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BOOK REVIEWS

Selected Studies In Federal Taxation. Second Series. By Randolph E. Paul, Philip Zimet and Muriel S. Paul. Chicago: Callaghan and Co. 1938. Pp. xiii, 447. $5.00.

From beginning to end, the authors bring not merely legal learning but enlightened and critical thinking to bear on a series of problems illustrative of the growing confusion in certain fields of federal tax law. They jump the first hurdles toward a tentative classification and organization of certain branches of tax law, and their study has resulted in that rare combination of an absorbing text with painstaking documentation. From the roots of exhaustive annotation spring a succession of pointed comments which serve as experimental compass-marks for the courts as well as for Congress.

Seven representative problems are selected for comprehensive treatment. In the first essay, The Effect on Federal Taxation of Local Rules of Property, Paul takes inventory of the decisions in this field. He notes that occasionally, as in the case of statutory mergers, the federal revenue acts clearly contemplate that local law shall govern. Occasionally, as with the meaning of the term dividend, the acts themselves clearly control. For the most part, however, it is left to the courts to determine as best they can whether Congress intended that the application of the federal act should be uniform or should vary according to local law. The resulting inconsistencies and inequalities lead Paul to the conviction that federal tax law should be applied uniformly. The difficulty lies in the special complexity of federal tax law which can never be developed coherently unless it is disentangled from local law and developed independently. The author's detailed analysis lends force to the argument for concentrating tax litigation in special courts. He suggests that the establishment of a single appellate court for tax cases would go far to eliminate the uncertainties of the present system. Such a proposal is bound to encounter the opposition which always attends any proposed disturbance of things as they are, the weight of tradition which serves to support a system not because it functions effectively but because it somehow survives.

In the chapter on Federal Tax Compromises and Prospective Regulations, Paul makes a forceful criticism of an Attorney General's opinion limiting the compromise power of the Commissioner of Internal Revenue and Secretary of the Treasury to those cases where the claim is uncertain or collection doubtful. The same chapter argues persuasively for the constitutionality of the power granted the Com-

missioner to determine the extent to which regulations shall be applied retroactively.

Another cause of inequalities is analyzed in the chapter on Res Judicata in Federal Taxation. The authors recognize that the doctrine is necessary to protect the courts from incessant litigation but are critical of its mechanical application in tax cases. They propose that Congress provide that the courts relax the rule in cases involving new facts or interpretations.

One of the most interesting chapters in the book takes up the complex problem of Ascertainment of Earnings or Profits for the Purpose of Determining Taxability of Corporate Distributions. It covers two broad subjects: distributions out of unrealized gains and distributions out of realized but unrecognized gains. Paul holds that in the first case the distributions should not be treated as taxable dividends. As for the latter, he takes issue with the rule of the Board of Tax Appeals and of the lower federal courts that realized but unrecognized gains constitute earnings or profits and that the distributions therefrom accordingly constitute taxable dividends. His own view is that as such gains are not recognized at the outset when they do not exist except in a technical legal sense, they should not subsequently be recognized for other purposes in the absence of a clear legislative intent to the contrary. He believes that the courts have erred in reading into the act what Congress could constitutionally do rather than what it intended.

The chapter on Step Transactions, involving for the most part reorganizations and other non-taxable transfers, takes account of the confusion in the law on this subject. The problem as to whether a number of steps constitute one transaction or a series of separate transactions is complicated by the indiscriminate use of a number of different doctrines. Nevertheless, with regard to the rule most generally applied, the so-called interdependent test taken from the law of contracts, Paul is inclined to let well enough alone on the ground that the vagueness of such a test is amply compensated by its adaptability to a variety of situations.

A major source of confusion is analyzed in the chapter on Motive and Intent in Federal Tax Law. This elusive subject is tackled in all its ramifications, from discussion of legislative intent and the distinction between intent and motive, to consideration of such intensely practical problems as accumulations of corporate earnings to avoid surtaxes upon shareholders, gifts in contemplation of death, and criminal liability.

Complicated as are the problems which the authors have done much to elucidate, it is encouraging to note that the one forming the basis of the last chapter, The Federal Tax Status of Will Contestants, has been settled by the Supreme Court's recent decision in *Lyeth v.*

Hoey[1] holding that the amount received by an heir in compromise of a will contest constituted an inheritance exempt from the income tax.

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Mr. Justice Holmes and the Supreme Court. By Felix Frankfurter. Cambridge: Harvard University Press. 1938. Pp. 139. $1.50.

Three lectures, less than one hundred pages, make up this little book. In terse and vital sentences, but with a restraint in full accord with the nature and point of view of his subject, the writer has drawn an entrancing, an enduring picture of a great American common law judge and jurist.

He has drawn a picture of a judge greatly conscious of his function to do justice according to law, greatly master of judicial method, the method by which that justice is done. The author's artistry has made us see, more clearly perhaps than most of us have ever seen, that "There is no guaranty of justice, except the personality of the judge";[1] that "It is the simple truth that the greatest task that has been given a man, to discover Justice, requires a standard of mental and moral greatness far above the common average";[2] that "Whenever it is the business of the judge to discover what the law is in fields in which it has not yet been formulated, his function has an appearance analogous to that of the legislator himself";[3] that "above all things, every jurist must become as clear as possible in his own mind on the problem of what constitutes his peculiar function in the life of society";[4] that "The play of the obscure forces of nature is powerless in itself to create true juridical customs; the incessant collaboration of man is needed";[5] and that Holdsworth was entirely right when he said:

"Philosophical speculation about law and politics is an attractive pursuit. A small knowledge of the rules of law, a sympathy with hardships which have been observed, and a little ingenuity, are sufficient to make a very pretty theory. It is a harder task to become a master of Anglo-American law by using the history of that law to discover the principles which underlie its rules, and to elucidate the manner in which

[1] 59 Sup. Ct. 155, 83 L. ed. Adv. Ops. 176 (1938).

[1] EHRLICH, *Judicial Freedom of Decision, Its Principles and Objects* in SCIENCE OF LEGAL METHOD (1917) 65, 66, 70, 73, 75, 77.
[2] *Ibid.*
[3] GÉNY, *Judicial Freedom of Decision, Its Necessity and Method* in SCIENCE OF LEGAL METHOD (1917) 2, 4, 5, 11, 18.
[4] *Ibid.*
[5] LAMBERT, *Codified Law and Case Law* in SCIENCE OF LEGAL METHOD (1917) 281.

these principles have been developed and adapted to meet the infinite complexities of life in different ages. Such students of our law will learn, even though at second hand, something of the practical wisdom which comes from knowledge of affairs. They will, for that reason, be able to suggest solutions of present problems which will depend not merely on their own unaided genius, but on the accumulated wisdom of the past."[6]

In the author's portrayal of Mr. Justice Holmes we see that while common law judging, the making of common or case law in general, is a special business,[7] common law judging in America, particularly the making of the common law of the Constitution, is a very special business indeed. Made under the comon law traditions of constitutional rights, and of *stare decisis* as modified, interpreted and applied under written constitutions in the midst of change, the making of this constitutional case law requires character, intelligence, training, and courage of the highest order.

Better, perhaps, than any other Mr. Justice Holmes has shown us the true place in society, in short the true function, of the American common law judge. Seeing more clearly than most, he has made more clear than any other the difference in the judicial function and method when the decisions of the judge have to do, on the one hand, with general common law, and on the other, with the common law of the Constitution. In his writings and in his opinions he has made it clear that in deciding ordinary common law cases judges must, and do, in a manner legislate. He said it in 1881, in *The Common Law.*[8] In subsequent opinions he repeated[9] it.[10] Again, in declaring that federal courts were bound as to the law of a state as much by the decisions of its courts[11] as by the acts of its legislature,[12] he affirmed that a state,

[6] HOLDSWORTH, SOME LESSONS FROM OUR LEGAL HISTORY (1928) 24.

[7] "Easier a great deal it is for men by law to be taught what they ought to do than instructed how to judge as they should do of law; the one being a thing which belongeth generally unto all, the other such as none but the wiser and more judicious sort can perform. Yea, the wisest are always touching this point the readiest to acknowledge that soundly to judge of a law is the weightiest thing which any man can take upon himself." 1 HOOKER, ECCLESIASTICAL POLITY (1604) 90; see HUTCHESON, JUDGMENT INTUITIVE (1938) 166.

[8] P. 35: "In form its [the law's] growth is logical. . . . in substance the growth of the law is legislative. . . . It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret roots from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."

[9] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Southern Pacific Co. v. Jensen, 244 U. S. 205, 221, 37 Sup. Ct. 524, 531, 61 L. ed. 1086, 1100 (1917) (dissenting opinion).

[10] Kuhn v. Fairmont Coal Co., 215 U. S. 349, 372, 30 Sup. Ct. 140, 148, 54 L. ed. 228, 239 (1910) (dissenting opinion).

[11] Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U. S. 518, 534, 48 Sup. Ct. 404, 409, 72 L. ed. 681, 688 (1928) (dissenting opinion).

[12] *Cf.* Erie R. R. v. Tompkins, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938).

in establishing its laws, speaks with two voices: one, its legislature; the other, its courts. But though he has made it crystal clear that when a state uses its judicial voice to declare the common law, judges must and do legislate, that is, must and do consider and declare what the public policy of the state should be and is, he has made it even clearer that when the state uses its legislative voice, judges, in interpreting and applying the law thus declared, may not at all concern themselves with the policy or the wisdom of the statute.

In such cases judges have no function, except (1) to ascertain the meaning of the law, and (2) to give that meaning effect, unless and only unless the law appears unconstitutional beyond all reasonable doubt. Particularly he has made it clear that in determining whether an act is unconstitutional, the judge must turn rigidly away from considerations of "what is expedient for the community concerned", the very considerations which should properly concern him when the matter before him is for decision as a matter of ordinary, rather than of constitutional, common law.

The volume under review treats of the Justice's decisions on constitutional questions in three divisions. The first chapter treats of rights in property, or the conflicting claims of the individual and society; the second of civil rights, or the conflicting claims of liberty and authority; the third of the federal system, or the conflicting claims of state and nation. I have a little difference with the distinguished author, but not much, in his drawing an apparent distinction between the matter and manner of Mr. Justice Holmes' work in the three constitutional fields he has selected for treatment here. His constitutional decisions seem to me to be alike the work of a master craftsman. Characterized throughout by the same profound conception of function, the same complete mastery of method, they conform throughout to the same clear pattern.

I see, shining from each of his decisions in each of the fields, the same spirit of the great master of the common law. Exhibited equally in them all is the great common law learning, the great judicial restraint, the great knowledge of function and method which he so magnificently drew upon. All of them show the same cool, calm, discriminating exercise of the judicial process in finding the line beyond which it became the duty of the Court to say to the legislature of the state or of the nation, "Thus far thou canst go, and no farther." I see equally in them all the same influence of his profound knowledge that the line could not be finely, it must be broadly, drawn, and that it could never be drawn by the Court except at the point where reasonable minds could not differ; it could never be drawn except at the point where, beyond any reasonable doubt, the challenged act was beyond legislative power.

I see, in short, in all of his opinions the same strong, steady, vigorous working of a cultivated mind, the same dispassionate consideration, the same superb judicial results, as without variableness, neither shadow of turning, he went serenely on his appointed way, greatly conscious of his function as a common law judge, greatly master of judicial method. Had he done only this, his place on the earth would have been a great one. But when there is added the fact that the matter of his judging was expressed in matchless prose, it is seen at once that his permanent place is not among men, it is with the immortals. In the author's deathless phrase, "Mr. Justice Holmes has written himself into the slender volume of the literature of all time."

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Labour Relations in Republican Germany. By Nathan Reich. New York: Oxford University Press. 1938. Pp. 293. $3.00.

Labour Courts. International Labour Office Studies and Reports, Series A (Industrial Relations) No. 40. Geneva: International Labour Office. 1938. Pp. v, 220. $1.25.

The transition in employer-employee relations since the World War reflects the fundamental political, economic and social changes which have occurred. To students, who have seen during this period the elimination of the private employer in Soviet Russia and the developing control of the state over labour under Fascism, the efforts from 1919-1933 in Germany to fit a "collective organization of industrial relations within the frame-work of a traditional political democracy" should be studied with particular concern.

Theoretical currents and institutional developments in Germany had paved the way before 1914 for a considerable degree of state action in the sphere of labour relations. By 1919, in accordance with the Weimar Constitution, labour was placed under the protection of the Federal Republic and details of a uniform labour law were to be worked out within the broad constitutional principles; freedom of association with the aim of improving social and economic conditions was guaranteed; a comprehensive system of social insurance was envisaged; and the right to work or maintenance was stipulated. Art. 165, which was looked upon by many as the cornerstone of a new social and economic order, provided that "wage-earners and salaried employees are entitled to coöperate on equal terms with the employers in the regulation of wages and working conditions, as well as in the entire economic development of the productive forces."

Within his book Dr. Reich's objective did not call for a general

consideration of labour relations or for a complete summary of the labour law during the period of the Republic. He was rather concerned with singling out "the collective elements in the Weimar experiment which were unique in their character and pioneering in their novelty." The extensiveness of the system of collective bargaining was evidenced by a network of national, district, local and company contracts which covered over 12,000,000 wage-earners and salaried employees in 1929 (pp. 108-109). A rather complex system of mediation and arbitration furnished additional means for employee participation in the solution of questions involving his real income. The works councils, for which a constitutional basis was provided in Art. 165, were instituted by an Act of February 4, 1920. Designed to protect the common economic interests of wage-earning and salaried employees by whom the members of the councils were elected, these agencies were set up in establishments which employed at least twenty persons. As a device for looking after the interests of workers and employers the works councils proved effective instruments in supervising the enforcement of collective contracts, in preventing violations of factory laws and in maintaining discipline. For various reasons they did not provide successful means for the participation of labour in the management of establishments. The adjudication of labour disputes was entrusted to labour courts, set up in accordance with the provisions of an Act of December 13, 1926. In these special tribunals an informal and inexpensive procedure, along with representation of the trade unions and employers' associations, was provided. Thus, on the basis of the right of association, there was built a system of labour law which placed an emphasis on collective bargaining, mediation and arbitration, and employee representation in establishment and judicial tribunal. These developments represented the fruition of that part of the Weimar program which "was directed to the democratization of industrial relations through the sanction and active promotion of the collective organization of industrial relations" (p. 268) and which attempted "to reconcile a system of private enterprise based on politico-legal individualism with the requirements for collective action in the field of economic relations" (p. 269).

With the treatment of certain questions by Dr. Reich there is room for difference of opinion. The absence of clear statutory guides made of the Reich Labour Court an unwitting social engineer at times prior to 1933, and the consequences of some of its bitterly criticized decisions was more serious to the "collective structure of industrial relations" than the author is willing to concede (p. 265). The discussion of the National Economic Council (pp. 56-59), though in keeping with the accepted appraisals of this body, would merit revision. An account

of the changes in labour law administration between January, 1933, and May 1, 1934 (when the National Labour Law of January 20, 1934, went into effect), would have furnished additional justification for the concluding chapter on Transition to the Third *Reich*. But withal, Dr. Reich in his well written and well documented book has made available to American readers some of the best German materials; he has handled the difficult problem of translation with unusual skill; and above all his general conclusions are sound.

International Labor Office's *Labour Courts* represents a companion study to its *Conciliation and Arbitration in Industrial Disputes* (Series A, Industrial Relations, No. 34) which appeared in 1933. This Report is divided into two parts, the first containing a comparative study of existing labour court systems and the second a series of individual monographs on each of the twenty-three states (including the United States) which have special judicial agencies for the settlement of labour disputes. Although the jurisdiction of the labour courts has been confined largely to individual labour controversies and to "disputes about rights or justiciable disputes", the courts have been entrusted in many cases with the settlement of collective labour disputes and even collective "disputes about interests" (pp. iii-iv, 19). No country which has established a permanent labour judiciary alongside its regular judiciary has ever abandoned the experiment. On the contrary, "the changes made were nearly always designed to extend the jurisdiction of the special labour tribunals, and in certain countries they handle practically all cases of friction affecting employment relationships" (p. 54). Of the institutions discussed by Dr. Reich, the labour courts alone have been carried over with some structural changes into the Third *Reich* (pp. 98ff.). The Report makes no effort to go further than to give brief, formal and uncritical descriptions of the separate systems. The statements that the members of the National Labor Relations Board are appointed "subject to the approval of Congress" (p. 14) and that an "amending Act of 1906 gave force of law to the decisions" of the Interstate Commerce Commission (p. 201) are evidence of loose phraseology which can be explained by the scope of the Report but which necessitates the reader's caution.

Those members of the legal fraternity who are interested in current aspects of labour relations in the United States would do well to read the excellent volume by Dr. Reich. And friends and critics of the National Labor Relations Act would find some solace in various of the monagraphs in *Labour Courts*.

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