power from Congress to the Supreme Court.*" And the later course of the inquest shows that the Supreme Court had used the power which it had arrogated by its own decision in order to strangle the power which the Constitution has given to Congress. Or, to be more exact, in order to get a strangle-hold upon the legislative power of Congress, which may be relaxed or tightened as the Court may see fit; and it usually sees fit to tighten the noose, at least whenever the relation of employer and employee comes into question.

"The question that necessarily arises upon a comparison of Marshall's opinion in *Gibbons v. Ogden* and Day's opinion in *Hammer v. Dagenhart* is, how did the Court ever get from the one to the other—what were the steps? The answer is, that there were no *steps*. The method of the Court was nothing so pedestrian. Rather is it to be compared to that of those Chinese rivers which occasionally abandon the courses they have followed for decades and proceed to plow a new channel to the sea, at sharp angles to the first. Only in the case of the Court, while a new channel was cut, the old one also continued in use. The once impressive current of harmonious doctrine was abruptly cleft into two lesser currents flowing in opposite directions."<sup>3</sup>

The main body of the book is devoted to an attempt to follow the two currents flowing in opposite directions—no wonder the chase is exciting. Unfortunately, the reader, excited and exhilarated by the chase, is let down at the end by the assurance that there is nothing that he can do about it except to get down on his knees and pray. Not even a constitutional amendment to curb the power of judicial review, which, "perhaps ought" to be adopted, would be of much use.

"The obvious fact is that such problems are much too intricate for the gross, fumbling hand of Amendment to deal with; and from this it follows that *we must still trust the Court, as we have so largely in the past, to correct its own errors.*"<sup>4</sup>

So there we are.

Louis B. Boudin.†

NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW (4 vols.). Columbia University Press, New York, 1935-36.

THE ORIGINS (Vol. 1). By Phillip C. Jessup and Francis Deak. Pp. xiv, 294. Price: \$3.75.

THE NAPOLEONIC PERIOD (Vol. 2). By W. Alison Phillips and Arthur H. Reede. Pp. ix, 339. Price: \$3.75.

THE WORLD WAR PERIOD (Vol. 3). By Edgar Turlington. Pp. xi, 267. Price: \$3.75.

TODAY AND TOMORROW (Vol. 4). By Phillip C. Jessup. Pp. vii, 237. Price: \$3.75.

It would be impossible even in the space of a long review to sing all the praises which these four volumes deserve. The claim in their title that they cover

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3. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1936) 17-18.

4. CORWIN, *op. cit. supra* note 3, at 265.

the history, economics and law of neutrality is over-modest, for they cover not only these but also a good deal of its sociology.

"The Origins" traces the development of the law of neutrality from the rise of the modern national state to about the middle of the eighteenth century. In it we see the early emergence of such honoured doctrines as those of contraband, blockade, free ship free goods, enemy ship enemy goods, and continuous voyage. As yet they were not much honoured either in the breach or in the observance, for they were none of them established as binding in the absence of express treaty provision between the belligerent and the neutral concerned. The plea of the "unprecedented nature" of a war need not be invoked by a belligerent to excuse its flagrant violation of theoretically neutral rights. The only limit on its freedom of action, apart from treaty, is the fact that the belligerent today may be neutral tomorrow and vice versa, and that imprudent claims by a state in one capacity might rebound to its great discomfort when next it acted in the other.

All this is as one would have expected. So is the interesting tale of the devices used by traders to evade the belligerent nets. "Bribery and forgery could secure full sets of papers proving that the ship belonged to any desired nationality and was sailing between the two most innocent ports in the world. . . . One set of papers would be designed to satisfy the English that the voyage was for the benefit of them, or their allies. Another set would prove to England's enemies that this was a venture most obnoxious to the English." Conversely, we are reminded of the role of the profit-seeking privateer in the chastening of the neutral, and of our good luck in being rid of that institution. "In many cases", we are told, privateers removed technical difficulties by strong arm methods, as when one of them visited a neutral merchantman and carried off her papers, to be shortly followed by a second privateer which seized the prize on the ground that she had no papers". Nor does the belligerent's *alter ego* fail to show its faithfulness to type in the judgments of prize courts directed to the effectuation of the belligerent's purposes.

Volume II takes up the thread at the last decade of the eighteenth century and has as its title "The Napoleonic Period". The reviewer has not studied this volume as thoroughly as he would wish, and will therefore content himself with saying that it takes the ambitious form of an analysis in Part I of the struggle "between belligerents and neutrals throughout the period of French Revolutionary and Napoleonic wars", and in Part II "an economic analysis of the effects of this conflict upon the neutral nations". It is of great importance from the American point of view, giving as it does the setting of the first American experiments in neutrality which led with the inexorable tread of a Greek tragedy to the War of 1812.

Volume III on "The World War Period", by Edgar Turlington, and Volume IV on "Today and Tomorrow", by Professor Jessup, complete the history and point the moral. They bring the problems of neutrality home to American business and American bosoms in a manner and with a thoroughness unrivalled by any other work known to the reviewer. They contain more illumination and wisdom on the twin American conceptions of isolation and neutrality than has been produced or even suggested in all the testimony before legislative committees, and all the propaganda for and against American entanglement since the close of the last war. The story told by Mr. Turlington is a familiar one in its outlines. British encroachment on neutral rights on the plea of the unprecedented nature of the war involved the progressive extension of the list of contraband articles until it reached one hundred eighty-one items of absolute and thirty-four of conditional contraband by July 1917; the virtual abolition of the distinction between conditional and absolute contraband; the famous "blockade" against Germany and the claim to detain and take into port "all ships carrying

goods of presumed enemy destination, ownership and origin"; the extensive application of the doctrine of "ultimate enemy destination" with its bastard statistical corollary (as irrebuttable a presumption as was ever inconclusive).

These contortions of the law of neutrality were orthodox, however, compared to what the belligerents did under cover of the doctrine of "sovereign right". The most effective of these measures was the British system of "bunker control", whereby neutrals were not allowed to fuel at depots under allied control without a license; licenses were naturally only granted on condition that the owners of the vessels undertook not to allow any of their fleet to carry goods to or intended for the enemy, or even on condition that they supplied vessels for the use of the allies. This device was supplemented and perfected by the use of the notorious "black lists". Again both sides brought pressure to bear on neutrals to compel them to trade or not to trade with one side or the other by import, export and financial boycotts.

As a result of these measures, and in spite of general illusions to the contrary, the statistics as given in this volume show that the total exports and imports of Holland, Sweden, Norway, Denmark and Switzerland actually fell substantially during the war and in the United States (while neutral) the increase was not so large as is usually imagined, increased prosperity being attributable rather to the expansion of industry to fill the domestic market abandoned by the belligerents. So far did this control by the belligerents go that after the United States entered the war, the rest of the neutrals entered into the so-called "rationing agreements" whereby quotas of their necessary imports were allocated to them in return for exports to the Allies and their agreement to limit their exports to the Central Powers.<sup>1</sup>

The provocations issuing from the side of the Allies have been emphasised since it is often forgotten that as early as November 5, 1915, Ambassador Page informed His Majesty's Government that the United States "cannot with complacency suffer further subordination of its rights and interests to the plea that the exceptional geographical position of the enemies of Great Britain require or justify oppressive and illegal practices". The sufferings of the United States and the other neutrals continued to be borne, however, if not with complacency, at least with fortitude. Eventually it was provocation issuing from the German side which converted American fortitude into war-like virtue.

This clash of belligerent and neutral claims is lucidly told not only in terms of law, politics and history, but in terms of economics, buttressed with tables of losses to neutrals arising from belligerent measures, as well as of fluctuations and changes in neutral imports, exports and shipping. To these tables, the able work of a number of Mr. Turlington's collaborators, the reader's attention is particularly directed.

It is necessary, however, to make an end. Let us hasten therefore to the moralist and his moral; and let it be said forthwith that Professor Jessup is a first rate moralist and his moral itself unimpeachable so far as the facts are concerned. The rules of the law of neutrality are a product of constant unstable compromise, and there is no good reason to hope that the point of equilibrium is yet reached, or that belligerents will be any more considerate of neutral rights and feelings in the future than they have been in the past, or that the American people and its government will be more saint-like under provocation than they have ever been. That being so, two broad alternatives are open to the United States bent on "honest" neutrality as the path to peace.

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1. It is most interesting to note that this assumption by belligerents of control over world shipping and movement of goods during the war is viewed by thinkers like Sir Arthur Slater and Sir Alfred Zimmern as a high-water mark in the evolution of the technique of international cooperation. See ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW* (1918-1935) (1936) 142-149.

One is abandonment, partial or general, of her right to trade by sea during war time. The other is a carefully planned and solid alliance with other neutrals to form a "united front" of neutral bargaining power against belligerents.

The nearest approach to an effective plan of abandonment is the proposed "cash and carry" legislation which is before Congress at the time of writing. Professor Jessup rightly points out that insofar as such legislation only applies to trade with the belligerents, it will not effectuate its object; for trade with neutrals was even more fruitful a source of friction during the last war than trade with belligerents. "Ultimate enemy destination" is a ghost still unlaid. On the other hand, to extend the legislation to trade with neutrals as well as belligerents would mean laying up the mercantile marine of the United States for the duration of the war, a prospect all the more formidable since neutral shipping was by far the greatest profit maker in the last war.

There remains the alternative of a "united front" with other neutrals against belligerent impertinences. This idea is thoroughly explored under the title "The Revision of Neutrality", in a very long chapter. Neutral cooperation is to have two main objects, first to keep the neutrals out of war (presumably whilst protecting them from undue belligerent pressure) and second "in some respects analogous to the theory of economic sanctions under Art. 16, neutral cooperation would tend to shorten the war by cutting off supplies essential to the belligerents". Both these objects would be attained by limiting all neutral trade with the belligerents to their normal peace time trade, and resisting belligerent efforts to reduce it still further. This simple idea is fraught with great difficulties, but they are honestly faced and discussed, the general conclusion being that assuming careful international organisation in advance, somewhat on the lines of the Argentine Anti-War Treaty of 1933, already ratified by the United States,<sup>2</sup> and assuming that the League system of economic boycott "operates perfectly" so that the united neutrals can cooperate with it, at least to the extent of non-interference, this revised neutrality "may be expected to shorten the duration of the war and restrict its spread by eliminating clashes between belligerent and neutral rights at sea".

A European reviewer, and particularly one who hails from Great Britain, is left somewhat breathless. The more convinced he is of the soundness of the author's argument, the more is he convinced that the circle has all but been squared. Isolation necessitates neutrality; neutrality necessitates cooperation among neutrals; cooperation among neutrals necessitates at least passive cooperation with the League of Nations when its system of economic sanctions is "operating perfectly". In brief, eliminating the mediate terms, *Isolation necessitates cooperation with the League of Nations when its system of economic sanctions is "operating perfectly"*. In the light of such an analysis, executive declarations concerning trade with neutrals during the Italo-Ethiopian war, and the obvious attempt to correlate American neutrality with League sanctions lose their anomaly. So let it be! Perhaps the tribulations of neutrality will succeed, where Wilsonian idealism failed, to make the hue and cry a part of the international social consciousness.

In making this contribution to international cooperation the scheme leaves largely unsolved the peculiarly American problem of neutrality. It is only to be correlated with League sanctions when these latter "operate perfectly". It needs no great perspicacity to observe that League sanctions are only likely to "operate perfectly" when the war is not between major powers. Now the danger of

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2. See Vol. IV, p. 175. The Treaty provides in Art. 3 for the adoption by the signatories "in their character as neutrals" of "a common solidary attitude", in their efforts for the maintenance of peace, whenever any state signatory engaged in a dispute fails to comply with its provisions.

American neutrality leading America into war can scarcely arise except in a struggle between major powers. In other situations such as that of the Italo-Ethiopian war, no risk of embroilment is really involved for the United States, and any neutral measures in which the United States cooperates, will be directed rather to shortening the war than to preventing the neutral being dragged into it. It is in the major conflagration that the risk of embroilment arises; but it is exactly here that the author would have the common and solidary action of the neutrals independent of any League measures. Whether this action will attain its end of preserving neutral rights without the need of neutral recourse to arms, will only be slightly less doubtful than it was when the neutrals were not united. It will be dependent perforce upon what needs of the belligerents only the neutrals can supply on the one hand, and what needs of the neutrals only the belligerents can supply on the other. The history of this problem in the last war, does not encourage the belief that a combination of the states likely to be neutral in a major conflagration will, even if they include the United States, enjoy a sufficient preponderance of bargaining power to deter belligerents from excesses as provocative as any in the past.

Perhaps we must conclude that the world cannot yet be made safe for neutrality.

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