

BOOK REVIEWS

THE FEDERAL INCOME TAX. By Roland R. Foulke. John C. Winston Co., Philadelphia. 1927. Pp. xxxviii, 1143.

Since the ratification of the sixteenth amendment to the Constitution of the United States on February 25, 1913, Congress has passed the Income Tax Laws of 1913, 1916, 1917, 1918, 1921, 1924 and 1926. As each of these several acts appeared, numerous authors prepared more or less elaborate texts on its content. These works were generally divided into an explanation of the provisions of the law and a presentation of what in their own opinion should or should not have been included therein. Considerable space was used in finding fault with Congress, with the decisions of the Treasury Department and with the administration of the law itself. It has remained for Mr. Roland Roberts Foulke, LL. B., Member of the Philadelphia Bar, and Lecturer on Eminent Domain in Pennsylvania at the University of Pennsylvania, to prepare a work in which the avowed purpose, as expressed by the author, was "to pour the light of legal principle upon the income tax, because it is only by so considering the subject that it may be understood."

The author has produced a monumental work on income taxation, and in doing so has eliminated the subjects which formed part of legislation now repealed, such as personal service corporations, excess profits tax and invested capital. He has confined his attention primarily to a discussion of the Income Tax Law of 1926, together with such portions of the 1924 Law as would be of particular interest to the reader.

He has developed an arrangement of his own in order to develop the subject progressively under the various headings. In this connection he states: "We have practically had to take statutes, regulations, and rulings apart and group them together under different headings." How well he has succeeded in presenting an effective arrangement is attested by the parts into which the book itself is divided.

Part I, covering the introduction to the subject, treats of the general view of the whole field, covering specifically the definition of income, kinds of income, taxable period, receipt of income, federal income tax legislation, and the theory on which the income tax is based. The various sorts of taxpayers are then considered, followed by a discussion of personal receipts and expenses. A chapter is devoted in this same part to the subject of exempt income, consisting of such income as is not subject to tax under the provisions of the statute.

Part II deals with the subject of taxable income in which the various chapters are devoted to a discussion of income derived from personal efforts, from the use of property, and from the conversion of property. The subject of dividends is considered; likewise stock dividends, the latter representing those received by a shareholder in the form of capital stock of the company whose shares he owns. In the Supreme Court decision handed down in the case of *Eisner v. Macomber*, 252 U. S. 189, the question was decided definitely

that a stock dividend does not constitute income, and the recipient is, therefore, not subject to a tax levied on income. Through all of the various ramifications and mazes of the law, the author leads us in a manner that is truly remarkable, making clear that which is obscure and throwing the light of legal principle upon the law itself. Each chapter deals with a separate topic which is discussed in detail and which furnishes a real basis for the proper understanding of this important subject.

Part III concerns special classes of taxpayers, such as non-resident aliens, husband and wife, insurance companies, partnerships and fiduciaries.

Part IV deals with the methods of assessment and collection of the tax and with the procedure in the case of refunds or credits allowed by the government to the taxpayer.

In order that the book itself might be strictly up to date at the time it came from the press an appendix was added in which new citations are made. This appendix is followed by two others, in one of which the text of the Acts of 1924 and 1926 are published for informative purposes, while the second contains citations of Regulation No. 69, court cases, cases of the Board of Tax Appeals, Treasury rulings, etc. The whole work is completed by the addition of a comprehensive index of all of the subject matter contained therein.

The volume from a mechanical standpoint is all that could be desired. Not only are the parts well defined, as hereinbefore indicated, but each chapter has preceding it a complete table of contents. The paragraphs are consecutively numbered from the beginning of the book to the end, and all references are to paragraph numbers. This is also the case with the general index and with the several appendices. The text itself is supplemented by many and voluminous notes, from which those interested may secure further detailed information on any desired topic. In these notes reference is made to rulings, cases and other authority from which the material has emanated. The topic of each page refers to the chapter title, the chapter number, and the paragraph numbers treated on the page itself. Heavy face type is used to note the headings to paragraphs and a similar method is employed in expressing in the notes the texts of Treasury Regulations. All references to Cumulative Bulletins, Supreme Court Cases and other citations, likewise appear in heavy face type.

The work itself is one in which the underlying principles are discussed and furnishes all of the necessary material for a complete understanding of the 1926 Law. It will be found of inestimable value by the income tax practitioner, by the general practicing attorney, by the certified public accountant, and by the law student.

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CASES AND AUTHORITIES ON PUBLIC UTILITIES. By G. H. Robinson. Callaghan & Co., Chicago. 1926. Pp. xxiv, 976.

The need succeeding the publication of the last editions of Beale and Wyman's Cases on the Law of Public Service Companies has brought forth, among others, three casebooks of distinct excellence. The second edition of Professor Charles K. Burdick's "Cases on the Law of Public Service, including

the Law Peculiar to Common Carriers and Innkeepers," has the merits of compactness and of the author's usual scholarly treatment, and is of date (1924) recent enough to make it still practicably usable. And for those desiring somewhat larger collections, with the convenience of the inclusion of more recent cases, the year 1926 has been exceedingly kind in the production of two such works as that of Professor Robinson, mentioned in the caption, and that of Professors Young B. Smith and Noel T. Dowling, which includes cases and readings on rates, selected and arranged by Dr. Robert L. Hale. Between these two works of the last year, the present reviewer has been able to make selection for class-room work only with considerable hesitation, and after much comparison of respective merits.

Professor Robinson has produced a very readable book, of disinctive character, with a comprehensive scope and apt selection of cases. In the interesting preface he states his purpose to present, "first, the utility concept; second, the obligations to the general public which lie in the concept, and their enforcement; and third, these duties of performance which run to the individual for whom service is undertaken." Around the three ideas, thus substantially expressed, he has built up a detailed classification of considerable originality. The volume, avowedly, "seeks to show a modern view of the general subject." With the exception of the citation of a few in the notes, "English cases are absent." The majority of the American cases are of the twentieth century. Many are of very recent date, and with the exception of two which antedate it by one and three years respectively, all are subsequent to *Munn v. Illinois*. The cases are profusely annotated in the editor's characteristic sprightly style with many excerpts from the cited cases. Thus the student will probably obtain familiarity with the language of an unusual number of cases. The editor has searched the law reviews and included the results of his search in the annotations. There are also occasional references to the standard books of annotations. Included in the prefatory matter is a list of texts on the general subject, which is unusual in that it includes a list of the reviews of each text. Here also is found a very valuable feature; a complete list of the law review articles cited together with some of the more important law review notes. This is indeed a comprehensive list, a veritable treasure chest for the research worker.

The editor makes no attempt at historical development of principles. The zealous student will find some historical references and some materials for historical comparison, but the book shows the law as it is, and these are merely incidental, not introductory, nor frequently in themselves enlightening.

In the treatment of the first of the three general divisions, "The Public Utility Concept," this absence of orderly historical development is particularly noticeable. This part contains three chapters. The first of these is: "The Property Concept and the Public Utility Idea." It commences with the ultimate, the case of *German Alliance Ins. Co. v. Lewis*, then follows with an annotation including reference to law review articles, among them those of Professor Burdick, Professor Beale, and Mr. Adler, without enlightening clue to their contents, and a quotation, pertinent on the power to regulate, from the opinion of Goode, J. of the Missouri Appellate Court; in *State v. Kinloch Telephone Co. People ex rel. v. La Fetra*, the succeeding case, goes on the principle of the general police power as applied to the New York rent regulation statutes, and

its annotation, even with the important quotation from the opinion of Ritz, *J.*, in the *Clarksburg Light & Heat Co.* case, is not strikingly different. This chapter shows clearly that a business may rise from private to public concern and so subject to governmental regulation, and some of the tests to determine when it has so risen, but I doubt that it makes clear the distinction, between the exercise of the general police power and the exercise of the special police power applicable to those callings devoted to a public use, wherein regulation of the service and particularly of the price of the service to potential customers within the scope of the public calling is permissible. Conceivably, the editor was anticipating a possible abandonment of this distinction. Perhaps the test should be reasonable necessity alone, but Mr. Justice Holmes' views (not exactly that) have not yet the approval of the majority—witness the recent New York theater case. The second chapter, "The Public Callings," has three parts. The first, "Judicial Enlargement of the Public Category," shows the application of public calling principles to modern forms of carriage, telephone companies, telegraph companies, and electric light and power companies. It shows the conflict between the cases of the news associations, and that between the cases of the cotton gin and the cotton press, the distinctions between the inn and the boarding house, that between the public and the private carrier, and the effect of the right or exercise of the right of eminent domain. Characteristic of the work's modernity is the citation of two cases in which aeroplanes were held not to be common carriers. Express companies are relegated to a note with the statement that they, under the doctrine of the above cases (of forwarding companies more than fifty years later), were held to be common carriers. "Legislative Extension of the Public Category" is of comprehensive but not exhaustive scope. It opens with *Munn v. Illinois*, but treats only by comment in annotation of the dissenting opinion in that case and of the succeeding case of *Budd v. New York* with a pertinent excerpt from *Brass v. Stoeser*. In "Factors Limiting Legislative Authority," it is brought out in a very satisfactory manner that the state cannot by mere legislative fiat create a public utility where there has been no devotion to public service. The third chapter, "Personnel—its Special Public Obligation by Employment in a Public Service Occupation," is brought up to very recent date by the inclusion of President Coolidge's synopsis of the Watson-Parker Bill.

The second part, "Obligations of the Public Utility Status and Their Enforcement," takes up the major portion of the book. In its respective chapters are treated entry into service, and the general nature of the duties of the corporation, the obligation to serve without discrimination, the obligation to serve at reasonable rates, the duty to serve with adequate facilities, the obligation to continue service, regulation of the utility by the utility itself, regulation at common law and under modern statutes. The chapter on discrimination is especially strong and includes the theory of the filed tariff and of payment in money. The rate problem takes up the entire chapter on the duty to serve at reasonable rates. In general this chapter covers the general theory of rate control, that it is a legislative and not a judicial function, that reasonableness embraces at most what the traffic will stand, with perhaps a tendency to base reasonableness on costs, some of the problems of apportioning costs between different services of the same utility, the factors in ascertaining the rate, and factors limiting the

enforcement of the duty to serve at reasonable rates. These are the factors in ascertaining the rate named by the editor :

- A. Operating Expense
- B. The Rate Base: the Valuation Problem
- C. Depreciation and Contingency Funds
- D. Going Value-Allowance
- E. Working Capital—Water Rights
- F. Franchises—Outstanding Securities
- G. Valuation of Railroads by the Interstate Commerce Commission
- H. The Rate of Return.

The chapter is suggestive but not up to the standard of some of the other chapters. Under the valuation problem, the *Southwestern Bell Telephone* case, a subsequent case from the Wisconsin reports, three Federal Reporter cases and the language of Butler, J., in *Standard Oil Company v. Southern Pacific Co.* give some notion of the difficulty of the subject, but hardly all that could be shown of the theory of stabilized present value which seems to be indicated in the recent decisions of the Federal Supreme Court. The treatment of valuation by the Interstate Commerce Commission is fragmentary. No commission cases are cited, nor is there any reference to the working principles set forth in volume seventy-five of the Interstate Commerce Commission Reports, or to any subsequent developments before the commission. The clue to this, perhaps, is the editor's statement: "The Commission early recognized that its task involved the labors of Hercules . . . it becomes increasingly likely that the task involves the labors of Sisyphus as well." The succeeding quotation from the opinion in the *Los Angeles* case [8 F. (2) 747 (1925)] holding that the Commission could find only one value, "the true actual value" of the railroad property, is followed by a notation of the date set for argument in the Supreme Court, but the subsequent disposal of this case in the Supreme Court on grounds of procedure leaves the matter where it stood with the probability that for some time at least our principal light will be the opinions of the commission, and the discussions of writers, a list of which to recent date is included in the annotation.

In this second part there are substantial portions of the book which might well be relegated to courses on Administrative Law and Interstate Commerce. Thus the complexities of the rate problem, we suspect, would justify the omission of paragraph three of the chapter, "Gathering Information as to Rates in General and Apportionment for Decision as to Reasonableness of Rates." Other matters of administrative procedure are gone into extensively in Chapter XII, "Special Problems Arising out of Regulation Through the Agency of Commissions." So the greater portion of the chapter on "Interacting Areas of Regulating Authority" is taken up with the scope of the Interstate Commerce Act, and conflicts between federal and state authority. The second part of this chapter shows the respective powers of state and municipal authority as against each other.

The editor points out in the preface the brevity of the third part, but none the less he has collected cases giving a fair notion of the elements of much of the law of both the carrier and the innkeeper, as well as of the sleeping car company and the telegraph company. The treatment of limitation of liability

of carriers of goods is confined to the doctrine of interstate shipments. Possibly, in view of the uniformity with the federal law, towards which state statutes, and even to a degree, state decisions, will tend, it is desirable not to emphasize the diversity of the law in the various states.

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THE CASE OF SACCO AND VANZETTI. By Felix Frankfurter. Little, Brown & Co., in association with The Atlantic Monthly Co. 1927. 118 Pages.

On April 15, 1920, at South Braintree, Massachusetts, a paymaster was murdered in a carefully conceived and efficiently executed hold-up. At least five participated in the crime. Fourteen months later, Sacco, a laborer, and Vanzetti, a fish peddler, were tried, convicted of the murder and sentenced to death. The Supreme Judicial Court of Massachusetts has twice affirmed the verdict, holding: (a) that no prejudicial error had been committed below; (b) that the lower court did not abuse its discretion in declining a new trial on the ground of after-discovered evidence.

The defendants are illiterate Italians who, prior to the murder, were under the surveillance of the immigration authorities because of their radical political views. There is an almost world-wide impression that the issues of bolshevism and murder were confused at the trial.

Felix Frankfurter in his book mercilessly analyzes both the record of the trial and the affidavits summarizing the after-discovered evidence upon which a new trial was sought. He begins by relating the accidental clue which led to the arrest of Sacco and Vanzetti. A somewhat similar hold-up and murder had been committed in Bridgewater, Mass., by a gang of Italians. The criminals were seen to leave in a small car in the direction of Cohasset. Having been informed that the Braintree murderers were also Italians and left in a small car, a detective concluded that he could solve both crimes by finding an Italian with a small automobile in Cohasset. One Boda fitted this description. The sleuth watched the Italian's car in a garage where it was being repaired. Eventually Boda and three other Italians called for it. The owner and one of his friends were released. The other two were Sacco and Vanzetti.

The author next considers the testimony of the eye-witnesses, who, fourteen months after the incident, were able definitely and positively to identify the defendants as participants in the crime. The credibility of these witnesses is impeached (1) by the obvious impossibility (due to the circumstances of the crime) of accurate observation; (2) by proof of their inability, immediately after the crime, to identify the defendants; (3) by the fact that the witnesses contradicted each other as to important matters; (4) by the seemingly convincing alibis of the defendants.

He then summarizes the evidence which concerns the conduct of the defendants when placed under arrest, dwelt upon at length in the charge as "consciousness of guilt." The defendants' explanation was that they were apprehensive lest they be maltreated and then deported as radicals. In cross-examination, the district attorney was permitted to heckle the defendants on their political opinions and so to display them to the war-patriotized jury in their most unfavorable light. No motive was shown for the commission of the crime by the

defendants and neither had a criminal record. Neither altered his mode of living or showed any sign of having received a share of the plunder.

Were there no more to the case than what took place at the trial, the entire matter would be a question of credibility upon which sound lawyers, not having seen or heard the witnesses upon the stand, would hesitate to express an opinion. It is the after-discovered evidence that is most interesting to Frankfurter, as it will be to his readers.

One Medeiros, convicted of another homicide and sentenced to death, confessed that he and his "gang" had committed the Braintree murder. His statement completely exonerates Sacco and Vanzetti. A careful check-up seems to corroborate his entire story. His "gang" was notorious for banditry; the members tally with the description by the eye-witnesses of the participants in the Braintree hold-up; the "gang" cannot account for its conduct on April 15, 1920; their car was similar in make to the bandit car; they had motive; they had money after April 15, 1920, and none before. These and other interesting newly discovered facts were the basis for the recent motion for a new trial.

None can read Frankfurter's able brief without an inner conviction that the defendants are innocent. The author offers no solution. He withholds comment on the plan advocated principally by labor unions and college professors to have an impartial commission investigate and report to the Governor. Opinions vary concerning the wisdom of the proposed investigating commission. Its advocates would sacrifice precedent and perhaps judicial prestige to prevent what they consider a miscarriage of justice in a particular case. Others believing that the trial judge alone was capable of weighing the after-discovered evidence, and that only the defendants' side of the case is receiving publicity, are frankly skeptical.

There exists in the case an additional problem which should concern the conservatives even more than the defendants' advocates. In the event that the sentence of death is carried out, will Sacco and Vanzetti not become martyrs to a political cause? Is it not likely that the ignorant defendants, unsoundly socialistic, will be extolled by their ilk as heroes, murdered by a despotic government to suppress political freedom?

It is ventured that if the pardoning power of Massachusetts should see fit to commute the sentence from death to life imprisonment, the public interest would soon wane. Then, uninfluenced by hysterical petitions, that same pardoning power could, in its usual manner, conduct its customary investigation and in its good time act upon its independent judgment.

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