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Book Reviews

AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES. By Charles A. Beard. With a New Introduction. New York: The Macmillan Company, 1935. pp. xxi, 330. $2.

THAT Charles Beard, reissuing after twenty-two years "An Economic Interpretation of the Constitution of the United States" should find it necessary to introduce the new volume with a patient defense of his work and his motives is a sorry comment on the tenor of American thinking about American history. That a journal devoted exclusively to law should want Dr. Beard's book reviewed in its pages is, on the other hand, a hopeful sign concerning the future tenor of American legal thought. For it is both ridiculous and tragic that Dr. Beard's penetrating analysis of the economic motives behind the Constitution is not required reading for every course in American history and every course in American constitutional law. Certainly no one who is ignorant of the facts which Dr. Beard first put convincingly between two covers can know much or understand much about the Constitution.

Thirteen pages of introduction—thirteen pages pregnant with historical horse sense—are all that distinguish the new edition from the old one. Those thirteen pages alone are well worth the price of admission, and the text that follows them is, unfortunately, just about as fresh today as it was in 1913—"unfortunately" because the stuff of Dr. Beard's book should by now be as stale and unstartling as the multiplication table. Once stated as he stated it, it should have been quickly woven into the fabric of accepted knowledge, and should today be taken as a matter of course.

The parlor patriots—that large group of rather canny sentimentalists which seems to include most of the historians who write school-books and most of the successful and therefore respectable and therefore influential constitutional lawyers—have seen to it that Dr. Beard's notions about the Constitution have not only not become common knowledge but have been religiously hush-hushed as rank heresy. Yet all that Dr. Beard said about the Constitution was that it was written and put across by a small, aggressive group of men who stood to benefit financially by its adoption, that its by no means accidental theme was the protection of acquired private property, and that an amazing majority of the adult males in the thirteen original states had no voice, direct or indirect, in the framing or ratification of the document. He said it, of course, in a great deal more detail, for he did not presume to say it without benefit of carefully collected facts, citations, and figures. In form, the book was little more than a devastating catalogue of facts. That those facts, however, have never been discredited nor seriously denied has not stopped the parlor patriots from denouncing Dr. Beard's conclusions, although the conclusions were so apparent from a mere statement of the facts that Dr. Beard scarcely bothered to make them explicit.

The book made a splash when it was published. It rocked the boats of all the little pseudo-scholars who had been sailing peacefully around in circles on the untroubled waters of mythological history, and they resented it. They called Charles Beard names, chief among which was "Marxist," and though they eventually managed to calm the surface, they continued for years to shout their indignation at the receding ripples. Now, in his new introduction, Dr. Beard has taken time out to answer them.

It is not an angry answer. Quietly and dispassionately, with an air of being forced to elaborate the obvious, Dr. Beard explains and justifies his work. He had been intrigued by Madison's broad hint, in the tenth of the Federalist papers, that

the Founding Fathers had played extremely practical politics. He had not been satisfied by the tone of abstract formality grown fashionable in the field of constitutional history and theory. He had been unable to swallow a purely moral explanation of the admitted conflict over the adoption of the Constitution. He sought the sources and got "the shock of my life." Not only, he discovered, had economic interests been at the root of the movement for the Constitution and of the fight over ratification, but the framers had been well aware of it. What Dr. Beard found, he published as "an economic interpretation of the Constitution," with the emphasis on the "an." He did not pretend to omniscience nor to any "formula of completeness and comprehensiveness." "I simply sought to bring back into the mental picture of the Constitution those realistic features of economic conflict, stress, and strain, which my masters had, for some reason, left out of it, or thrust far into the background as incidental rather than fundamental."

Then, turning to his critics, Dr. Beard picks Professor Theodore Clarke Smith as the sacrificial goat. Professor Smith, as recently as 1934, had been labelling the "Economic Interpretation" partisan, doctrinaire, and Marxian, and pinning ethical medals on the Founding Fathers for being "straight-thinking" and "national-minded." Dr. Beard takes Professor Smith to pieces as cooly and efficiently as a surgeon dissecting a corpse:—It is the traditional approach—the awed and adulatory crawl—which is, perforce, partisan and doctrinaire. Starting with a moral judgment, and then bending the facts so that they may be crammed into the mold of that judgment, it makes a fairy-story out of history and defends the fairy-story with religious fervor. Dr. Beard's approach—the search for bread-and-butter causes behind conflict and change—can be, and Dr. Beard has tried to make it, "coldly neutral." There is no need and no place in it for condemnation or praise. Nor is there any claim to the revelation of ultimates. "If anywhere I have said or written that 'all history' can be 'explained' in economic terms, I was then suffering from an aberration of the mind."

As for the "Marxian" label: "In the minds of some, the term 'Marxian,' imported into the discussion by Professor Smith, means an epithet; and in the minds of others praise. With neither of these views have I the least concern." As a student of history, Dr. Beard was of course not ignorant of the work of Karl Marx. Nor was he unaware that Aristotle, Madison, and others had preceded Marx in thinking that economic forces were vital and often fundamental in the shaping of history. But to suppose that a frank recognition of those forces or an emphasis upon them brands, or knights, a man as a disciple of Marx is to join with "those who use his name to rally political parties or to frighten Daughters of the American Revolution."

Yet, in laying low his conservative critics with a sort of cold contempt, Dr. Beard has managed to acquire a new and far more formidable heckler. Max Lerner, writing in the *Nation* under the title "Charles Beard Confronts Himself,"[1] objects to having Karl Marx treated so cavalierly. He seems to think either that the new introduction makes a turncoat of Dr. Beard, or else that Dr. Beard's notions of historical interpretation have always been a trifle shallow, or perhaps both. Mr. Lerner does pay tribute to the Charles Beard of 1913 who "dared defy all the myths and taboos of the historical scholarship of his day"; he pats Dr. Beard on the back for having "made history" and "showed that a new Higher Criticism had come into existence." When it comes to the new introduction, however, "unless it be on purely tactical grounds in order to confound the professional patrioteers, I do not see the cogency of avoiding the Marxist stigma as if it were leprous," and Mr. Lerner goes on from there.

1. (1936) 142 THE NATION 452.

Now, I have great respect for Mr. Lerner, and for that reason I have read his article at least a dozen times, but I confess that I still can not be certain that I understand exactly what he is driving at. Or if I do understand, I do not think it worthy of Mr. Lerner. He speaks of Dr. Beard's refusal to be classified as a whole-hog Marxian as a lot of "twistings and turnings," which "may be explained by Mr. Beard's desire to escape any form of determinism in history." Yet Dr. Beard professed: "I have never been able to discover all-pervading determinism in history." Dr. Beard's clear implication is that he has been open to conviction about determinism. And Mr. Lerner's comment must mean, if it mean anything, that Dr. Beard is a liar, or that he does not know his own mind as well as Mr. Lerner knows it.

At this point, even the Charles Beard of 1913 begins to resemble, to Mr. Lerner, the tragi-comic figure of "the village atheist" who "got a kick out of destroying the theological and pseudo-spiritual myths." Does Mr. Lerner then, by contrast to historical atheism, insist on being given new faiths for old? For a moment he denies it:—"We do not want final explanations. What we want is an approach to the movement of history, a way of interpreting it." And for a moment I wonder just wherein lies Mr. Lerner's quarrel with Dr. Beard. Surely Dr. Beard gives us a definite "approach to the movement of history," even though Mr. Lerner choose to decry it as atheistic. But Mr. Lerner goes on. "One asks not only how fundamental are the economic forces, but what dynamic is there that they use and that uses them in the processes of history?" "The Marxians," he says, "have an answer" which "may be too sweeping or dogmatic," but "does give philosophic roots to the emphasis on economic factors." And though it is somewhere around here that I begin to lose Mr. Lerner's drift, I have a suspicion that he is asking for something pretty close to "final explanations," after all.

When Dr. Beard says that he does not want "final explanations" he is more convincing about it:—"He who really 'explains' history must have the attributes ascribed by the theologians to God. It can be 'explained,' no doubt, to the satisfaction of certain mentalities at certain times, but such explanations are not universally accepted and approved." Plain talk of this sort does not quite gee with Mr. Lerner's conclusion, in which he repeats that "the economic interpretation of history . . . must be part of a deeply rooted philosophy which makes room within the framework of economic forces for chance, contingency, and human effort." And when Mr. Lerner calls for a "deeply rooted philosophy," he *may* not be calling for "final explanations," but he seems to me to be calling for a brand of mental satisfaction which amounts to very nearly the same thing.

At any rate, Dr. Beard's approach does not give Mr. Lerner satisfaction. It leaves, I take it, too many ends sticking out. Mr. Lerner wants his history presented a bit more neatly; he wants the edges smooth and rounded, like an egg. He insists that Dr. Beard, having smashed the mythological egg, accept the Marxian egg or lay a better one. And I can not help feeling that Mr. Lerner, in this insistence and in his plea for a "deeply rooted philosophy," is coming perilously close to a demand for a new theology.

A theology of history need not be so naive as that embodied in the Constitutional fairy-story which Charles Beard first exposed in 1913. Nevertheless, as Thurman Arnold put it: "When men observe human conduct in the light of principles which they consider sacred or fundamental, they develop priests but not scientists."[2] Frankly, I can not conceive of a "deeply rooted philosophy" which does not rest on principles considered fundamental, and I therefore strongly suspect Mr.

2. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935) iv.

Lerner of crying for nothing more than a new set of priests. If history, or any other field of inquiry into human conduct and affairs, could be trimly fitted into a formula made up of basic principles, it would be pleasant indeed. But the ideal strikes me as more romantic than realistic—even though Mr. Lerner's economic determinism is substituted for the older historians' "finger of God."

Perhaps I do injustice to Mr. Lerner. I prefaced these remarks with the confession that I was by no means sure I understood what he was driving at. So perhaps he does not intend to praise Dr. Beard for shattering one theology and then damn him for not embracing or creating a new one. Dr. Beard, incidentally, brings his introduction to a close with a warning that, when certain historical theories are urged as political principles, "it is for us . . . to inquire constantly and persistently . . . 'What interests are behind them and to whose advantage will changes or the maintenance of old forms accrue?' By refusing to do this we become victims of history —clay in the hands of its makers." That, I do understand.

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CASES ON FEDERAL JURISDICTION AND PROCEDURE. By Armisted M. Dobie.[1] St. Paul: West Publishing Co., 1935. pp. xxxix, 762. $6.00.

EACH new casebook raises anew the question of what a casebook ought to be. The inventors thought it ought to be a collection of leading cases from which basic common law principles might be dialectically extracted and in which the evolution of doctrine might be perceived. Since that time there have been seven important discoveries of ancient wisdom: that "law" is not fully described or understood without knowledge of the effect of legal activity upon the world it is designed to regulate; that legislatures as well as judges can and do legislate; that man-made rules may be better or worse and therefore invite evaluation; that there is more to the doctrine of precedent than the matching of old writs and decisions to modern cases and more to the "judicial process" than most judges know or say; that the evaluation of judicial decisions depends therefore, like the evaluation of legislation, on the broadest sort of thought and investigation; and, finally, that a history of bare doctrinal changes is an incomplete history of law. Though these discoveries have greatly affected law teaching and writing and have made some impression on some judges, they have not, paradoxically enough, altered fundamentally the casebooks teachers use. True there has been in recent years a marked disposition to include, *mirabile dictu,* relevant statutory material. There has also been a tendency to increase the number and decrease the age of the cases reprinted, digested or cited, culminating in Professor Llewellyn's notion of a panoramic portrait, in miniature, of the judges at play. There has even been a wild hunt for "relevant non-legal material" of economic and sociological stamp, necessarily unsuccessful, however, because of the paucity of material of the type envisaged and the inevitable length and inconclusiveness of such as can be found. Nevertheless, greatly as the introductions and prefaces to casebooks have changed, casebooks as a specie of law-book and a vehicle of law-teaching have remained basically the same. They have employed different cases and have thus avoided obvious problems of etiquette and been brought up to date, but they still consist, for the most part, of cases and are therefore, for the most part, the same. That this is so would be surprising were it not that where law

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teaching has progressed beyond the mere extraction of rules from leading cases to a more ambitious intellectual enterprise, the importance of the casebook has greatly diminished.[2] Those teachers whose interest lies in speculating about the "judicial process" attribute little genuine importance to the cases they use so long as they may conjecture why they were decided as they were. Those whose object is primarily the description of judicial action in a particular field, have found it increasingly necessary to deal with cases and other materials on a large scale, with the result that a casebook serves as little more than a syllabus, a condition which the undiminished output of statutes and decisions indicates to be permanent. Those whose concern is primarily an understanding of the nature of the political problem presented by each subject matter and an ordering of means and ends to the common good, regard statutes and cases, severally or in collection, as mere matter without vital form. For the first group, one casebook is about as good as another, for the second no genuinely adequate collection of teaching materials is possible, for the third, a useful collection is possible but it is one in which cases and statutes are subordinated to text, critique and questions which chart the course of the analysis and beget a digest of critical ideas and not a casebook at all.[3]

Dean Dobie's casebook was apparently edited for none of these groups. It was designed primarily for a fourth, those who are concerned with training for practice by transmitting an orderly knowledge of the working formulae and rules.[4] Cases have therefore been cut down for the most part to the crucial language, and a running descriptive text has been introduced consisting of extracts from the editor's well-known hornbook.[5] Thus a wide range of subject matter is covered, including many of the details omitted from the other collection[6] in the field,[7] that of Professors Frankfurter and Katz.[8] On the other hand, an effort was made in the earlier volume to view the subject in the grand manner as the historic battlefield of the forces of nation and state, with the result that the emphasis was put on such abiding problems as the scope of judicial power, the role of the federal courts as censors of state activities and the unique position of the Supreme Court, rather than on the particular formulae within which such problems have from time to time been resolved. There can be little doubt as to the relative merit and importance of these two objectives,

2. This is a point I did not see a few years ago [See Book Review (1932) 32 COL. L. REV. 774] though it was pointed out to me by a very kind author after I had reviewed his book.

3. I do not mean to imply that there are no books which approach this ideal. See e. g., Professor Llewellyn's sales book, Professor Richard Powell's property books and Professor Leach's new book on Future Interests.

4. This I take it is the author's meaning in his prefatory statement that he "has been guided chiefly by what might be called the practical viewpoint." (v.) The sentences which follow the quotation may, however, be cited against my interpretation. They are: "He [the editor] has endeavored to give a realistic picture of the jurisdiction and actual functioning of the federal courts. This does not mean, however, that the historical and political approaches have been overlooked." Nevertheless, the book as a whole is evidence in support of the conclusion stated in the text.

5. DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928). In addition there are copious references to cases and periodicals.

6. The present volume apparently supplants Professor Medina's in the American Casebook Series.

7. Notably those dealing with routine questions of diversity of citizenship and ancillary jurisdiction, of jurisdictional amount, removal jurisdiction and procedure, venue and jury trial.

8. CASES ON FEDERAL JURISDICTION AND PROCEDURE (1931).

if a lawschool is to be part of a university and a university is to be dedicated to ideas.[9] But in spite of their critical enthusiasm, Professors Frankfurter and Katz did not introduce the kind of textual material which, I have ventured to suggest, may transform a casebook into a digest of critical ideas. Accordingly, their product is less well adapted to their end than Dean Dobie's is to his, if I have understood it correctly. Thus, the two books share the fate of other casebooks in that they differ less radically than their prefaces. Nevertheless, viewing them both as means to the end avowed by Professors Frankfurter and Katz, I prefer the older work with its more extensive material on the scope of judicial power, the federal injunction against state regulation, the federal receivership and the Supreme Court, to the greater range, more recent decisions, shorter extracts and narrower vision of the present volume.[10]

A word may perhaps be added about the problem of evaluating federal jurisdictional rules. The allocation of jurisdiction is the allocation of power; and power should not be distributed, however much it may be sought, for its own sake. The allotment may be guided by considerations merely of economics in time and expense, as should usually be the case with respect to the courts of a single sovereignty,[11] or it may be guided by more subtle considerations of the way in which the power is likely to be exercised, and of the broader consequences of its exercise, if entrusted to one or another of the agencies competing for it. Both types of considera-

9. I used to think the way to make the dry skeleton of a formula take on the flesh and bones of life was by discovering all the cases in which the formula had been employed and then reformulating it in the light of its application. See Book Review (1932) 32 COL. L. REV. 774. I see now that this enterprise, though it may produce a better formula, merely transforms the skeleton into a corpse. The life we all seek lies in an understanding of the problems which the rules are intended to, but can never more than partly, solve; and understanding is the product of thought, not of the mere accumulation of facts. cf. HUTCHINS, NO FRIENDLY VOICE (1936) 41-50.

10. Receiverships are not considered in Dean Dobie's book, possibly because he regards them as antiquated in view of the reorganization provisions of the Bankruptcy Act; but the problems of § 77 (b), which are many and varied, are merely a continuation of those of the "friendly" receivership. The other subjects mentioned in the text are, of course, considered. There are 76 pages on the scope of judicial power, including a textual description of the various courts, their organization and principal functions (21 pp.), extracts from *Ex parte Bakelite Corporation and O'Donoghue* v. *United States* (8 pp.), extracts from *Cohens* v. *Virginia, Martin* v. *Hunter's Lessee, Kline* v. *Burke Construction Company* and *Sheldon* v. *Sill* (7 pp.), five cases on the nature and survival of the jurisdictional question (10 pp.) and eight cases on "cases" and "controversies" (25 pp.). There are 21 pages on federal questions, including six pages on federal corporations, *Mosher* v. *City of Phoenix, L. and N. Rr.* v. *Mottley, Hurn* v. *Oursler* and a few other cases. There are six pages on suits against a state. *Prentis* v. *Atlantic Coastline* is in a section far removed (p. 568) on federal injunctions staying state proceedings; the only reference to the Johnson Act is in a footnote in the section on "miscellaneous jurisdiction," where appears also a reference to some cases under § 266 of the Judicial Code. The only cases under § 266 which have been printed are in the chapter on the Supreme Court. Failure to treat federal court control of state legislative and administrative activity as a single developing problem produces a loss of all sense of perspective and results in the omission of some of the most interesting cases in the whole field. My criticism of the chapter on the appellate jurisdiction of the Supreme Court is very much the same. At the very least *Ex parte McCardle* and *Murdock* v. *Memphis* deserve to be printed; so too does Rule 12 of the court, to which I found no reference at all.

11. cf. Foster, *Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217.

tion are apposite in the process of distributing power between national and state courts.[12] The desirability of lower federal court jurisdiction may be viewed differently in cases where dismissing a plaintiff merely entails the cost of starting over again in a state court, and where it bars a meritorious claim under the statute of limitations, facilitates the organization of labor, or the collection of a tax, or thwarts the enforcement of a national policy which, in each case, we may approve or disapprove. It is one of the complexities of all procedural problems that procedure serves tangential ends; but the complexity is greatest of all in the field with which this casebook deals. The complexities of policy embedded in the problems of federal jurisdiction cannot be resolved in a law school or anywhere else. If they are understood, the mind has in most cases exhausted its power, and the time for guessing has come. But unless they are understood there is nothing to guess about and therefore nothing to do, save possibly "the right deed for the wrong reason." If there is a danger in case-books like Dean Dobie's it is that in such books these complexities tend to be more obscured than they have to be.

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La consecuencia juridica de la norma del derecho internacional privado (THE LEGAL CONSEQUENCE OF THE RULES OF PRIVATE INTERNATIONAL LAW). By Werner Goldschmidt.[1] Barcelona: Casa Editorial Bosch, 1935. pp. 149. 6 pesetas.

THE present monograph is a stimulating reexamination of certain central problems of private international law, in the light of Dr. Goldschmidt's special theory of what actually happens when a court declares that under the rules of conflict of laws it is compelled to apply foreign law to a set of facts before it for adjudication.

The manner in which the domestic court regards the foreign law under such circumstances has been the subject of much controversy. Dr. Goldschmidt's first interest is to attack the doctrine, more accepted on the continent than in Anglo-American Law, that whenever a foreign legal system is said to govern a given case, the domestic court treats the foreign law as "law." To substantiate his criticism of this thesis, he calls attention to what he believes to be the essence of the judicial process. The author argues familiarly that in deciding particular cases judges create law not only within the realm of Anglo-American law, but equally under the code systems of continental Europe. Once the idea of a complete system of law competent to settle conflicts arising out of every possible set of facts is abandoned as a fiction, it must be conceded that the contribution of the judges to the genesis of law in any country is considerable. Starting with this premise, the author concludes that when a court of State *A* is required by the rules of private international law "to apply the law of State *B*" it inevitably "creates" law of State *B*. To the extent that a judge can "create" law, this obviously means a disregard of the sovereign prerogatives of State *B*. Suggesting that this paradoxical conclusion invalidates the premise from which it seems to stem, the author presents what he considers a more adequate description of what actually happens when "foreign law" is applied by local courts.

But his criticism of what he treats as the prevailing theory is hardly unobjec-

12. The best effort to develop this thesis in some detail is Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393.

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tionable. Even if it is granted that in a sense the judicial process creates law, does it follow that the courts of State *A*, by deciding particular cases in *A*, on the basis of rules formulated in State *B*, attempt to frame rules to be observed as law in *B*? The author's conclusion that the prevailing theory explaining the process involves a derogation of sovereignty is unwarranted even with respect to the extreme situations on which he relies, like the problem when there is substantial identity of legislation in two countries[2] and the domestic courts of one country substitute their own interpretation of the common statute for the interpretation adopted by the courts of the other.

In ordinary conflict of laws cases the fallacy of Dr. Goldschmidt's syllogism is more obvious. It would seem, however, that if he is misled, it is partly due to the fact that he isolates the problem of the consequence of the conflict rules from the more fundamental question of their *raison d'être*. In the light of such further inquiry it would become evident that if a domestic court attempted to innovate rules of foreign law, it would deny the very foundation of the conflict rule which it pretends to follow; for whatever theory be elaborated to explain the existence of the rules of private international law, it is generally understood that the objective of the judicial process in these cases is to permit foreign law, as the product of a foreign state, to govern.[3]

Dr. Goldschmidt is more successful in affirmatively enunciating his description of the conflict of laws mechanism. His thesis is that reference is made to a foreign legal system not as "law," but as the legal usage prevailing in the foreign country; in other words as "fact."[4] The idea that the judge of the forum considers foreign legal rules only in the form of the actual legal practice prevailing in the foreign country, implies the conclusion that the task of the domestic courts consists in approximating as closely as possible the decisions which the courts of the foreign country themselves would render if called upon to decide the case. In view of the reluctance of many courts to undertake the difficult task of applying foreign law correctly, it seems to the present reviewer that this theory of approximation should be advocated as a desirable approach to cases involving the application of foreign law.

In the second part of his study, the author tries to demonstrate the practical value of his conception when applied to some crucial controversies of private international law. He examines successively in the light of his theory the relation between international private law on one side and interprovincial as well as intertemporal law on the other; the renvoi and qualification problems; the so-called autonomy of the parties in determining the law governing their contractual relations; and several other problems more technically related to the treatment of foreign law by the local courts, such as proof of foreign law, impossibility of such proof, and the question of whether appeal to the courts of last resort may be based on misapplication of foreign law. Dr. Goldschmidt's approach seems to afford additional basis for the English renvoi practice which this reviewer believes to come closest to a satisfactory solution of the puzzling renvoi issue: that is, that if the local rule of State *A* requires reference to the law of *B*, the domestic judge has to decide the case as it would be decided in the courts of State *B*, with regard to the conflict of law rules of *B*, including the foreign state's acceptance or rejection of the renvoi doctrine

2. Eg. The German General Bills of Exchange Act of 1848, separately introduced in the different states which formed the German Confederation, or any of the American Uniform State Laws.

3. This has nothing to do with what Wigny terms *"le problème de l'importation de la loi étrangère"* and the different theories made for its solution, such as the "local law," the "vested rights" and related theories.

4. Hardly a novelty, although its author apparently claims originality for it, after Professor Beale's well-known theory. Cf. 1 BEALE, CONFLICT OF LAWS (1935) 53.

(double renvoi).[5] But with regard to the qualification problem, the author does not apply his theory but merely states that unlike the renvoi problem, qualification is always a strictly legal not factual proposition obviously to be answered by the lex fori.

Dr. Goldschmidt's theory is equally unsatisfactory as he applies it to the question of the parties' autonomy to determine the law applicable to their contracts. The author laconically states that if the parties refer to the foreign law as "law" their intention is doomed as violative of the sovereignty of the foreign state (according to the author's underlying theory of the law-creative function of the domestic courts). Those who, like the reviewer, believe in the desirability of the rule of autonomy will be disappointed in this conclusion. It seems clear that, assuming that the point of reference of the parties is not the genuine foreign law, but only the fact-phenomenon of the legal usage obtaining abroad, the main objection to the autonomy rule (namely the argument that the parties can move only within the limits of their contractual liberty, as fixed by the "proper law of the contract"), could easily be overcome.

In the chapter dealing with the proof of foreign law, the author suggests a novel form of international judicial assistance. Dr. Goldschmidt proposes a specific procedure to be followed in cases which according to the rules of conflict in one state would be governed by the law of another state. The court of State *A* which has to apply the law of State *B* would send the whole record of the case to a court of State *B* requesting it to render a decision as if the case were before it. If the conflict rules of State *B* refer to the law of State *C*, the record would be forwarded for decision to a court of that state. Eventually, the record and decisions made thereon would be returned to the court of State *A*, where the final decision would be pronounced on the basis of the preliminary decisions of the foreign courts. The author goes so far as to suggest that special courts to handle these cases should be created in every country. Though he realizes that this procedure involves considerable complication, he considers this an inevitable result of the existence both of the modern system of private international law and of the coexistence of sovereign legal systems. It seems, however, that methods now used to obtain legal information from other states,[6] especially as stipulated in a series of post-war bilateral conventions on judicial assistance, which generally require the exchange of information between the central ministries of justice, are preferable to the cumbersome, though ingenious, device of the author.[7]

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5. Cf. DICEY-KEITH, THE CONFLICT OF LAWS (1932) 869; MELCHIOR, DIE GRUNDLAGEN DES DEUTCHEN INTERNATIONALEN PRIVATRECHTS 222; Elkin, *La Doctrine Du Renvoi en Droit Anglais* (1934) 61 JOURN. CLUNET 577 and cases there cited.

6. See among many: Art. 8 of the Swiss-Czechoslovakian Convention of December 21, 1926—Brit. & For. State Papers, vol. 126, p. 638; Art. 9 of the Spanish-Czechoslovakian Convention of November 26, 1927—Brit. For. State Papers vol. 129, p. 432.

7. It is noteworthy that since the FOREIGN LAW ASCERTAINMENT ACT, 24 & 25 VICT. c. XI (1861) which authorized a procedure somewhat similar to that suggested by the author (with this difference that according to the wording of the Act only a statement of the facts of the case and the legal problems arising therefrom, not the whole record of the case, would be put before the foreign court) Great Britain has not entered into any international convention of this sort (See 13 HALSBURY'S LAWS OF ENGLAND (1934) 618). Neither does the Draft Convention relating to civil procedure of the "Sumner Committee" (1919) nor any of the later conventions based upon it, adopt such procedure. (See Appendix B, Report of the Committee appointed by the Lord Chancellor to consider the conduct of legal proceedings between parties in this country and parties abroad, London 1919, H. M. Stat. Off.).

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ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES, 1929 AND 1930. Edited by H. Lauterpacht.[1] New York: Longmans, Green & Co. 1935. pp. xi, 534. $15.

ALREADY an institution, the Annual Digest has served primarily those who wished to watch international law in action, and to erect a bridge between fact and theory. It has had a special value for those who, through language barriers, are deprived of information as to interesting cases in foreign jurisdictions. While one may regret the passing from active service on the editorial board of Sir John Fischer Williams and Professor Arnold D. McNair, this volume, which is the first under the sole editorship of Professor Lauterpacht, maintains the high standard of selection and analysis which has made the previous volumes outstanding.

In this volume there is a decrease of the number of "war" cases, and an increase in the decisions reported from claims commissions, such as the American, British and French commissions with Mexico, and the special tribunal set up to handle individual problems. While the American reader will probably have easy access to unabridged texts of many of these international decisions, he will welcome particularly the summaries of the municipal decisions concerning international law, which have been rendered in other countries. The decisions from Central Europe on problems of state succession, the continental treatment of issues arising in connection with Soviet Russia, and the legal position of the government controlled corporation are but a few instances of the type of decision here reported which will be of practical use to the American student and lawyer.

While the familiar outline has been maintained in most respects, there have been several changes in the form of the book, which are most acceptable. The standardization of the type makes reading much more comfortable. The new system of arranging cases and notes, designed to meet deficiencies found in earlier volumes, is most welcome.

As any lawyer accustomed to using a digest system knows, no digest is completely free from criticism. But even if the summaries, the choice of quotations, or the richness of the notes do not always meet with approval, the use to which the *Annual Digest* is constantly put in libraries, whether those of individuals or universities, is the true measure of its success, and by this test there can be no question of its success.

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LAW OF FEDERAL INCOME TAXATION. By Randolph E. Paul[1] and Jacob Mertens, Jr.[2] Chicago: Callaghan and Company. 1934, six volumes, pp. xcii, 695; xx, 807; xvii, 620; xxi, 642; xxvi, 864; 691. 1935 Cumulative Supplements, 6 volumes, pp. iv, 141; 150; 98; 121; 158; 175. $60.

THIS is primarily a practical, and not a critical work; but federal income taxation is a preeminently practical subject, being at present the largest single item of litigation in the Supreme Court of the United States (almost 20 per cent of the opinions of the court during the past five terms being concerned with federal taxation, chiefly income taxation),[3] and expanding with bewildering rapidity into every corner of

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3. Frankfurter and Hart, *The Business of the Supreme Court at October Term*, 1934

the law. There was a real need for a thorough and lawyerlike treatise surveying the entire field of federal income taxation, collecting the mass of material which has accumulated, and digesting it into coherent form. The present work, a pioneer in the field, presents a comprehensive study of federal income tax law which will be of inestimable value as a reference book and an aid to brief writers. It may be a matter of academic regret that Paul and Mertens make no very considerable contribution to the growth of doctrine in many of the fields where the rules and concepts out of which tax law is built, are in need of clarification. But this is designed as a manual for practitioners and it is not ambitious beyond its scope.

The authors have obviously tried to make their book useful and complete. All relevant statutes, Treasury regulations and practice, B. T. A. and court decisions are reported and digested as well as much of the literature from current legal periodicals. All of this material may, moreover, be easily found through an exhaustive table of cases and very complete index. The problem of statutory change, new regulations and decisions, which has made so many texts outdated and useless, is here solved by annual supplements, the first of which, the 1935 supplement, has already been published.

It is difficult adequately to summarize so monumental a work. It covers in detail problems relating to classification of incomes and deductions, procedure and administration, valuation, special types of taxpayers. Some space is devoted to "rules" of statutory construction,[4] although the authors admit that they have generally served merely to support the result desired after a decision had already been reached. The constitutional questions involved in income taxation are also treated.[5] And although general attacks on the constitutionality of the federal income tax laws have been almost invariably unsuccessful,[6] questions of exemption from federal taxation on constitutional grounds, especially of state officers and instrumentalities, are of considerable interest,[7] all the more since the Supreme Court has, after *Willcutts v. Bunn*,[8] indicated that the older standards in this field may not survive.

A typically excellent section is that dealing with the recognition of loss or gain in connection with corporate reorganizations, a branch of federal income tax law which has lately been much discussed.[9] The efforts of the courts to prevent abuse of these provisions have given rise to such decisions as the *Cortland Specialty* case,[10] a radical departure from previous reorganization decisions, designed to plug up loopholes in the existing structure. Then Congress in the Revenue Act of 1934 materially modified and restricted the definition of reorganization for the purpose of tax exemption.[11]

Like many another good guidebook to the law the present work is weak in analytical material. In many places, the text consists of case digests and a summary of results with little connecting comment. But it is no easy task to summarize and digest all important phases of a field of law so vast and so novel. That the authors

(1935) 49 HARV. L. REV. 68, 89.

4. § 3.01 (Section numbers indicate the chapter by the numbers preceding the decimal point, and the position of the section in the chapter by the numbers after the decimal point. Interpolated sections in the Supplement are designated by the preceding section number followed by letters).

5. Chapter IV.

6. § 4.14.

7. See §§ 6.83, 6.84.

8. 282 U. S. 216 (1930).

9. § 17.74 et seq.

10. 60 F. (2d) 937 (C. C. A. 2nd, 1932). But cf. the attitude taken by the Supreme Court in Minnesota Tea Co. v. Helvering, 296 U. S. 378 (1935).

11. Section 112 (g) of the Revenue Act of 1934, 48 STAT. 705 (1934), 26 U. S. C. A. § 112 (1935). See Comment (1935) 45 YALE L. J. 134.

have done the pedestrian part of their work thoroughly should alone earn them the gratitude of every practitioner. There can be no doubt that the present work, kept up to date by cumulative supplements, is destined to become a standard book of reference, far outstripping in merit even the nearest of its competitors.

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