

## BOOK REVIEWS

ESSAYS ON THE CONFLICT OF LAWS. By John Delatre Falconbridge. Canada Law Book Company Limited, Toronto, 1947. Pp. xxxi, 730.

This book collects the many comments and articles written by Dean Falconbridge in the field of conflict of laws which have for the most part appeared previously in various legal periodicals. They have been integrated and revised to some extent for the purpose of publication in book form. But, although the author has been a prolific writer in the conflict of laws, the book falls far short of a full textual discussion of the subject. For example, in the field of tort all that is discussed are "Tort at Sea: Phillips v. Eyre in Quebec: Proof of Foreign Law," "Tort: The Merchant Shipping Act: Phillips v. Eyre," and "Tort in Ontario: Action in Quebec: Gratuitous Passenger," highly specialized points in a broad part of the conflict of laws. This, however, is one of the features that recommends the book as a useful tool, for one who desires a particularization of the esoteric in the conflict of laws is likely to find it here.

Dean Falconbridge presents discussion on many topics normally glossed over in other texts because their solution is subsumed under general over-all discussion. Although, as in the case of tort, a general discussion of contracts is omitted, there is a chapter devoted to "Frustrated Contracts and Unjust Enrichment." There is a good deal on bills and notes, a chapter each on bills of lading and "Agency: Authority and Power." A mortgagee's interest in land is discussed at length in the material dealing with various aspects of property in the conflict of laws. These are but a few of the specialized subjects probed and dissected by Dean Falconbridge.

The primary law discussed is that of the Canadian Provinces and England. There are occasional references to the federal and state law of the United States with a whole chapter on the recognition of foreign divorces under the full faith and credit clause. The analysis is precise and careful, although at times one wonders whether it is not too refined and repetitive; but this is no doubt due to the fact that the book is essentially a collection of separately published essays. Discussion of case material is ample.

The most absorbing part of the book is that devoted to characterization. It is now more than a quarter of a century since discussion of this subject was opened in this country by Professor Lorenzen. Since then a half dozen or so others have entered the arena and one book entirely devoted to this phase of the conflict of laws has been published. (Robertson, *Characterization in the Conflict of Laws*, 1940.) But the literature has been marked by a singular failure of agreement other than on the existence of the problem and by notable lack of discussion addressed to the question in judicial opinions. The latter has been explained as due to the fact that, although judges engage in the process of characterization in many of their conflict of laws cases, they do so "subconsciously." This in turn might be explained by a Freudian, just as convincingly, as being due to an urge of many of those on the bench to suppress the fact of their being sexagenarians.

What is the problem? Basically, as described by Dean Falconbridge and others, it is one of semantics. When a conflict of laws problem arises it must be determined whether it is, for example, a "tort" or a "contract" problem—the juridical nature of the question before the court must be

defined or characterized. Should the forum decide this according to its own notions of the matter or should it bring into consideration the thoughts of other places having contacts with the problem? Assume the forum has disposed of this question and so come to the conflict of laws rule to be applied. In that rule is a term such as "domicile" describing the place to which the reference is to be made. By whose concepts should that term be defined? When this has been surmounted and the place whose law is to be applied has been determined, who decides how and how much of that law is applicable, the forum or the place to which the reference is to be had? Although variations of each of these questions are presented, these are the stages into which Dean Falconbridge states a court's inquiry should be divided in approaching the problem of characterization. He denominates them respectively "Characterization of the Question," "Selection of the Proper Law—the Connecting Factor" and "Application of the Proper Law."

Before discussing his approach, Dean Falconbridge summarizes some of the prevailing views. Some have argued that characterization is solely a function of the forum. It has been suggested at the other extreme that the *lex causae* should be determinative. Still others, Dr. Rabel in particular, have urged that characterization should be on the basis of a study of comparative law—the arrived at rules distilled from such a study, disassociated from any one system of law and constructed from a universal point of view.

Dean Falconbridge proposes a compromise, best illustrated by one of the cases he discusses. Before an English court is a case involving a marriage celebrated in England between French domiciliaries. French, but not English law, requires parental consent because of the age of the parties. If this requirement is one of formality, the requirement of parental consent is not material, but if it is one of capacity or intrinsic validity, French law governs. How is the requirement of parental consent to be characterized?

The author says that "The characterization should, in an English court and for the purpose of English conflict of laws, be made in accordance with the concepts of English law, but the thing which has to be characterized is a requirement as to parental consent regarded in the light of its context in the French law of marriage, construed as if it were an English statute, and is not either a requirement as to parental consent transferred to English law without its context or a requirement as to parental consent in its actual context in English law." Accordingly, "In order to characterize the requirements of French law the English court must examine the concrete provisions of the French law of marriage, not merely the relevant provisions as to parental consent or other alleged grounds of invalidity disassociated or isolated from their context, but the whole title or group of chapters and articles relating to marriage" (p. 56). To the question how the foreign law can be consulted when the reference is not yet known, a case arising where the place of celebration is one other than the forum, Dean Falconbridge answers that French law is consulted only provisionally to see, once the question is characterized, whether it will be applicable.

Were the sole criterion the theoretical purpose of a conflict of laws system not to have the rights and duties of parties to a law suit vary according to the forum chosen, Dean Falconbridge's suggested solution would have to give way to the view advocating the comparative method; for that view has the objective of attaining this goal to recommend it.

But uniformity is not the sole criterion. The other standard is one of practicability and Dean Falconbridge rejects the comparative method approach because it would "require a supranational class of judges, deeply learned in comparative law, capable of disassociating problems before them from the law of the forum, and willing to adopt in conflict problems a technique which is entirely foreign to the technique applied by them to other problems" (p. 46).

Does not the suggested compromise, however, require comparably strange and complex mental feats of the judge of the forum? He is asked to consult the law of another place in determining his choice of law rule and its content and meaning. He is asked to refer not to an isolated segment of foreign law but to that segment in the full context of the foreign law. He is required to characterize a particular requirement of the foreign law, so placed in its proper perspective, in accordance with the concepts of his own law. What else is required of him to perform is at best not simply deduced from the instructions given by the author and quoted above. And, all this he must do to make the decision conform a little more to that which would have obtained had suit been brought at the place to which the reference is had.

Compromise of the theoretical objective of a conflict of laws system is not to be decried if a practical and workable solution is the result. It has been accepted in the conflict of laws in recognition of the realities confronting a court trying a case under the pressing necessity of arriving at a decision in that case as well as the many others on its calendar. Ideally, a court trying a lawsuit involving contacts with another place should, if the objective is not to vary the rights and duties of the litigants because of the choice of the forum, adopt for the purposes of that case the legal machinery available at that place in addition to referring to its "substantive" law. This is not done for the very good reason that it would impose a heavy burden upon the forum. It is a compromise of necessary convenience to draw a line between "substance" and "procedure" in the conflict of laws.

It may well be asked why a similar rationalization should not obtain in the problem at hand. What this would suggest is characterization according to the concepts of the forum only, without reference to any foreign law until the choice of laws rule has been arrived at and defined, and is so ready to indicate the place to whose law the forum will look. To this rule there could and would be exceptions where, for compelling historical, social or political reasons, exception proved necessary, and such an admission is not, as some have said it is, evidence of the invalidity of this approach. The result of such a course may well be that parental consent to a marriage is considered as a formality rather than as relating to capacity or intrinsic validity and, therefore, as being immaterial in a suit at the place of celebration whereas if the action had been brought at the domicile it might have been of controlling significance. But, this should be of no greater critical importance than a difference in the outcome of litigation due to distinctions of "substance" and "procedure." It would be no less a necessary sacrifice in the interest of a practical and workable conflict of laws system for the courts.

This in substance is the view of the advocates of the *lex fori* approach and was suggested by Professor Lorenzen in his first consideration of the matter. It is adopted in section 7 of the *Restatement of the Conflict of Laws*—"in all cases where as a preliminary to determining the choice of law it is necessary to determine the quality and character of legal ideas,

these are determined by the forum according to its law. . . ." It has in its favor simplicity, ease of application, and recognition of the realities of lawsuits. Its advocates can admit that it is weak in that "if each conflicts law is nothing but an annex to the corresponding internal law and receives its sense and meaning only from this national and local source, uniformity cannot be achieved, even though all conflicts laws should be unified, without simultaneous unification of all municipal laws." (Rabel, *The Conflict of Laws: A Comparative Study* (1945), p. 55.) But, until the millennium of Dr. Rabel becomes feasible of achievement, they can take strength in that what they argue for is feasible today and they can reject an approach which, while compromising the theoretical objective of the Rabels because its attainment is not practicable now, offers a method not much more workable.

Paul A. Wolkin.†

HOW SHOULD CORPORATIONS BE TAXED? Tax Institute Symposium, Tax Institute, Inc., New York, 1947. Pp. 251. \$4.00

Clients have a habit of requesting many things from their attorneys. Frequent questions on the application of existing law are to be expected. But the tax attorney, in addition, is all too frequently asked to go beyond that and to predict the future law in order that tax planning may be more accurate. For those forecasters, not numbering among their items of professional equipment a crystal ball, this should be a helpful volume. I do not mean to suggest that it is a manual of future tax legislation, for that is far from the case. What this volume does present, however, is an exposition of some of the main lines of thought concerning amendatory revision of our tax laws.

Since a symposium is by definition a collection of opinions, it is apparent that no main current of thought is to be found in the volume. The reader is, however, afforded an opportunity to examine the thinking of individuals representing all shadings of political and economic thought. Many of the participants are leading tax authorities and may be said to be speaking for themselves. Others, however, prominent though they may be in fields other than tax law, must be considered as voicing the attitudes of the groups to which they belong.

The discussions were divided into several sections, the first of which dealt with "Proposals for Reforming Corporate Income Taxes." In discussing the question whether corporations should be taxed as such, it is not surprising that Matthew Woll, Second Vice-President of the American Federation of Labor, should disagree strongly with John L. Connolly, General Counsel of the Minnesota Mining and Manufacturing Company. This discussion, like the others contained in the book, stimulates thought but fails to lead the reader to any definite conclusion.

Part Five attempts to find the answer to the question whether the present tax system discourages business enterprise. The opinions of industry as opposed to those of labor clearly highlight the futility of attempting to approach the problems herein discussed with an open mind and reaching a conclusion on the basis of the arguments presented. W. L.

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Hearne of the United States Steel Corporation begins his article: "Our question is, 'Does the present tax system discourage business enterprise?' The answer is that of course it does." Stanley Ruttenberg of the Research Department of the Congress of Industrial Organization states: "It is difficult for me to see how our present tax structure, in any major way, discourages American business enterprise." Finally, Roswell Magill, formerly of the Columbia Law School faculty and presently in private practice, states that the question could be answered in two words: "And How!"

Leon Henderson, late of the government service, takes the affirmative in reply to the question whether the taxing power should be employed to regulate our economy. His opponent, as it were, H. E. Humphreys, Jr., of the United States Rubber Company and the National Association of Manufacturers, seems to content himself with glittering generalities that are too unrealistic to be convincing. Mr. Henderson points out that whether we like it or not, taxes, in sufficient amounts to meet revenue needs, must have an impact on our economy. Since that is so, we are forced to agree with him in concluding that the impact of taxation on the economy might better be planned than left to chance.

One of the more illuminating articles was by Richard Goode, Economist, United States Treasury Department, who ably points out that the problems of corporate taxation need considerably more analysis before these questions can be adequately answered. Where is the true incidence of corporate taxation? Higher prices for the consumer? Lower wages for labor? Lower profits for the investor? These and many other related questions underlie the entire problem and must be answered before the broader questions can be properly considered.

A final word must be said about the section entitled "Detailed Aspects of Corporate Income Taxes." Here, prominent tax practitioners discuss specific problems in authoritative terms. It is the one section in the volume which does not present controversial views, and, consequently, this section is likely to be of most value to the practitioner who seeks understanding of the present law.

The volume is a very stimulating one and deserves careful consideration not only by tax specialists and attorneys, but also by economists, business men and any others interested in the impact of taxes on our present economy.

*Barton E. Ferst.†*

HISTORY OF ROMAN LEGAL SCIENCE. By Fritz Schulz. Oxford University Press, 1946. Pp. xvi, 358.

The phrase "legal science" is here used in a rather unusual sense. This is not a history of Roman legal ideas, but a book about the lawyers themselves, what sort of people they were, how they practised their art, what was the nature of their authority, how they thought, and what they wrote. The discussion is divided into four chronological parts, covering respectively the Archaic Period beginning with the Twelve Tables, the Hellenistic Period beginning about the close of the Second Punic War, the Classical Period beginning with Augustus, and the Bureaucratic Period from Diocletian to Justinian's codification.

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Such a project was one which Dr. Schulz, with his wide knowledge and long experience, could be expected to carry out supremely well. He has done so. The result is an exciting and important work, which will be valuable not only to specialist scholars of Roman law but to all who are concerned to know something about it as one of the great achievements of the human mind.

Dr. Schulz tells us that perhaps the most important chapter is that entitled "Literature of the Classical Age: its Forms and its Transmission." Treated in greater detail than any other, it is undoubtedly the most important for specialists. It is also the most controversial, because here, and in summarizing paragraphs on pp. 280 and 300, Dr. Schulz sets out his opinions on the Interpolations question. So far as the *Digest* is concerned, this question briefly is as follows. At one time it was generally believed that any text which was not classical was due to Justinian's compilers. In recent years, however, so many interpolations, or alleged interpolations, have been discovered that Tribonian and his colleagues would have been physically unable to make them in the time available. Assuming that all the impugned texts really are interpolated, it follows that the editions used by the compilers were by no means faithful copies of their classical originals. Who, then, had done what to the texts, when, and why? Dr. Schulz has an answer: jurists in the western Empire, probably of the law school at Rome, deliberately manipulated the texts during the latter part of the third century and the early part of the fourth, in order to adapt them to their own times. This system is most cogently expounded, and if correct throws entirely new light on the jurists of the early post-classical period; but, with so little independent evidence about these men, we cannot accept it unreservedly. Certainly there are powerful reasons for thinking that if any deliberate recasting of the texts was done at all, it was done during the period contended for by Dr. Schulz. But these reasons are largely negative, namely, that other periods must be eliminated. Further, the reasons for believing that there was a general recasting at any time before Justinian are far less powerful; nobody has upset the position of those who affirm the authenticity of many impugned texts, and hold that the remainder can be accounted for as routine alterations by the compilers, abridgments, intruded glosses, and verbal corruptions by copyists. Moreover the system traverses Buckland's opinion that when the line of classical jurists died out, their writings at once took on such authority that no private person could deliberately have altered them; points too long for treatment in glosses would have been discussed in commentaries; the texts themselves were sacred.

The classical jurists themselves are pictured in a somewhat mechanical light. "The jurists of the Principate perfected the work of the great originators of the Republic" (p. 126). "If we cannot among the classical jurists discover personalities of pronounced scientific originality, it is because none such existed" (p. 125). "With untiring patience and unvarying acumen the classical writers subject the institutions of the law ever and again to a searching casuistic examination which, by applying it in concrete cases, real or imaginary, pursues each principle to its most remote and minute consequences. No problem of private law, however petty or singular, but was welcomed and probed. One is astonished at the number of insignificant and practically unimportant questions that are discussed" (p. 126). In fact, while asserting that "there is no doctrine in private law that they have not in some way advanced and enriched" (p. 126), Dr. Schulz does not rate their constructive achievement very high.

But what they did, he argues, they did perfectly. There is an underlying assumption that anything they wrote must have been the lucid expression of accurate thought. Many readers will dissent from this. Without denying the strength of their tradition, may we not regard the jurists as human; as great men, but occasionally capable of defective reasoning and imperfect exposition? Indeed, his insistence that the classics were always precise has led Dr. Schulz into difficulties.<sup>1</sup>

Dr. Schulz's discussions of the Archaic, Hellenistic, and Bureaucratic periods, while nearly as controversial, especially in the case of the last-mentioned, as that of the Classical Period, are quite as illuminating. In Part I (Archaic Period) his account of the pontiffs and their legal technique is masterly. The significance of Part II is largely implicit in its title—the Hellenistic Period; Dr. Schulz treats of Hellenistic influence from a revealing angle. Of Part IV (Bureaucratic Period) we have already seen that his opinions entail a re-assessment of the early post-classical jurists; and his examination of the literature is full of interest. We may note particularly his discussion of the *Collatio* (p. 311); how much reliance can be placed upon this odd work is a crucial question, and any clarification is welcome.

In sum, our gratitude is due to Dr. Schulz for a thoroughly stimulating book, and our praise to Professor de Zulueta for his really admirable translation. Readers are certain to question much that is said; but in this field it is barely possible to write two consecutive sentences with which everybody will agree, and any controversy provoked by Dr. Schulz's work will be along rewarding lines.

S. F. C. Milsom.†

#### REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND."

By Charles E. Clark. Second Edition. Callaghan and Company, Chicago, 1947. Pp. iv, 310.

Judge Clark's small treatise on covenants that run with the land, which came from the press in 1929, proved to be popular. In fact, with one exception, it was the only modern treatment of the subject to be found on law library shelves. The chapters of the book first appeared in law reviews, and treat of licenses, easements and easements in gross, the doctrine of privity of estates, party-walls, equitable restrictions, rents, and legislative restriction of running interests.

The new edition retains most of this material as it appeared in the first edition. Some phases of the subject have been rewritten, especially where the author has found it necessary to voice his opposition to the *Restatement of Servitudes*. He has added three appendices which deal wholly with the *Restatement*. The footnotes have grown in volume in the new edition, making possibly a third of the two hundred pages of text. This has been done by adding new cases and references to law review articles and texts. This adds greatly to the value of the book from the practitioner's point of view.

1. See Dr. Daube's excellent notice of this book in 9 *MOD. L. REV.* 343 (1946).

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As one reads through the book he notes a lack of definiteness in the author's conclusions. This is, of course, partly due to the confused state of the courts' decisions, and possibly to the application of the reasoning of very early cases to modern situations. Then, too, the author refers to certain law review articles (note pp. 144, 145) and assumes his reader has copies of them or is already familiar with their contents. He then carries on his discussion on this assumption. Doubtless many of his readers are familiar with these law review articles, but it is safe to say that the average lawyer is not, nor does he have the works available in his law library.

In some respects the new edition fails to measure up to the first. Sometimes the reader is apt to ask himself whether he is reading a legal treatise on the law of covenants running with the land or a bit of propaganda on why the *Restatement of Servitudes* is as it should not be. The reviewer holds no brief for the *Restatements* and has found them of very little help in the past, nor does he believe they are going to have very much weight in shaping the common law of the future. However, he does think that it is unfortunate that an author of a legal treatise should yield at times to the temptation to show a personal animus to the Reporter in charge of the *Restatement* in the field covered by his volume.

W. Lewis Roberts.†

RECUEIL DE LOIS MODERNES CONCERNANT LE DROIT INTERNATIONAL PRIVÉ. By E. M. Meijers. Universitaire Pers Leiden, Leiden, 1947. Pp. viii, 100.

This little collection of foreign material on private international law, compiled by Professor Meijers of Leyden University, was published, as indicated in the preface, primarily for the use of the editor's students. It will be welcomed by a much larger audience.

The volume contains Conflicts provisions from the following legal codes: the German Civil Code (in German), the new Greek Civil Code (in French), the new Italian Civil Code (in Italian), the laws of Liechtenstein (in German), the Polish Conflicts Law (in French), the Swiss Conflicts Law and the Swiss Civil Code (in French), the Chinese and the Japanese Codes (in French), and the Conflicts Act of Siam of 1939 (in English). It gives, furthermore, the text of the Montevideo Treaty of 1940 on International Civil Law (in English), and, in the Appendix, an amendment to Article 3 of the French Civil Code, proposed by the French Committee on Private International Law in 1939, and excerpts from an article by Mancini dealing with Article 8 of the old Italian Civil Code and the *renvoi* question.

The choice made of material included in the volume is open to some criticism. It would be important to have the text of Article 3 of the French Civil Code and not only amendments proposed in 1939. The text of the Montevideo Treaty now in force would seem more useful than the new Treaty of 1940, ratified by one country only. One looks in vain, notably, for the text of the Bustamante Code of Private International Law, ratified by fifteen Latin American countries, and the provisions of the

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new Brazilian Civil Code. One must notice also with regret the absence of any excerpt from the *Restatement of Conflict of Laws*, prepared by the American Law Institute and available also in French, which has made American Conflicts rules readily accessible to foreign students.

The collection is most useful for its inclusion of widely dispersed material. Texts are included which cannot easily be obtained. The volume will be indispensable to those who work in the Conflicts field.

The appearance of this volume in The Netherlands testifies to the need everywhere for collections of material on foreign private international law. They are needed by the practitioner as well as for teaching purposes. Professor Meijers is in the envious position of having students with a reading knowledge of four foreign languages. For American counterparts of the *Recueil*, English translations of the foreign texts would be indispensable.

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- THE LAW OF THE ORGANIZATION AND OPERATION OF COOPERATIVES (2d Edition). By Israel Packel. Matthew Bender & Co., Albany, 1947. Pp. xix, 333.
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