
Law students and teachers, as well as practicing lawyers and Judges will find Professor Mason's latest book on Brandeis, the first full scale biography, good reading. Indeed, it is likely that, for many readers, "Part I—Heritage," comprising the first hundred pages and dealing with the family background, his early schooling, "the wonderful years" at the Harvard Law School, and his start in private practice—will even surpass in interest subsequent chapters which have to do with the activities of Mr. Justice Brandeis "On the National Stage," and finally his years on the Bench which, of course, are already somewhat better known.

Brandeis was not yet nineteen when he entered the Harvard Law School in 1875, without college training and having prepared directly for his new studies only by reading Kent's Commentaries on American Law. Before the end of his days there, a fellow student described him in a letter as "one of the most brilliant legal minds they have ever had here," and went on to say: "The professors listen to his opinion with the greatest deference. And it is generally correct."

The future Justice was, therefore, "among the first subjected to the new legal training" instituted by Langdell, and Dr. Mason quotes from numerous letters written by the brilliant law student at the time showing his great enthusiasm for the case system. Quite soon, apparently, he acquired "a great distrust of textbooks," writing that "One sees how loosely most textbooks are written and how many startling propositions are unsupported by the authorities cited to sustain them," and that: "A lecture alone is little better than the reading of textbooks." Frequently Brandeis stressed the "intellectual self-reliance and spirit of investigation" which the inductive method engenders. If the extent of his own possession of these attributes may be traced even in part to the case method of law study and teaching, the life of Louis D. Brandeis stands as an extraordinary example of its effectiveness. Under the headings "Reading Maketh a Full Man" and "Hobnobbing With Intellectuals," the author makes clear, however, that Brandeis was prepared for the strenuous and useful life which lay before him by other pursuits not immediately connected with his law course.

It is interesting to read perhaps in greater detail than has heretofore been generally afforded how difficult it was for Brandeis to choose between teaching and practice. "The law as a logical science has very great attractions for me. . . . I know that such a study of the law cannot be pursued by a successful practitioner nor by a Judge." He recognized, though, that "The wrangling of the Bar may have the greatest attraction for me." While few would have the temerity to wish that "the greatest attraction" for this talented lawyer might have lain in any other direction, one cannot help wondering what effect it might have had on legal education if Brandeis had chosen to bring to it in a more direct manner his unusual talents. But the same one would have difficulty in endeavors to justify the loss if Brandeis had never become a Boston practitioner, had not served so many years unofficially as "The People's Attorney," or had not sat on the Supreme Court of the United States!

1. Professor of Politics, Princeton University.
Of particular interest to law students and young lawyers will be those portions of the book showing how Brandeis went about selecting where he would practice, his rejection of some opportunities and his final choosing of a partner. The experience and other advantages he gained through working for Chief Justice Gray are but another demonstration of how helpful such a law clerkship can be.

Even after he decided against what was apparently his family's preference for his acceptance of the preferred assistant professorship, Brandeis continued "teaching himself and others." As he became acquainted with practice, he took time to analyze it and to set down certain axioms: "Know thoroughly each fact. Don't believe client witness. Examine documents. Reason; use imagination. Know bookkeeping—the universal language of business; know persons. Far more likely to impress clients by knowledge of facts than by knowledge of law." He made it "one of the rules of my life that no one shall ever trip me on a question of fact." Some years later, as a successful and widely known practitioner, Brandeis stated flatly that "My special field of knowledge is figures,"—a subject, Professor Mason observes, of which most lawyers know next to nothing.

The final portion of the first hundred pages comes in a Chapter entitled "The Brandeis Way of Life and Law," with such sub-topics as "Recipe for Success," "Mr. Brandeis and his Firm" (which some senior law partners would do well to read), and "A Law Practice Merges into a Public Career." In the course of the last mentioned, we learn that "the prospect of a long life limited to conventional law practice was not enough. He wanted new worlds to conquer, fresh problems to spur him on. He had begun to find a challenge in public activities."

Many of these are recounted in Part II of the book—"New England Battles." Here the reader is given, in case history form, the pattern of the man's life, the thoroughness of his preparation, his reliance upon organization and publicity (pressure groups and lawyers who advise them will find much of benefit in studying his techniques), and also considerable understanding of why he irritated as well as confounded his opponents. One sees clearly, as he reads, that here was a lawyer who refused to be bound by conventional procedures but who, like those who more recently succeeded in releasing atomic energy, was always ready, indeed eager, to think in new ways to find a solution.

The author appropriately devotes considerable space to the three cases which at the time and subsequently were so heavily relied on as establishing unethical conduct on the part of Brandeis the lawyer. "As Brandeis's activities were making him noted as a public benefactor, his enemies were seeking to make him notorious as a shyster lawyer." While here, as throughout the book, Professor Mason seeks to present the subject "in a spirit of impartiality," he demonstrates, by the use of italics and otherwise, perhaps more than he intended his own conviction that there really was no substance to the charges and that they were born of personal hatred.

The next two parts of the book have to do with the activities of the Boston lawyer on the national scene, first his legal causes and then in politics. They are further illustrations of his fight for principles, his insistence upon the necessity of balance in power in the American democracy, and his deep-seated conviction that, to the extent there is conflict between the "large interests" on the one hand and "the interests of the masses on the other, it is mistaken and short-sighted that the ablest lawyers should be found all in one camp."
Finally, Chapter V, "In the Temple of Law," which follows the fascinating recital of the fight over his nomination to the Supreme Court of the United States, has to do with more than his work as an Associate Justice. His continued role as President Wilson's adviser, the "Doubts and Misgivings" he began to entertain, his watching the "Normalcy and Irresponsibility" of the 1920's are here shown but perhaps the best reading is that to be had in the two chapters, "Holmes and Brandeis Dissenting" and "Crusader Amid Prosperity and Depression."

Forty pages of Bibliographic Notes indicate the extent of Professor Mason's research and of the material placed at his disposal by Mr. Justice Brandeis, members of his family, and others, not confined to friends. Portions of the Appendix, showing the lawyer's income -(and absence of taxes or small ones) and his contributions will be of interest to some, perhaps discouraging to others.

Professor Mason has shown excellent craftsmanship in putting the rich material together. The reader will find very little opportunity for his interest to lag; he will pause over many pages and he will read again in an endeavor to get a firm grasp on what is before him. This is a most competent biography of a truly great lawyer and jurist. Mr. Justice Brandeis brought the law and life together in a new and more effective way. This story of his life will doubtless find its way quickly to many Auxiliary Reading lists—it belongs there.

_Earl G. Harrison_ 

**Economic Freedom for the West.** By Wendel Berge.1 University of Nebraska Press. Lincoln, Nebraska. Pp. 149. $3.00.

This is a book about a choice which we as a nation must make, a choice that is crucial in these days as we turn from the regimented economy of war to consider how we shall use the new opportunities for fruitful peace. It is the choice between official and unofficial, between public and private, government. Public government is exemplified by such operations as levying an import duty, paying an export subsidy, or regulating interstate commerce. The decrees of the "Western Traffic Executive Committee", a private organization of supposedly competing railroads fixing rates and services for more than half the country, are also "government," as ineluctable as federal administrative orders and equivalent in practical effect to regional tariffs and subsidies. Such regulation, if attempted by a "sovereign" state of this union, would be instantly struck down as unconstitutional interference with national control. Mr. Berge shows how the operations of this private regulatory agency zone the nation industry-wise,* determining what may profitably be produced in the South and how much toll the consumers of the West shall pay for goods which, but for concerted rate discriminations, might be manufactured locally. These determinations of course reflect the financial interests of the railroad managements which make them. There is no nice resolving of the conflicting interests of shippers, consumers, labor and national defense, such as an agency of public government would be obliged to make.

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1. Assistant Attorney-General of the United States.
* Cf. charges that mortgage-lenders of New York City zoned the city on racial lines by concerted refusal to lend. U. S. v. The Mortgage Conference, antitrust complaint filed Aug. 6, 1946, S. D. N. Y., Civ. 37-247.†
This book is not, however, a bureaucrat's plea for expansion of public government, e. g. by having the Interstate Commerce Commission take over the actual fixing of rates. Mr. Berge's thesis is "Freedom"—freedom for one railroad executive to pioneer in cheaper transportation and better service, without the restraining hand of his less daring brethren, freedom of shippers to choose among really competing carriers, freedom for every section of the country to make the greatest contribution which its resources permit. This is the magnificent concept of private enterprise, more often on the tongues than in the hearts of its lovers. If this system is to give way to another, it will not be because Mr. Berge or the people of this country want more government, but because, when more government seems inevitable, they will always prefer political government responsive to the general will over private government for profit. Thus those who most stubbornly defend private concentrations of economic power may be hurrying the day of expanded political control.

Mr. Berge conceives of the antitrust laws as an instrument against private government: where competition prevails (or can be restored by an antitrust suit) the customer has a power of effective choice among many sellers. Prices are determined by the interaction of many wills on both sides of the transaction, rather than by fiat. The consumer, in other words, is not "governed". On the other hand, price-fixing agreements affecting a service as basic as rail transport and embracing substantially all sellers of the service put the customer in a take-it-or-else position; i. e. shippers as a group are subjected to the will of carriers as a group. Some may see no danger so long as the I. C. C. has power to set aside "unreasonable" rates. Others, knowing that only a small fraction of the tariffs filed by carriers actually come up for review by the Commission, may agree with Mr. Berge that shippers should be entitled to competition among carriers within the broad area of "reasonableness" to which the I. C. C. theoretically confines transportation rates. There is little basis for believing that administrative protection against extortionate rates was won only by yielding that more ancient common law protection, the prohibition against monopoly and restraint of trade.

That railroads must compete although they are also subject to regulation was decided by the Supreme Court half a century ago. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290. But the old longing for untrammeled power dies hard; only yesterday was the latest drive for license not to compete turned back, when the Bullwinkle bill to exempt railroad rate conferencees from the antitrust laws died in the current Congress. Today a new note is struck among business men themselves, as a maverick financier, Robert R. Young, chairman of the Chesapeake & Ohio Railroad, withdraws his system from the Association of American Railroads, charging that it dissipated its funds in lobbying for antitrust exemption, opposed competition in the sale of railroad securities, discouraged competitive technological development, and was implicated in regional rate discriminations. New York Times, October 16, 1946, p. 41. Significant also is Mr. Young's assertion that "At least 90% of the association's members feel the way we do but haven't dared do anything about it."

Although this reviewer, like all of the tribe, yields to the temptation to make another man's book an occasion for airing his own political preferences, a few sentences are here resolutely devoted to assisting the curious in deciding whether to buy or read the work in question. Let it therefore be noted that transportation is only one of the problems dealt with in this
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volume: The resources and opportunities of the West are inventoried. There is an examination of the possibility of reducing Eastern domination of Western industry by proper administration of the Surplus Property Act of 1944, which subordinates financial return from the sale of surplus property to promotion of independent competitive small enterprise. There is a fascinating chapter on the function that government regional development on the model of T. V. A. can perform.

Are you a lawyer who may sometimes find himself across the conference or counsel table from Mr. Berge and his energetic assistants, or briefing a client to appear before the great Senate Committees probing our economic organization? You will want this book, the better to understand a point of view which for half a century, and never more than now, has commanded powerful adherence in Congress, the courts and the country. Are you an economist, political scientist or plain citizen interested in the workability of democracy? This is a clear, intelligent, authoritative essay on a fundamental issue of our time. But those whose political arteries hardened in the '20s, may find more irritation than enlightenment here.

Louis B. Schwartz.†

Mr. Berge, head of the Anti-Trust Division of the Department of Justice, presents in this volume of fourteen papers his views and those which have been advanced repeatedly by him and other spokesmen of the Anti-Trust Division in hearings before Congressional committees, in court and Commission proceedings, in newspapers and books. The oft-repeated theme of this collection of papers is that the economic development of the West is stultified by monopoly,—industrial and transportation. He appeals to other sections of the country, particularly the South and East, to assist the West in “throwing off the economic shackles forged by the monopolists.” He appeals to other sectional interests to take this action not only to aid the West, but to preserve and advance the economic interests of the South and East, because, he asserts, the “economic interests of one region converge into those of another.” (p. 7) He does not attempt to marshal evidence to show the truth of this statement, but treats it as a truism.

He states that the resources of the West are transported to the East, manufactured and processed, and transported back to the West at what he states are unreasonably high freight rates and sold to western buyers at exorbitant prices. This is made possible, Mr. Berge charges, by monopolists in industry aided and abetted by the transportation monopolists. What Mr. Berge does not state is that only part of the resources of the West are shipped East and then back again. A large part of the manufactured goods is sold in Eastern or Southern markets or is exported, and only some of the goods go West as finished goods. This is not due, in the opinion of this reviewer, to the monopolists, but to market conditions and to relative costs of manufacture. If a sufficient market existed in the western states, the western raw materials would be manufactured there and distributed from western manufacturing plants.

He states that the steel industry in the West was ruined because steel prices were quoted “at a few base mills, all of which were east of the Mississippi River.” (p. 23) The unwary reader may get the impression that the author is referring to present conditions, although he

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uses the past tense in this sentence. There are now more than 20 steel basing points west of the Mississippi River, although they are not basing points for all steel products. There are, however, steel basing points west of the Mississippi River, and the steel industry in the West is highly competitive.

The weakness of Mr. Berge's economic analysis is nowhere more clearly exposed than in his discussion of the future of the war plants of the West. He observes: "We must ask not only how many of the war plants have been locked up with the cessation of war contracts; we must also ask whether if Nebraska industry can load bombs, make fuses, and contract and operate a large alcohol plant, such creative ability cannot find peacetime outlets." (p. 79) This observation is not only an obvious appeal to prejudice and defective in logic, but it ignores the important fact that the economics of plant location are adjourned during war.

In three papers on The Railroads, How Rates are Made, and Transport and New Industries, Mr. Berge repeats the views of the Anti-Trust Division that the railroads are a monopoly-ridden industry in which competition is a sham battle; that technological progress is restrained by the monopolists; and that the West is strangled economically by excessive and discriminatory freight rates made by the private regulations of traffic associations. He repeats the charge that only 1% of freight rates filed are ever reviewed by the Interstate Commerce Commission, and that these rates are examined only to ascertain whether or not they are within a zone of reasonableness, or violate the Interstate Commerce Act. He implies that this amounts virtually to no regulation worth the name and that excessive and discriminatory rates and rate bases persist. (pp. 111-112) He ignores the replies made to these charges by such acknowledged authorities on transportation regulation as Hon. Clyde B. Atchison, the senior member of the Interstate Commerce Commission, in his testimony before the House Committee in the Bullwinkle Bill hearings.

Although he concedes that many war-built industrial plants were not placed at ideal sites from the standpoint of their continued operation, Mr. Berge asserts that "transportation rates are still the dividing line between their success and failure." (pp. 125-126)

His prescription for the ills of the West is a copious dose of the Anti-Trust Act panacea. He states that the result of the enforcement of the Anti-Trust Acts will be the emergence of many independent local industries "freed from the stifling effects of monopoly," which will be "at liberty to strive for the development of new markets and to reduce prices to stimulate demand for their products. Consumers will benefit by increased purchasing power and more opportunities for employment." (pp. 132-133)

He charges that it "was the decision of cartel groups to prevent the establishment of industries in the West." (p. 142) Apparently he ignores completely the evidence that large industries are continually seeking to locate new plants or branches where the availability of raw materials and the markets for their products make such locations desirable from the standpoint of relative costs of production and cost of distribution, including transportation. He does not consider the recent significant studies of economists in monopolistic competition. Evidently the author assumes that all large industries are non-competitive,—a dangerous and an unwarranted assumption.

Mr. Berge gives no consideration to the significant fact reported in current popular magazines and newspapers that many industries are estab-
lishing branches, factories, assembly plants, and other facilities in the West. The economic improvement of the West, it is believed, will be accelerated by allowing natural economic laws to effectuate the expansion of well-established industries into the West rather than by attempting to force Twentieth Century industrial development into the antiquated pattern of the early Nineteenth Century in which competition is regarded as the panacea for all economic disorders. Mr. Berge and others who seek to foster unlimited competition are undertaking to turn the economic clock backward to the economic era of Adam Smith.

The real issue is whether the development of the West and of the rest of the United States will be developed better and more rapidly by the unrestricted competition which Mr. Berge advocates, or by the more orderly restricted competition between large and small industries under "monopolistic competition."

It is suggested that the size of the industries should be determined by the business in which they are engaged, the markets to be served, and the efficiency of management, that is, by economic considerations—and not by artificial and uneconomic considerations, such as those apparently advocated by Mr. Berge.

G. Lloyd Wilson.†


In their foreword, the authors warn that they "have, with some mis-givings, undertaken the rather ambitious task of attempting, in one work, to accomplish two objectives: (1) an exposition of the law of arbitration, as applied particularly to labor disputes, with citations to the authorities, to serve as a useful reference work for lawyers; and (2) a practical and not-too-technical guide for the layman who may be called upon to conduct an arbitration without benefit of legal counsel."

As they feared, "certain portions, which may be quite useful to the lawyer, will be very heavy reading for the layman; and conversely, other portions, which may appear 'light' to the lawyer, will be useful and informative to the layman." It might have been wiser for the authors to have separated their two objectives and expanded their effort with respect to each. Had they done so, what is a handy manual might have become more useful tools both for the labor union officials and the management representatives who frequently present cases in arbitration unaided by counsel and for the attorneys who occasionally or frequently represent either side in such matters.

Certain portions of the book have been marked out by the authors as being particularly worthy of the lawyer's attention. Included in this category is one chapter dealing with arbitration awards and their enforcement and another with the enforcement of contracts to arbitrate. Also prescribed as reading for lawyers are those sections of a chapter entitled "The Agreement to Arbitrate and the Submission" which deal with the capacity of parties to enter into an arbitration agreement, with interpretation and with subsequent modification, waiver, rescission, revocation and amendment of agreements to arbitrate and submissions.

It is true that these portions of the book will prove interesting to the professional reader. They will be of interest, however, from an

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academic standpoint for the most part. Even the labor attorney—whether company or union—who finds himself practicing extensively before arbitrators, will find the need and occasion for referring to these sections somewhat limited. Most arbitrations of labor disputes grow out of a provision in a labor agreement between a company and a union whereby it is agreed at the negotiating table that differences which may arise during the life of the agreement and which cannot be settled by the union steward and a foreman or the head of a department, or by the union's grievance committee meeting with higher supervisory officials of the company shall be submitted to an impartial person whose decision shall be final and binding.

A myriad of legal problems could arise from such provisions in labor agreements especially since many are loosely and ineptly drawn. Undoubtedly there are occasions when the question of the capacity of a party to enter into an arbitration agreement, the conduct of a party subsequent to the making of such an agreement, or the enforcement of an award or of a contract to arbitrate does arise. As a practical matter, however for the most part, disputes which are not settled in the earlier stages of the grievance procedure go almost automatically to arbitration. The arbitrator hears the dispute, makes an award and the parties comply with it. There is a continuing day-in-day-out relationship between the employees and the union on the one hand and the employer on the other. This relationship and the effects of its being either discordant or harmonious are probably what account for the willingness of the parties to be bound by and to comply with an arbitrator's award. Furthermore, there is some likelihood that a union that has obtained a favorable award with which the company refuses or fails to comply will use means of securing compliance other than court action.

One real value of this book is in the service that it renders for the lay presenter of either side in the arbitration of a labor dispute. It should also have some appeal for the lawyer, but not because of its academic discussion of the legal problems which come to the fore when it is necessary to enforce an award. The lawyer who is regularly engaged in the negotiation of labor agreements, in the preparation of submissions, and in the presentation of one side or the other before an arbitrator will find that reading straight through the book will provide him with helpful hints and practical suggestions which he may not previously have considered or which he may have forgotten and which will aid him in his work.

As a guide to the new attorney who intends to practice in the field of labor relations law and to the practicing attorney who finds himself confronted for the first time with an arbitration case, or with the drafting of an agreement to arbitrate or a submission agreement, this book is invaluable. Another type of person who will find the book most helpful is one who is contemplating becoming a professional arbitrator or who has been asked to serve as an arbitrator. The sections dealing with the limitations upon an arbitrator's authority, with the responsibility and conduct of arbitrators, and with procedure at the hearing will be of particular significance to him.

It may be noted incidentally that the authors express their belief in the wisdom of selecting professional arbitrators to decide labor disputes. Some practitioners in the field, some labor representatives and some management representatives do not subscribe to this view. They feel, on the contrary, that professional arbitrators are apt, as a result of their familiarity with the recurring types of disputes, to prejudge cases and to make up
their minds before they have heard all the facts. They also feel that the professional arbitrator who is called upon frequently by the same company and union has a tendency to make awards in a one-for-the-company, one-for-the-union fashion, since his job and livelihood depend, to some extent, upon his keeping in the good graces of the respective parties. Those who make these criticisms, long for the days when public-spirited citizens felt it their civic duty to act as arbitrators of labor disputes and did so without compensation; and this longing is very infrequently based upon the desire to save the amount of the arbitrator's fee. Today, the use of arbitration as a means of settling labor disputes is so much more widespread than it formerly had been that to hope for "the good old days" would appear rather futile.

All who find this book helpful will secure particular aid from a very adequate topical index and from appendices which set forth specimen forms of submission agreements and specimen arbitration decisions and awards. The lawyer will be interested also in Appendix D which furnishes the citations to state arbitration statutes.

S. Harry Galfand.


Wars have in the past been responsible for the appearance of new annuals of international law\(^1\) and the same is true again. The Swiss Society of International Law, founded during the First World War, has begun publication of a Yearbook. The new "Swiss Yearbook of International Law" of which the first two volumes have appeared, is most welcome to international lawyers.

Like the first volume, the volume here reviewed contains two leading articles and a number of documentary reports covering the developments in Switzerland in the various branches of international law. The articles in the opening volume by Max Huber on "The Red Cross in International Law" and Professor Sauser-Hall on "Military Occupation and Private Property" are followed in this volume by an article of Professor Guggenheim on "Collective Security and the Problem of Neutrality" (in French) and an address by Professor Gutzwiller on "The Private International Law of the Hague Conferences: Past and Future" (in German). Professor Guggenheim's thesis is that in an international system which does not provide for total security, room remains for the status of neutrality.\(^2\) Professor Gutzwiller favors the resumption of the Hague Conferences on Private International Law with a program extended to the field of international commercial law. He suggests preparation of proposals by private groups like the International Law Association, the Institute of International Law, the Academy of Comparative Law and the American Law Institute.\(^3\)

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1. Publication of the British Yearbook of International Law, e. g., began in 1920.
2. Cf. The Memorandum on Swiss Neutrality of the Swiss Branch of the International Law Association, also published in this volume, which contains the passage: "A sound appreciation of the realities leads to the conclusion that, in view of its unique situation, Switzerland would render greater service to the United Nations if it remained neutral within the United Nations than if, to adhere to the Charter, it had to relinquish its 'secular' neutrality." (at p. 106). (Our translation.)
3. At page 86.
The reports on developments in Swiss international law are given, as in the first volume, by Professors Schindler (public international law), Sauser-Hall (private international law), Gutzwiller (international commercial law), Fritzsche (international procedural law), Dr. Marti (international administrative law), Dr. Henggeler (international law of taxation), and Professor Oppikofer (international air law). The new publications in the various fields are listed.

The decisions reported in this volume do not reveal changes in well established principles of Swiss private international law. There is no decision comparable in originality to that in Volume I where the Swiss Federal Tribunal was acting, under the Act of the Conference of Algeciras of 1906, as court of highest resort in a case in which the State Bank of Morocco in Tangier claimed tax exemption from a levy decreed by the Government of Morocco.4 Among the cases fully reported is Böhmische Unionbank v. Heynau.5 The Swiss Federal Tribunal refused to recognize effects of an order of administration made in 1939 in Czechoslovakia for the property of a Czech non-aryan citizen who had taken residence in Switzerland. Payment of a claim due to him in Switzerland was asked by him at the same time as by a bank in Czechoslovakia to which the administrator had assigned the claim. The court considered the measure as an expropriation and held it against Swiss public policy. Other decisions6 which are noted show the application of the Swiss choice of law rules in the field of contracts. A new trade mark decision7 is reported in which the Swiss Federal Tribunal held the use of "S. O. S." for an alarm clock to be against bonos mores, comparing it with the use of "Kidnapper" for liquor and "Stavisky" for a cocktail.

The volume closes with documents from the International Committee of the Red Cross.

Kurt H. Nadelmann†


Wolff's book should be of peculiar value to American lawyers, teachers and students. It deals with the English Private International Law and is the first book to contain a detailed commentary on a common law system of Conflict of Laws from the civilian point of view. It contains copious citation of English and Continental authorities and is, thus, a valuable source book. In fact, if the discussion of American rules and the citation of American authorities were as complete, it would contain, within an extraordinarily small volume, an outline of the modern law of Conflict of Laws.

That Wolff is primarily a civilian is shown by his whole approach and by many expressions which sound foreign to us. For example, he

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speaks of the English "legislator", or "directory" and "irritant" impediments to marriage, and makes the astonishing statement (p. 598) that the use of the genesis of a statute for its interpretation "should be forbidden in any country, as it is happily forbidden here, on the ground that the statute frequently proves wiser than the legislator."

Part I discusses the scope of Private International Law, examines the various reasons given for the application of foreign laws, and reaches the conclusion that the ultimate goal is uniformity of decision in a given case, irrespective of the possibly fortuitous identity of the forum. Part II presents the problems of jurisdiction of courts and contains a helpful analysis of the reasons for accepting or rejecting jurisdiction. Part III begins the presentation of choice of law rules and contains discussions of the more general problems, including: domicile and nationality as points of contact, evasion of law, "classification", exceptions to the application of foreign law for reasons of public policy and ordre public, renvoi, procedure, and the recognition and enforcement of foreign judgments. Parts IV-VII cover the law of persons and of the family, of obligations—contracts, torts and quasi-contracts—, of property, and of succession on death.

Wolff, though writing in and of a country which is whole-heartedly devoted to the domicile as the significant point of contact in many situations, seems to find it necessary to apologize for preferring the domicile to the nationality. He points out some of the advantages of the domiciliary system, of which one is (p. 102) the inequity of applying to a person a system of law, that of his nationality, "which he disowns and which he no longer recognizes as his law." He refers, on the other hand, to the often advanced view that a person "should not be able by a 'private' act of emigration to alter his status and capacities," and says of it merely that this justification of the nationality principle does not seem very convincing. He points out, also, that the states from which large numbers of persons emigrate are inclined to stick to the nationality system in order to keep a hold on their people as long as possible. Of this he says only that: "It may, however, be open to discussion whether this interest deserves protection; it savors of sacro egoismo and covers a desire for expansion and for the exercise of a certain control within the sphere of foreign countries."

To us, who think of domicile as the normal connecting factor, these criticisms seem unduly gentle. Our difficulty is to think of tenable reasons for applying the law of a state to persons whose only connection with it may be that they or their parents have not yet changed nationality by naturalization. It may seem queer, moreover, that a writer who, like Wolff, accepts and approves the doctrine that the parties to a contract can make a "private" selection of the contract law applicable to it, should think it other than natural that a person can make a "private" selection of the personal law applicable to him by identifying himself, as far as he can by his own efforts, with a new center of life.

It is in Wolff's approach to problems of capacity that I find the most obvious example of the peculiar value of his work. He starts with the notion that status is the basis of capacity, incapacity and restricted capacity. He says (p. 284): "As capacity in the strict sense of the term results from status, the law governing the status of a person governs his capacity. Etat et capacité cohere ... The subjection of capacity to the personal law is a leading principle in this country."

This sounds a little queer to us who are in the habit of thinking of capacity, not as an inherent quality of a person, but as an element of the
legal transaction involved; e.g., capacity to marry, capacity to convey, capacity to make contracts, etc. It does, however, represent an approach which we should consider. Even though a "leading principle" which is subject to the many exceptions found by Wolff may seem somewhat anomalous, it may lead us to a useful re-examination of the reasons for some of our rules.

Wolff criticizes Cheshire's view, which is in general agreement with the American rule—namely, that capacity to make contracts is governed by the law applicable to the substantive validity of the contract—, and states the English rule as follows (p. 285) : capacity to enter into contracts is governed by the law of the domicile, "modified in the interest of an undisrupted commercial intercourse by a rule that the contracting party cannot rely on his incapacity under the lex domicilii if he was capax under the lex loci actus." His criticism is on the following grounds. First: There is no reason why any other system of law should protect the party when his own law considers him capable. Second: The parties, who can select the "proper" law of the contract, should not be able to select a system of law to determine their capacity and "thus to evade all the compulsory rules by which their capacity is, and ought to be, governed." (My italics.)

These criticisms, based on a typically civilian, a priori notion—that status and capacity cohere and are governed by the personal law—, may or may not be valid; but they should lead us to reconsideration of the policy reflected in our rules concerning capacity, particularly the Conflict of Laws rules.

Nor should we be unduly bothered by a few apparently unavoidable weaknesses of this approach, for example: (1) The apparently necessary technique of stating as a rule of some other category, one which appears clearly to concern capacity. (2) The necessity of allocating to some other category, rules which seem to be rules of capacity, but which cannot be—because the courts apply to them some system of law other than that which governs capacity. (3) The necessity of doubtful classification, as rules of capacity, of some rules governing matters which should be governed by the law applicable to capacity. (4) The necessity of finding many exceptions to the "leading principle" of the Conflict of Laws of capacity.

An example of the first of these is to be found in Wolff's discussion of capacity to acquire property by succession on death. He says (p. 588) that this capacity is governed by the lex situs in cases of immovables and by the law of the domicile of the decedent in cases of movables, and not by the law of the domicile of the claimant. Thus, if under the law of the situs, or of the decedent's domicile, a corporation is incapable of acquiring land, or more than a certain sum of money, "such prohibitions nullify the legacy." On the other hand, if no such restrictions are in these laws, but are in the law of the state which created the corporation, "it depends on the latter law whether the legacy is void on the grounds of illegality, or valid despite the prohibition."

It is difficult to understand why such restrictions should lie in the category, capacity, when they are in the system of law governing the succession, but in the category, illegality, when in the personal law of the corporation. My suggestion is that Wolff so expresses himself because of the obvious anomaly of saying: "If the law governing the succession gives the claimant capacity, the 'leading principle' may be applicable to deny such capacity." That this technique is not actually necessary is shown by the fact that it would be equally accurate to say, paraphrasing Wolff's statement of the law governing capacity to make contracts, that "the ca-
capacity of a claimant to succession is governed by his personal law, but he cannot rely on such capacity if he is *incapax* under the *lex successionis*.

An example of doubtful allocation to some category other than capacity is to be found in Wolff's discussion of the law of marriage. He allocates to capacity prohibitions of incestuous marriages, but to *substance other than capacity* prohibitions of miscogenous marriages, when governed by the English law; though it is to be supposed that he would consider them to be in the field of capacity under the American law which, he says, deems such marriages invalid if prohibited by the domiciliary law of either party.

An example of doubtful classification because of the desirability that the personal law apply is to be found in Wolff's treatment of one of the sections of the Matrimonial Causes Act, 1937, which says that a marriage "should be voidable on the ground (Wolff's italics) that . . . either party . . . is at the time of the marriage of unsound mind or a mental defective . . . or subject to recurrent fits of insanity," but adds that "the court shall not grant a decree unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged." Wolff says of this: "Does this provision establish incapacity (unless the petitioner knows the facts) or voidability based on error? The wording suggests the former solution."

It is evident that Wolff believes that this provision should be applied to marriages of English domiciliaries. His tentative conclusion shows that. He says elsewhere that English law applies the *lex loci celebrationis* to questions of error. Unless, however, the problem is approached with the "leading principle" in mind, it is unnecessary to reach such a doubtful conclusion as to the proper classification of the statutory provision. I suggest that the conclusion is doubtful because it is difficult to understand how the capacity of one party can depend on the knowledge of the other.

Wolff's discussions of the Conflict of Laws rules on capacity offer an outstanding example of the necessity of finding many exceptions to a "leading principle." He finds exceptions in cases concerning the capacity to convey or devise immovables and the capacity to commit torts. The exception in cases concerning the capacity to acquire by succession on death, and the exception to that exception have been discussed, as has the exception in cases concerning capacity to make commercial contracts, which Wolff expands to cover other commercial transactions. He even finds two exceptions in cases concerning capacity to marry. The sum of all these exceptions seems to cover an immense number of important legal classes of transactions.

The weaknesses and inconsistencies in the civilian approach are, however, of minor importance. It is greatly to be hoped that someone who has the time and inclination will undertake a careful study of Wolff's book and of the possibilities which may exist in a combination of his civilian approach—based primarily on a group of *a priori* principles—and the approach which is more familiar to us, which considers the various types of legal transactions as involving nearly independent problems of public policy. The result should be a re-analysis of the reasons for many of our conflicts rules of substantive and procedural law, and a more rational scheme of rules of Conflict of Laws.

I suggest, tentatively, that an example of the combined approach may be found in Wolff's treatment of the *Sussex Peerage Case*, in which the English court invalidated a marriage under the Royal Marriage Act, of which Wolff says (p. 334) that it "provides that no descendent of King
George II shall be capable (my italics) of concluding a valid marriage without the consent of the Sovereign in Council.” He says of the decision that it was “founded solely on the interest of the state,” and was “by no means based on the English domicile of the prince or on his British nationality; it would have been the same if he had been a domiciled Italian.” It seems that this statement must represent an abandonment of the “leading principle,” and a complete abandonment since it denies the application of either the domiciliary or the national law, in a case which was deemed inappropriate for the application of the personal law, and an independent examination of the public policy involved. Otherwise, it would have been natural to express it as another exception to the leading principle.

Physically the book is excellent: there is no reflected glare from the paper; the type is readable; there are very few typographical errors (I found none except the few which are corrected in a slip headed “errata”). There is a full analytical Table of Contents; a list of cases which, unfortunately, does not include the American cases cited in the footnotes; a list of the applicable English statutes; a general bibliography; special bibliographies following the various subjects; and a usable index. I have only one serious complaint to make, the references in the lists of cases and statutes and in the index are to sections, not pages and the section numbers are to be found on the inner corners of the pages while the page numbers are on the outer corners. This makes it a little difficult to turn rapidly to the places indicated in the lists and the index.

Charles W. Taintor II †


The first edition of this work achieved a unique position in the field of tax literature. The complexities of tax law, particularly income tax law, are such that a concise and penetrating analysis of basic conceptions and trends is extremely difficult of accomplishment. Yet this is the task which the first edition performed in excellent fashion and which is brought up to date by the revised edition. It is a task for which the author is eminently qualified by his extensive experience in teaching, practice and government service.

The purpose of the book is to outline and to criticize the generic conceptions of taxable income which the federal courts and Congress have evolved during thirty-two years of the federal income tax. The organization of the work remains substantially the same as it was in the first edition. Part I is devoted to an analysis of the concept of realization, particularly as developed in the cases involving corporate distributions and sales, exchanges and purchases of property. Part II bearing the title of Characteristics of Income relates principally to the form in which taxable income may be received, such as money and property, benefits through the discharge of obligations, and the element of control as a substitute for physical receipt. In Part III consideration is given to the source of the payment as a factor in taxability as illustrated by gifts, bequests and compensatory payments, such as insurance and damages.

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There has been great development in income tax law during the ten years which have elapsed since the first edition of the work appeared in 1936 and this revision is not a scissors and paste job. The new material is carefully considered and integrated into the author's general treatment of his subject. However, the size of the book is increased by less than a quarter and the reader's view of essentials is not blurred by an undue elaboration of detail, a pitfall that is not easy to avoid in treating so intricate a subject.

Of course, the book is in no sense a substitute for a comprehensive treatise, such as the standard work by Mertens, and it does not purport to be. However, the revised edition will be of service to practitioners as well as law teachers and students, who have found the first edition so useful in the past. A single or unitary concept of taxable income is just as illusory now as it was in 1936, and undoubtedly will always remain so. But the determination of the base to which the income tax is to be applied involves certain fundamental factors which should constantly be reexamined. In the accomplishment of such an objective this work remains unequalled in tax literature.

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BOOKS RECEIVED

A TRIAL ON A TRIAL. By Maximillion St. George and Laurence Dennis. National Civil Right Committee. Pp. 5-501. $5.00.


MATERIALS FOR LEGAL METHOD. By Dowling, Patterson, and Powell. Chicago: The Foundation Press. Pp. xii, 580. $7.00.

