**Book Reviews**


"A word fitly spoken," it was said in Old Testament days, "is like apples of gold in pictures of silver." This book, unlike much tax literature, has many sentences full of words most fitly spoken at this critical period of American tax history. It is a stimulating and highly informative book. For years the printing presses have been busy putting together books designed to acquaint readers interested in taxes with the super-technical secrets of tax law as they are incorporated in the Internal Revenue Code, the administrative process, and the diverse opinions of many courts. In contrast, this book deals with basic theory at a tender point. Justice Holmes once said: "We have too little theory in the law rather than too much..." This remark, made in another context, is certainly not inapplicable to tax law—and, one can appropriately add, tax policy.

There is a surprising lack of unanimity among the experts as to the degree of progression in the American system of taxation. Of course, accurate appraisal must include the impact of state and local taxes. Rufus S. Tucker, writing in 1951, has asserted that as a whole the system is "highly progressive in the matter of rates from $1,000 up," this being especially true, in his opinion, of federal taxation by itself. But Musgrave, Carroll, Cook, and Frane, also writing in 1951, have asserted a conflicting view that "[t]he over-all tax structure is by no means as progressive as is generally surmised, at least not as far as the lower 90 per cent of the taxpayers are concerned." Rather, they contend, "the effective rate curve follows a U-shaped pattern with regression at the lower end, a proportional range over the middle and progression at the upper end of the scale." Over a wide range of incomes, including 90 or more per cent of the spending units, the progressive elements of the tax structure appear to these economists "to be balanced or outweighed by others which are proportional or regressive." In terms of revenue it may be roughly estimated that something less than one-quarter of total receipts from the personal income tax is attributable to the graduated surtaxes.

In point of fact no one knows with any complete certainty how progressive the American tax system is. Contributing to this uncertainty is much doubt about the incidence of corporate taxes. For the fiscal year 1953 the corporation income tax contributed about 31 per cent of the gross yield of the federal tax system. Are corporate taxes borne by stockholders? To the extent that they are, they have a generally progressive effect because stock ownership is predominantly in the upper income brackets. Or are corporate taxes shifted to consumers and wage earners? If that is what happens below the surface of statutory language of imposition, corporate taxes are regressive in their effect. Also contributing to a general ignorance about the degree of progressivity in the American tax system is lack of knowledge about the effect on an apparently progressive rate structure of a number of special exemptions and deductions such as the exemption of interest on state and municipal bonds and the percentage depletion provision.

In this vague condition of tax affairs it is almost a relief to turn attention to some things we do know very well. We do know that many of our most articulate citizens assert most emphatically that we have too much progression, presumably toward the top of the surtax brackets. One would expect that this feeling of resentment would have had more intensity before the income tax "changed its morning coat for overalls." There was a time when the income tax was a more exclusive club than it is now, say in 1920 when a population of 106,000,000 produced only about 3,500,000 income tax returns, or in 1939 when a population of close to 100,000,000 over 14 years of age produced only about 4,000,000 taxpayers. In those years the income tax directed its thrust more exclusively at the most financially successful of our citizens. Now it strikes at a much larger proportion of the population. Apparently misery does not always derive as much comfort from company as is sometimes supposed. Perhaps part of the reason is in this instance that there has been since 1939 a considerable shift of our emphasis in taxation in the direction of income and profits taxation. In 1939 income and profits taxes produced only about 45 per cent of government receipts. By 1952 they produced almost 80 per cent. It does not seem to be adequate compensation that new low-income taxpayers have contributed in large part to this trend. High-income taxpayers have also had to contribute, and we have now reached the point where everything possible is being taken from the high incomes of those who are not fortunate enough to be able to take advantage of the capital gain rate, the percentage depletion provision, and a number of further gadgets which minimize the impact of the high marginal rates.

Much of the protest against progression has identified progressive taxation as an aspect of class warfare. Some advocates of progression have not objected to this label. A recent article in the American Bar Association Journal entitled "The History of a Prophecy: Class War and the Income Tax" seems to set the modern record for emotional intensity. Mr. Samuel B. Pettengill, the author of the article, views the Sixteenth Amendment as "a political curiosity," and according to this former Congressman a number of Republicans headed by former President William Howard Taft carried a Democratic plank to legislative success when they submitted the amendment for ratification. Perhaps something worse than

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are merely seeking to persuade twelve persons who must listen to you. The jury is a captive audience. You are the one who chooses the topic. You are the one who chooses the mode of presentation. You will be surprised at what a calm, orderly discussion of even the undisputed facts will do for your side. Use all the rhetorical devices; similes, metaphors, illustrations, everything to help the jury think, because argument is nothing but an audible thinking process. Once you get the jury thinking with you, then, of course, you have gained the upper hand and are their master.

May I observe that expert testimony, notwithstanding the many volumes written about it, is frequently overlooked. Many times we encounter situations with facts which have meaning only when explained by an expert. This is an effective avenue of illustrating the meaning of facts when such are not within the purview of the ordinary man. Always investigate the feature of expert testimony in your case.

May I direct your attention to the hypothetical question—properly employed this is an effective device. Indeed, it constitutes an argument while evidence is being introduced. It wraps up the entire case, so to speak, and presents for the expert an opinion which makes for better understanding by the jury.

Another word. Rebuttal evidence is, it seems to me, overlooked. Too often a witness for the defense testifies concerning a fact which has not been brought out on the plaintiff's case. The plaintiff disputes that fact and has within his power evidence to controvert it. However, he accepts that the jury understands that he denies these facts and closes his proof when the defendant does. The realization of this error is not appreciated until he hears defendant's counsel argue that thus and so was not denied by the plaintiff. The same holds for the defendant as well as the plaintiff. As far as the defendant is concerned, it becomes a matter of sure rebuttal.

Thank you. It has been a real pleasure to be here.

Krock on Crosskey (Continued from page 8)

WASHINGTON, Feb. 18—In this space last Tuesday an account, necessarily inadequate, was given of a revolutionary concept of the meaning of the language of the Constitution that was evolved by Prof. William Winslow Crosskey, after fifteen years of intense research into writings contemporaneous with its drafting. It was reported that, on the evidence he offered of what words meant in the eighteenth century, these were among his startling conclusions:

"Commerce" meant all gainful activity by the people; hence the long-made judicial distinction between "interstate" and "intrastate" commerce has no warrant in the Constitution.

"By States" its drafters meant the people within specified territories, and not these territories or their internal regulations. Hence it was intended that the power given Congress to "regulate (govern) commerce" covered all gainful activity within state borders.

Congress was designed to be supreme among the branches of the Federal Government; the Supreme Court was never intended to possess a general power to review the Acts of Congress, only those dealing with its specific province; and the Supreme Court was not bound to follow state courts' interpretation of state law and local common law. In the first instance it has violated the Constitution; in the second it has "abdicated" its appointed role.

Though Professor Crosskey's work is a miracle of scholarly research, and is being read with serious attention by, among others, members of the Supreme Court, its thesis is so controversial that one lawyer wrote to this department: "Now I join the book burners!" Did not, he demanded, Chief Justice John Marshall know the semantics of the eighteenth century, in which he was born and in which he helped to draft the Constitution? And, if a "state" did not mean a specific territory and local government, why did the Founding Fathers empower Congress to regulate commerce "among" the several states?

OTHER CONCLUSIONS

The author, who was law secretary to Chief Justice Taft, has answers for these and other dissents, as follows:

Eighteenth century documents show no evidence that "among" was used in the sense of "between." An example is a press report that "a severe hurricane blew among the Windward Islands," and "it is needless to point out that the hurricane blew 'within' as well as 'between' them."

Marshall's career "was a long and stubborn rear-guard action in defense of the Constitution" as it was meant to be read. "Nevertheless, he was continually forced . . . into compromise and defeat, the cumulative effect of which amounted to a transformation of the Constitution."

Book Reviews (Continued from page 5)

a Democratic plank. In Mr. Pettengill's opinion the present marginal rate of 92 per cent represents a triumph of the poor in their war against the rich foreseen by Justice Field in his opinion in the Pollock case. A heavy progressive or graduated income tax represents the achievement of one plank in the Communist Manifesto of 1848 and moves the country definitely along the "road to serfdom." We should return to proportionate taxation or we all will soon join the perished civilizations of the past by consuming ourselves "through excessive and unjust taxation" until we collapse "and are succeeded by the Man on Horseback or the rank growth of the jungle."
Articles which rise to such heights of rhetorical pitch certainly serve to demonstrate the need of an objective and logical treatment of the question of progression at a time when the needs of previous wars, the obligations of world leadership, and the demands of defense have thrust upon this country tax burdens the like of which no country has ever borne before. A reasonable degree of progression may well be a political necessity at such a time. Certainly alternatives are limited. In any event, the arguments for and against progression need new analysis at such a time. At the most, a better knowledge will help us to move intelligently forward in the job of improving the present tax system; at the least, it may comfort some of those who complain by showing that the arguments on the question go in two directions.

Professors Blum and Kalven have picked up the story of progressive taxation pretty much at the point where Professor Edwin R. A. Seligman left that story in his book Progressive Taxation in Theory and Practice. They call an article published in 1916 in the Yale Law Journal “virtually the last gasp of constitutional objection to the principle of progression” and dispose quickly of the constitutional aspects of progression. They then examine the policy objections to progression: (1) that it complicates the structure of the income tax and expands taxpayer opportunity for ingenuity directed to lawful avoidance; (2) that it is a politically irresponsible formula; and (3) that it lessens the economic productivity of society. They conclude that these arguments are not enough to stand in the way of a strong affirmative case for progression. The book then discusses the affirmative case, including the arguments (1) that progression makes for wider fluctuation of annual revenues and thus provides a built-in flexibility; (2) that benefits purchased with taxation justify a graduated scale of rates; (3) that progression establishes an equitable apportionment of the sacrifice involved in the payment of taxes; (4) that the Seligman “faculty” theory, a variation of the popular principle of ability to pay, permits graduation of rates; and (5) that progression operates to lessen inequalities in the distribution of income and even to redistribute income in a desirable way and to promote greater equality of opportunity. After this “long critical look” the case for progression turns out to be “stubborn but uneasy.” To the authors notions of benefit, sacrifice, ability to pay, and economic stability have less appeal than arguments which view progressive taxation as a means of reducing economic inequalities. But the case for more economic equality is itself “perplexing,” particularly when it is voiced by “those who in the quest for greater equality are unwilling to argue for radical changes in the fundamental institutions of the society.”

Many persons would disagree, and many would agree, with this final and somewhat ambivalent judgment of Professors Kalven and Blum. No two persons would agree with their conclusions as to the weight to be given the respective arguments for and against progression. But few would dispute the timeliness of this survey of progressive taxation. It is a carefully documented, closely reasoned, highly readable discussion of one of the most difficult problems of our troubled times. It fills a vacuum in tax literature. It is not a “luxury” item. It needed to be written, and it needs to be widely read. Both those who favor and those who oppose progression will discuss that subject more intelligently after they have read this study.

In fact, it would be hard to think of any group in our population who would not profit from a reading of this scholarly book. Senators and representatives would acquire a useful perspective. If they will read the book carefully, students of taxation still in universities, and those in post-graduate life who have not yet resigned themselves to lack of understanding of taxation, will gain new insight into the meaning of a fierce struggle of our times. I will go so far as to urge that tax specialists will acquire increased competence in dealing with the problems they face as they represent taxpayers in practice if they are able, as they will be better able after reading the book, to integrate their problems in the panoramic development of their special subject. Too few tax specialists realize this necessity.

The book is to some extent historical and to a larger extent theoretical. That does not mean that its history is ancient, or that its theory is unrelated to modern tax life. There is nothing more relevant to tax debate at the middle of the 20th century than the questions whether progression dampens incentives and whether it aids in maintaining economic stability and a high level of business activity. Whatever one may conclude, it is important to canvass the extent to which progression complicates the positive law of taxation. And it is certainly worth while to analyze the merits of progression in the light of how our Government spends the money it collects. Last but not least, the book explores many areas and analyzes a number of principles that may be too much taken for granted in these days of high taxation.

Among those who assume the propriety of progressive taxation are many tax philosophers who like to call themselves liberals. Some of them may feel that in examining their articles of faith the book gives aid and comfort to their ideological enemies. In this respect the book could suggest to some of its readers that many liberals and conservatives are not different under the skin because they both object to the presentation of arguments against propositions in which they deeply believe. It is not the point that the book has confirmed rather than shaken my belief that there should be more, rather than less, progression in the American tax system. The effect on other readers may be different. The point is that both sides of any argument should have a fair hearing. Time has eroded many faiths to which men have given their last measure of devotion. It is as true today as it was in 1920 that the best test of truth is its ability to gain acceptance in an intellectual market place.
that denies no one his opportunity to speak freely against, as well as for, the majority opinion of the moment. Some liberals would be better liberals if they were less like some conservatives, and their condemnation of their opponents would be at least more graceful and becoming if they practiced what they preached and opened their minds as freely to arguments with which they disagree as to those with which they agree.

RANDOLPH PAUL

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For years it has been well known that something was cooking at the University of Chicago Law School in connection with Contracts, and from time to time we have caught glimpses of the cooks at work. The product is now brought forth for public consumption and is a very welcome addition to the menu.

Kessler and Sharp show again, as Havighurst, Fuller, and Mueller had shown in different ways, that the first year course in Contracts can be made to yield fresh insight and some original views of law and society. The novelty of their treatment does not lie, however, as it does in the case of Havighurst and Mueller, in concentration on function or economic "context." Instead, the emphasis throughout is on some very broad conceptions. One of the authors recently stated his own conviction that "the all-important question of the domain of freedom of contract should from the outset be made one of the central themes, if not the central theme, in any text on contracts." It seems that the same conviction applies to casebook as well as text in the minds of both authors. Their preoccupation with this theme starts with their own introductory text which traces historically the progression: from-status-to-contract-and-reverse. Then, there is a scattering of cases that project over a very wide panorama the theme of freedom versus control. The section headings and comments through the somewhat more standard materials that follow are also calculated to keep this theme in the foreground for discussion. Then, at the end, there is a chapter of about a hundred pages that dig into illustrative problems of "irregularity, inequality, and imperfect competition"—agreements in restraint of trade, the "contract of adhesion" (illustrated by automobile merchandising arrangements), problems of labor and collective bargaining, and "status and contract in insurance."

The standard contracts materials that comprise most of the book are arranged under headings and with comments that emphasize values and objectives, often in a most arresting way. In place of the usual procession, moving from offer to acceptance to consideration to the seal, etc., the authors have mixed these elements together in unusual combinations. Consideration, for example, appears ahead of the offer-acceptance and assent problems in a context which reveals it as a limitation on freedom of contract. The subtitle of the chapter that provides this first glimpse is "the basic ideals of an individualistic law of contracts," and the doctrine of consideration is here placed beside mistake doctrines (limiting freedom to determine price), risk assumption as to unforeseen difficulties, and requirements as to foreseeability of damages (Hadley v. Baxendale). Then, after a brief skirmish with tests of mutual assent, the significance of the "implied contract," and preliminary negotiations as distinguished from offers, the authors return to consideration in connection with "firm offers, a preliminary study of the ideal of reciprocity"; then again with offer and acceptance in contracts by correspondence and offers of unilateral contracts; and finally work around to a direct attack on the consideration doctrine itself. But other aspects of consideration then reappear in the following chapter concerned with "fairness of the bargain and equality"—i.e., with problems of economic duress in connection with readjustments of obligations and performance of pre-existing duty. In short, the attentive reader is forced to see the protean character of the remarkable term "consideration"; forced also to relate the common law techniques for contract formation to the values they are supposed to serve.

The authors have also included substantial quantities of material that is either usually reserved for a second or third year course in Restitution or else omitted from law school instruction entirely—material on mistake, duress, and restitution to or against a promisor in default. This material is not confined to a separate section in the latter part of the book so that it can be conveniently omitted. It is dispersed throughout and is essential to much of the analysis. As everyone knows who has worked over this material, it adds greatly to the interest, complexity, and depth of contracts problems. There is very much to be said for including it in the first year Contracts course, full-scale. The only arguments against full-scale inclusion that impress the present reviewer (and they do) rest on the difficulty of the issues they raise and the unsatisfactoriness of partial treatment in a Contracts course that is already overcrowded. Altogether, Kessler and Sharp have achieved a major shift of emphasis and provided, at the least, a much needed corrective. The standard materials for Contracts courses have surely given a distorted picture of the functions and limitations of contract in our society. Great teachers have no doubt transcended the materials. One need only mention Corbin, Oliphant, and Llewellyn to suggest the brains and imagination that have worked over this same subject matter. But on the whole, country-wide, the attraction of the usual Contracts course has been the opportunity for intensive drill in technique and analytical
skills while pursuing some simple, scarcely debatable objectives. It is difficult to oppose, if one wished to, the objectives of effectuating intent and maximizing individual autonomy. The limitations on these objectives are usually thought to be confined to the doctrines of illegality, which in the casebooks are left to the last section so that they are never reached at all or are reserved for the last day's "lecture." The result is training in close and refined analysis with very little attention to those larger issues of policy that require a different but equally necessary lawyer's technique—the weighing of conflicting interests, the choice between basic values, maturity of judgment.

The question that obviously cannot be answered without using this book is whether the authors have gone too far in reversing directions. By comparison with the widely used Contracts casebooks, excepting only Fuller's, this casebook is short. It has 795 pages of which 100 pages at the end are devoted to the "control" sector—agreements in restraint of trade, labor and collective bargaining, etc. It also includes, of course, the material on restitution for mistake, duress, and related grounds, though the volume of this is not great—perhaps 25 cases. One should also add that somewhat smaller type and a fuller page give about 20 per cent more reading matter per page than most of the standard books. Still, it is not a long casebook, and the inclusions mean many exclusions. For example, the treatment of equitable remedies seems exceedingly skimpy—five cases in a section of eleven pages plus the scattering of six or seven specific performance cases that almost all the Contracts casebooks use and that are inserted for reasons other than the light they throw on equitable remedies. It is disappointing too that two authors, both of whom are so competent in dealing with foreign law, should not have slipped in at least a few ideas by way of comparison with European results. But it is useless to ask for too much. These particular shortfalls, if shortfalls they are, do not raise so great a question as the thinness of treatment of many standard problems of analysis, especially the more technical problems. Many times in reading over the cases and notes, one feels that the authors are content to be suggestive and wish at all costs to avoid being exhaustive. This becomes a question of teaching theory, and it may be that Chicago students are brighter, but one often wishes that implications were explored, suggestions made more explicit, and more material provided for working out the hard questions. Even if one conceives that offer-acceptance, consideration, and conditions have, in the past, been fantastically overdone, the question survives in my own mind whether Kessler and Sharp, under compulsions of space, have not left them quite a bit undone. One could only tell by trying.

The care and scholarship shown throughout are of the highest order—all that one would expect of the authors. The notes and authors' text are full of clues and suggestions helpful to the teacher (question: how many of the footnote citations do the authors really expect students to read?). The arrangement is ingenious and thought-provoking all the way. The selection of cases is excellent. This is, in short, a first-class book which will open new directions for all teachers of the subject and have permanent effects for the good of all concerned.

University of Michigan Law School

Sheldon Tefft (Continued from page 2)

at Oklahoma in 1948. I understand that he has resisted other recent invitations. He has recently edited a new casebook on property with Mr. Aigler of Michigan.

This amateur professional has had easy work with Sheldon Tefft. His eccentricities, if any, are minor, and in supposedly more serious and important matters the record is singularly blank, for Tefft doesn't "do" things, doesn't agitate, doesn't champion, doesn't sign petitions, and doesn't join. He talks, or rather he debates, so that you can't get much out of him—very few concessions or admissions. My most authentic informant said, years ago, "Well, you know, Sheldon is cagie."

There are only a few light touches to close on. I have learned in my researches that my subject is at heart a mechanic (he repairs bicycles), that he has a strong feeling for antique objects and jewels, and that he is extravagant. These are "profile" data of fair quality. I believe some of them. But I shall have to deflate the sensationalism of that last item. No one can ever persuade me that Sheldon Tefft is extravagant. It is a fact, verifiable by his every acquaintance, that he is always searching for bargains. I have never heard, from him, of his finding any. The Tefft ideal price level is so low (an undetermined figure always less than any price actually paid) that I am sure he feels reckless whenever he makes a purchase. That must be the reason for the attribution of extravagance; I can think of no other.

ROBERT DILLER '37, J.S.D. '40

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