

BOOK REVIEWS

CASES AND OTHER MATERIALS ON JUDICIAL TECHNIQUE IN CONFLICT OF LAWS. Edited by Fowler Vincent Harper and Charles W. Taintor, II. The Bobbs-Merrill Co., Indianapolis, 1937. Pp. xxxix, 1189. Price: \$6.50.

This is the third casebook on the Conflict of Laws which has appeared since the publication of the *Restatement of the Law of Conflict of Laws* by the American Law Institute in 1934, the two earlier ones being by Carnahan (1935) and by Cheatham, Dowling and Goodrich (1936). Goodrich was from the very outset one of the committee that prepared the *Restatement*. He was also a Reporter for the chapter on Administration of Estates. Harper took an active part in connection with the work of the second revision of the *Restatement* and was one of the assistants to the Reporter for the chapter on Administration of Estates. Each of the casebooks referred to is a valuable addition to the materials for the study of the Conflict of Laws. In so far as they are the by-product of the *Restatement of the Law of Conflict of Laws*, the American Law Institute is entitled to gratitude on the part of all students of the Conflict of Laws. Carnahan's casebook brings together a wealth of materials selected largely from law reviews, whereas the casebook by Cheatham, Dowling and Goodrich stresses the constitutional angles of the subject. The book by Harper and Taintor places the emphasis upon the judicial technique in Conflict of Laws.

By way of comparison with this recent activity of casebook making in the field of the Conflict of Laws, it is interesting to recall that the first casebook on the subject in the United States was published in 1899, by John W. Dwyer, an instructor in the Michigan University Law School. Then followed the epoch-making three-volume casebook by Professor Beale, in 1900-1902, with a shorter selection in 1907. In 1909 the reviewer's casebook appeared in the American casebook series. Between that time and 1935 only one new casebook was added to the existing list, the one by Henry W. Humble, in 1923.

The principal difference between the casebook by Harper and Taintor and the other books referred to is to be found in Part I, containing the first three chapters. The balance of the work deals with the problems of jurisdiction and choice of law as usually dealt with in the courses on the Conflict of Laws. Part I covers 342 pages of which chapter 1 (58 pages) is devoted to "Postulates and their Derivatives" and to "Function and Policy of Conflict of Laws," chapter 2 (164 pages) to "Devices for Identifying Significant Foreign Elements" and chapter 3 (120 pages), to "Basic Technical Difficulties" (doctrine of qualifications and doctrine of renvoi). Chapter 1 contains interesting and excellent materials. Here we find extracts from Stumberg, Story, the *Restatement*, Beale, Wharton, Cook, Sloveere, Cardozo, Goodrich, Beach and Cavers, on comity, vested rights, obligatio theory, local law theory, public policy, and the like, and some of the fundamental cases of the Conflict of Laws relating to these topics, such as *Loucks v. Standard Oil Company*,¹ *Slater v. Mexican National R. R.*,² *Machado v. Fontes*,³ *The Halley*⁴ and *Guinness v. Miller*.⁵ The reviewer made a feeble effort in the same direction in the first edition of his casebook but discontinued it later for the reason that the general theory of the Conflict of Laws should be developed throughout the course instead of being given to the students

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1. 224 N. Y. 99, 120 N. E. 198 (1918).
 2. 194 U. S. 120 (1904).
 3. [1897] 2 Q. B. 231 (C. A.).
 4. L. R. 2 P. C. 193 (1868).
 5. 291 Fed. 769 (S. D. N. Y. 1923).

wholesale at the outset. Moreover, most of the cases included can be used to better advantage after the student is further along in the course and in connection with the study of the particular subject-matter to which they relate.

Chapter 2, "Devices for Identifying Significant Foreign Elements," deals with nationality, domicile, place of contracting, place of performance, place of injury, accumulation of contact points, place of doing business, location of persons and things, and the forum. It may be desirable to bring these points of contact to the attention of the student in a general way at the beginning of the course, perhaps in an introductory lecture, but any attempt to develop these concepts without reference to the relevant subject-matter seems purposeless. For example, the place of contracting becomes significant in the law of contracts. It is germane to one of several theories relating to the law governing contracts and should be dealt with in connection with the study of that subject. Even the situs of things cannot be dealt with in the abstract. Its significance will depend upon the nature of the property involved (e. g., intangibles) and the subject-matter to which it relates. This is true also of domicile. It may be justifiable, however, to make an exception in this instance on the ground of expediency. Although the concept of domicile may vary in connection with the different topics to which it relates, so that the rules governing domicile in the matter of taxation need not be identical with those relating to wills, the fact is that any existing differences do not clearly appear from the cases. It seems advisable, therefore, to deal with the concept of domicile generally. It might be developed when first met in the course—in connection with jurisdiction—but it seems awkward at that point to interrupt the discussion of the different bases of jurisdiction. It was for this reason that the reviewer preferred to place it in an introductory chapter.

For some unaccountable reason the editors have taken a special fancy to the doctrines of qualifications and renvoi, devoting, in Chapter 3, 120 pages to these topics. The subject of renvoi has worried the students of the Conflict of Laws on the continent since 1880, and that of qualifications since 1891. In this country a number of articles have been written on these subjects, the first on renvoi appearing in the *Columbia Law Review* in 1910, and the first on the subject of qualifications, ten years later, in the same *Law Review*. The reviewer has found these topics too difficult to teach in the early part of the course. Attention should be called to them as soon as possible, but their significance can be grasped only after the student possesses some knowledge of the Conflict of Laws. The student should be required to study some of the articles on the subject and to restudy them as the course advances. The editors have used in this chapter some French cases and excerpts from the French writers Arminjon and Bartin. This gives, however, only a very narrow segment of the continental point of view. In the matter of qualifications, it was Franz Kahn, who first propounded (in 1891) the necessity of applying the *lex fori*, being followed by Bartin. In more recent times, Rabel, until recently professor at the University of Berlin, made most important contributions to the subject of qualifications, which have had considerable influence upon English writers, such as Beckett and Cheshire.

In the preface, the editors say that inasmuch as Chapters 1 and 3 deal with the most difficult problems in the field of the Conflict of Laws, they have some doubt as to the wisdom of their position for teaching purposes. They suggest, therefore, that some instructors might prefer to treat these chapters at the end rather than at the beginning of the course. The difficulty with this suggestion is that the study of these topics at the end is too late. Much of the material, and especially the important cases to be found in these chapters, should be studied in their appropriate places throughout the course.

Chapters 4 to 14 consist almost entirely of case material dealing with jurisdiction, judgments, substance and procedure, domestic relations, torts, contracts, business associations, property, and the administration of estates, in the order mentioned. Much effort has been expended by the editors in giving cases not found in the other casebooks. The outline is logical and the order of cases satisfactory. Unfortunately, many cases appearing in the earlier chapters are indispensable in this part of the work and will have to be supplied if the instructor, omitting the first three chapters of the casebook, chooses to start his course, as is usually done, with the subject of Jurisdiction. Both the introductory notes and footnotes are helpful. The latter contain frequent references to the *Restatement of the Law of Conflict of Laws*, to Beale's treatise and to articles, and occasionally to Stumberg and French writers. For some unknown reason—unless it be from a sense of modesty because Harper was an assistant to the Reporter—no mention is made under "Administration of Decedents' Estates" of any of the sixty sections of the *Restatement* relating to this subject, which have clarified it in a most commendable manner. The workmanship throughout deserves high praise.

Ernest G. Lorenzen.†

HENRY WHEATON. By Elizabeth Feaster Baker. University of Pennsylvania Press, Philadelphia, 1937. Pp. x, 425. Price: \$4.00.

For the writer it was a privilege to review this splendid biography not merely because Henry Wheaton was a great lawyer whose life has been written in a most informing way by Elizabeth Baker. The work is also of unusual value to any lawyer and especially to members of the bar of the Supreme Court because of its timeliness.

Perhaps with respect to its timeliness the writer's judgment is biased. The fourth of five successive generations of lawyers of his own name since the Supreme Court was founded, and the great-great grandson of one in whose company Chief Justice Marshall served as a lieutenant during the Revolution, he is the great-grandson of the Hon. John Sergeant of Pennsylvania who with John Quincy Adams, Story, and Luther Martin made up the quartet who combined their influence to give the tribunal over which Marshall was placed, its initial prestige. Reared in the traditions of this great tribunal before which he had the honor of appearing often, even before becoming an Assistant Attorney General of the United States, and now one of the twenty members of the National Committee to Uphold Constitutional Government, it is not unnatural that he sees in Elizabeth Baker's work something of peculiar value. For in truth, written in the best biographical style it tells charmingly the story of a profound student of law, a practitioner, a Chief Justice of the Marine Court, a man who following Cranch, in 1815 became Recorder of the Supreme Court while Marshall, who made of him a personal friend, was laying the foundations of its strength.

It is doubtful if any other member of the American Bar had a more romantic professional career than did Wheaton following the beginning of his long association with Marshall. The outstanding legalistic writer of his day, as well as an able and active practitioner, his vast theoretical knowledge of international law was to stand him in good stead as a diplomat while rendering his country important services abroad before resuming practice in New York in 1847. The fact that a lawyer of such extraordinary versatility as Wheaton met with many disappointments, was often misunderstood; that frustration seemed to be his experience, is not surprising.

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Yet, however, much as he may have been disappointed in some respects, he suffered no frustration as an upholder of the best traditions of the Supreme Court. For this reason Elizabeth Baker's excellent story may well be recommended to all those, including members of the bar who, cherishing not these traditions, are today bent on undermining the foundations laid by Chief Justice Marshall despite the "Sage of Monticello."

Prejudice being the child of ignorance, the book if read and pondered by these enemies of the Republic, would do much toward their enlightenment. Possibly it would cause some of the "unconscious enemies" among them to see what Wheaton understood so well—the distinction between a tribunal and the limitations of the individuals selected to sit upon its bench by presidents with limitations of their own. Wheaton clearly showed the danger of trying to improve the Supreme Court by appointing to its bench individuals with minds so illogical that they could in good faith invoke Jefferson's Statute of Religious Freedom against those who had exposed his own intolerance!

What more can the writer of these lines say than this: the book has been placed by him on a shelf in his library besides Charles Warren's *History of the Supreme Court*, Sergeant's *Addresses*, and Beveridge's *Life of Marshall*.

Jennings C. Wise.†

VALUATION UNDER THE LAW OF EMINENT DOMAIN. By Lewis Orgel. The Mitchie Co., Charlottesville, 1937. Pp. xviii, 976. Price: \$12.00.

The happy combination of practice and research in the field of eminent domain has enabled the author to add a significant step to a "horizontal" analysis of an important problem of law and economics. The practitioner meets the problem of valuation in a multitude of situations, each of which has been associated traditionally with a "longitudinal" course of study covering a given compartment of the law. This book, however, is one of a series of volumes which treat the problems of valuation whether it be with regard to damages, insurance losses, public utility rates, tax liability, liability on stock sold for property, upset-price fixation, issuance of securities or with regard to fixing the compensation for property condemned for a public use.

In its jurisprudential aspect, the book is no longer particularly useful since its substance, from a comparative standpoint, has been included in the later volume on Valuation of Property, written by James C. Bonbright, the editor of this series of studies in valuation. To the attorney faced with a condemnation case, however, the present value of the book is quite obvious.

The author starts with the constitutional requirement of just compensation so as to make a clear-cut distinction between those deprivations of property rights which must be paid for and those which need not be paid for. The universally accepted statement of "market value at the time of the taking" is then criticized, since, almost of necessity, courts must admit they cannot mean the value at which the property could have been sold on the very day of the taking. The factors connected with depressions and booms and with unusual claims because of the prospective condemnation are considered. Furthermore, it is pointed out that the statement of the general rule admits of choice as to the present and prospective uses of the property which are to be considered.

A more serious deficiency of the general test is manifested, in the opinion of the author, in those cases in which there is present a "peculiar value to the owner, or to the taker, distinct from sale-value to an 'outside market.'" The peculiar value to the owner may exist because of (1) the nature of the building

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such as a church, clubhouse or other highly specialized use; (2) a partial taking of an integral part of a plot of land; (3) sentimental value; (4) a taking of only a partial interest such as an easement; (5) legal restrictions applicable to the use by the owner of the property; and (6) the avoidance of incidental damages such as a decrease of business, removal costs, interruption of business, and the increased cost of securing a new premises. The peculiar value to the taker, on the other hand, usually exists because of the particularly advantageous use to which the property will be put. The author very carefully analyzes the judicial consideration which is given to these factors.

An interesting question referred to in a short section is whether the courts, in measuring just compensation, distinguish between a taker which is a governmental body and a taker which is a public service corporation. English statutes make such a distinction. In this country, however, it appears that the courts and legislatures have not recognized the distinction. It would seem that, if for no other reason, the distinction could be based upon the non-profit aspect of governmental ownership.

The substantive aspect of the valuation of property, other than that of public utilities, is completed by two chapters devoted to the problems of valuation and apportionment of divided interests in property.¹ Such divided interests exist as between the owner of an easement and the owner of a fee, or between a mortgagor and a mortgagee, or between the owner of a possessory interest and the owner of a future interest.

To test the actual operation of the substantive rules expounded by the courts, the author turns next to a detailed study of judicial rulings on different types of evidence offered to measure value in condemnation proceedings. The many views taken by the courts as to the admissibility and weight of opinion testimony, sales and offers, business profits, rentals, reproduction costs and tax assessment valuations are presented. A difference of opinion may be expected over the conclusion of the author that evidence of tax assessments is not particularly helpful since tax assessments need only be "*relatively correct*" whereas eminent domain valuations must be "*absolutely correct*".²

Current talk of the acquisition of public utilities by the Tennessee Valley Authority and by other public agencies makes particularly interesting the valuation of public utilities for condemnation or purchase. The separate treatment of this subject by the author is more than justified by (1) the fact that condemnation of a public utility means the taking of not only the physical properties but also the very business itself; (2) the relationship between valuation for rate making and for condemnation or purchase; and (3) the absence of market sales of public utilities. After an examination of the relationship between rate making and condemnation, the author discusses physical property values and intangible values. Although these values are broken down and are separately evaluated by courts and commissions, the values do not in their aggregate fix the value of the enterprise. The author puts it mildly when he says the "final award is, therefore, an empiric approximation rather than a mathematical computation of the whole."

1. A recent Pennsylvania statute makes it mandatory in case of claims by owners and their tenants that first the total value of the property taken should be found and then the total value should be apportioned among the claimants. PA. STAT. ANN. (Purdon, Supp. 1938) tit. 26, § 44.

2. A significant attempt to bring condemnation and taxation valuation closer into line is a Pennsylvania act of 1937 which requires the board of viewers for condemnation in counties of the first class to be selected from the board of revision of taxes. The legislation was recently held constitutional in Commonwealth *ex rel.* Kelley v. Cantrell, 127 Pa. 201, 193 Atl. 655 (1937).

The same unsatisfactory state of the law pertaining to valuation for rate making is apparent in the discussion of condemnation valuation factors such as original cost, reproduction cost, accrued depreciation, physical depreciation, functional depreciation, franchise value, going-concern value and good will. As in the previous portion of the book, the author again turns to an examination of the rulings on evidence to test the substantive rules expressed by the courts in speaking of the valuation of public utilities.

The author has included a thorough analysis of the English cases dealing with the valuation of public utilities upon their public acquisition. There is also included an interesting chapter on governmental acquisition of public utilities by condemnation of their securities as contrasted to the condemnation of their physical property. Unfortunately, the manifest advantages of this method of acquisition can rarely be utilized at the present time. This is due to the absence of sales of the securities on the open market (a significant factor in the measurement of the value of the securities), which in turn results from the close holding of the securities of operating companies by the large holding companies.

A mere discussion of the general contents of the book does not completely disclose its real utility to the practitioner. A detailed index of ninety-seven pages and a table of approximately 1150 cases, which are carefully analyzed in the text, speak for themselves in showing that an attorney with a condemnation case cannot afford to miss the opportunity of making use of this valuable tool. Each subject discussed by the author is given an appropriate introduction to show how it fits into the problem and then is terminated by a section in which conclusions are stated.

In its broader aspects the "horizontal" study of valuation might well be the forerunner of a means of satisfying the new demand for post-law-school training. An intelligent excursion along a given line into many fields of the law is difficult if the listener does not have a general knowledge of those fields. To the practitioner, who already has the general knowledge, it appears that there are many special studies which would be of particular interest and assistance. For example, it would be interesting to compare the determination of insolvency for purposes of an adjudication of bankruptcy and other proceedings arising out of bankruptcy, for purposes of obtaining the appointment of a receiver, for purposes of creating a trust in a bank deposit, for purposes of setting aside a purchase by a corporation of its own shares and for purposes of setting aside a gift made to defeat creditors. Then again it would be interesting to compare the measure of reasonableness which is used for the purpose of determining whether there is actionable conduct in a tort case, whether there is a manifestation of assent in the making of a contract, whether police legislation is constitutional, whether a particular meaning should be given in the interpretation of a will or of a statute, or whether the rules and regulations of an administrative body are valid. The illustrations could be multiplied, but they are sufficient to show the way which can be led by this study of valuation.

Israel Packel.†

THE COMMERCE CLAUSE UNDER TANEY, MARSHALL AND WAITE. By Felix Frankfurter. Univ. of North Carolina Press, Chapel Hill, 1937. Pp. 114. Price: \$1.00.

In this, one is tempted to call pleasant, little volume, Professor Frankfurter has given us a keen insight into the workings of three great minds in their judicial wrestling with the commerce clause of the Constitution. No hero worshiper, no sinner at the feet of idols—constitutional or otherwise—nonetheless

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he is of the firm opinion that Marshall, Taney and Waite were responsible for much of the significant ebb and flow of the "liquid history" of America. "The influence of personalities is most far-reaching when a court's dominant function is the adjustment of conflicts touching the most sensitive economic and political forces within a federal system. That Marshall rather than Roane was Chief Justice, that Wolcott was rejected and Story confirmed, that Waite rather than Conkling headed the Court before which came *Munn v. Illinois*, surely made differences vital to the course of American history." With that all must agree.

To Marshall is awarded first place in Frankfurter's list of Supreme Court Justices. In evaluating Marshall's contribution, it is pointed out, and no doubt rightfully so, that when he was required to give effect to the commerce clause he "had available no fund of mature or coherent speculation regarding its implications." There are those of us who would hesitate, as does the author, to regard such a scarcity as a handicap. Perhaps even one or more of those now gracing the Supreme Bench have not infrequently damned past pronouncements of the Court. More particularly one wonders if the majority that decided the Wagner Labor Relations cases would not have felt a bit happier without the "fund of mature or coherent speculation" deposited in the Guffey Coal Act majority opinions. The objection, it must be admitted, is not of extreme salience. Certainly the pioneer aspects in Marshall's judicial career do not minimize his stature.

Three of Marshall's decisions established the negative effect of the commerce clause on the power of the states rather than the affirmative power it vested in the Federal Government.¹ Much is made of the fact that his technique of basing his decisions on statutory construction leading to a conflict between state and federal acts regulating commerce permits a wide field for the application of judicial discretion. Thus, in the first two he was astute to find such an inconsistency. In the third by defining "intent of Congress" an apparent conflict was resolved into serene consistency. Marshall, then, was the forerunner of a long line of judges who rejected self-restraint and formulated policy. Ironical too is the realization that his nationalism was at least in some measure traceable to his distrust of local government with which he associated a "dangerous indifference to rights of property".

Professor Frankfurter devotes several pages to what must be regarded as apologia for the ambiguity and tentativeness so prevalent in the Marshall opinions. Their wariness which to others less sympathetic might be regarded as weaseliness is attributed to a shrewd desire of Marshall to consolidate his gains of nation as opposed to confederation step by step so that no combination of states rights defenders be needlessly aroused. Finally, the author gives in no uncertain terms the lie to the sometime fashionable attempt to minimize Marshall by crediting much of his creative effort to the illustriousness of lawyers like Webster and Wirt, who practiced before him. The conclusion is that Marshall had the great capacity for distinguishing between the correct and the partisanly clever arguments of such counsel.

Taney, one reads with some surprise, was not merely an "agrarian" judge bent upon protecting the rights of slave states at all costs. Rather, he feared extreme action which might carry with it as its price the Union itself. Nor was he the extreme "localist" one is accustomed to hearing him called, according to Professor Frankfurter. The chief point of contrast between Marshall and Taney is that the latter did not believe that inherent in the grant of power over commerce to Congress was a limitation on the power of the states. Until Congress acted, then, the states also had the power to regulate commerce.

1. *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824); *Brown v. Maryland*, 12 Wheat. 419 (U. S. 1827); *Wilson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245 (U. S. 1829).

Despite the extenuating circumstances it is a little difficult for this reviewer to accept Taney as second only to Marshall. No less for what he did (e. g., the Dred Scott decision) than for what he did not do, one feels that there are others, more recent too, who might better be placed second to Marshall.

In his chapter on Waite, Professor Frankfurter properly expresses his gratitude for the decision of *Munn v. Illinois*. It stands today as a fine example of the exercise of judicial self-restraint. Indeed, Waite assumed the role of the earliest champion in opposition to the assumption of power by the judicial branch of our system of government.

There is, of course, mention of Waite's handicap of a lack of felicitous style. One is inclined to think the point labored—especially since the average reader of this delightful little book must ever be conscious of the author's success in avoiding the stodginess of the legalistic "style" too often associated with writers in the field of constitutional law.

David Berger.†

BOOK NOTES

THE DOCTOR LOOKS AT MURDER. By M. Edward Marten and Norman Cross.

Doubleday, Doran & Co., Garden City. 1937. Pp. xvi, 325. Price: \$3.00.

For a long time the legal profession has been cognizant of the inefficiency of the antiquated Coroner system, a system which has permitted a politician to certify to the highly technical "cause of death". True, these men are usually assisted by a physician, but this physician is in most instances a political henchman that is being rewarded for his services on election day. In 1915 the New York Legislature passed an act which abolished the office of Coroner in New York City and set up in its place the office of the Medical Examiner. The Medical Examiner is chosen by civil service examinations, which require him to have a thorough knowledge of medicine and surgery, of autopsy technic, of the legal aspects of medicine, and of biological test methods for blood and other stains. More than a casual acquaintance with botany, entomology, and ballistics is also required. Dr. Marten, who is at present Deputy Chief Medical Examiner of New York City, describes in this book the functions of that office and he evaluates its services to the City.

To the lawyer this book is valuable as a picture of the manner in which one of the law enforcement agencies of government cooperates and aids the district attorney's office. To the doctor, this book is interesting as a description of the place medical science plays in the detection of crime. To the layman, this book will be as entertaining as a dozen good detective stories combined into one narrative. Copious illustrations of the manner in which alert medical examiners have aided in the solution of apparently insoluble mysteries add zest to the reading.

Even the most skeptical member of the Coroner's Association would be convinced by a reading of Dr. Marten's book of the inadequacy of the office of Coroner under modern conditions.

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