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Annual Survey of American Law, 1945 (Book Review)

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BOOK REVIEWS

ANNUAL SURVEY OF AMERICAN LAW, 1945. New York University School of Law, pp. lxxxiv, 1375, index.

The selection of the writer to review the 1945 Annual Survey of American Law was motivated by the fact that a four-year absence, due to extra-mural activities, from the legal field places him in an advantageous position to assess the impact of the Survey upon the many thousands of law students, practicing lawyers and law teachers similarly situated. It is unfortunate that the same factor of recent absence from the law necessarily curtails the extent of the reviewer's capacity to probe the soundness of the juristic conclusions arrived at by the contributors of the various articles.

The standard recipe for a book review is to take several sentences of fulsome praise, mix with a few random specific references to show that the reviewer has read the book, and season with suggestions of the possible unsoundness of some of the author's conclusions, to demonstrate the reviewer's objectivity. The three previous issues of the Annual Survey have been recently reviewed¹ in general terms and with favorable conclusions. This reviewer feels that it would be but a slight contribution were he to confine himself merely to sounding a further paean of praise. With this preliminary explanation and apology, the reviewer will venture to express certain conclusions arrived at after the careful study which the Survey merits.

A preliminary and comprehensive comment, all the more sincere because it is the culmination of a study begun in a more than slightly skeptical spirit, is that the project is well conceived, vigorously prosecuted and crowned with a fully sufficient measure of usefulness as to justify its inclusion in the permanent annual literature of the law. The very importance of the work justifies study of its deficiencies in order that the fullest extent of usefulness may be derived from subsequent issues. With this motive as justification for what is to come, the reviewer proceeds to a detailed analysis of some of the articles, with a view to drawing certain conclusions from such analysis.

However understandable the reasons may be, the articles exhibit extreme unevenness with respect to choice of material, thoroughness of analysis, emphasis, style and scholarship. It is the reviewer's opinion that this is the inevitable result of the impracticability of any one law faculty, even supplemented by guest stars, providing adequate coverage for the many topics treated. The reviewer ventures to suggest, as a remedy, that some central body, such as the Association of American Law Schools, select for the task an all-American team of teachers, lawyers and public administrators, allotting the various topics to recognized masters in the various fields.

The foregoing criticism challenges proof by production of illustrations of the unevenness of treatment charged. Let us look then at chapter and verse

¹ In 15 Fordham Law Review 312 (1946).

of certain of the articles, taking first the initial topic, International Law. This essay frequently assumes too great background information in the reader. For example, the development of the "recognition of conquest" doctrine at page 8, and the discussion of the distinctions established in recent decisions on this subject would be, it is submitted, less than clear to one who is not already a student of International Law. The suggested distinction at page 14 between military occupation through conquest and following unconditional surrender seems meaningless. Another criticism of the article is lack of proportion. Too little is made, for example, of the theory of world organization; a brief reference at page 19 to the absence of authority in the United Nations charter to issue rules of law binding upon sovereign states is the only reference to the world-shaking doctrine of Emery Reves' "Anatomy of Peace." References in general are meager. To the sub-topic of "Literature" on this important subject, only ten lines are devoted (p. 9), allowing far too little space for explanation of the nature of the works cited.

It is difficult to grasp what assistance to the legal profession is rendered by the expression of the opinion of the author of the article on controversial issues. General observations such as "the United States has, however, like all other nations, disregarded those rules which might interfere with successful prosecution of the war" (p. 10); "The fundamental distinction between combatants and non-combatants is increasingly difficult to maintain in totalitarian war" (p. 10), and "The military government carried on by the United States in its zone has conformed to no particular theory or policy, in spite of careful preparation of personnel and long studies" (p. 15), may be right or wrong. This reviewer happens to be of the opinion that there is simply no comparison between the ways in which Germany and Japan have disregarded the Rules of Land Warfare and the ways in which the United States may have done so; that there is still a clear distinction between combatants and non-combatants which the United States has recognized and which Germany has not; and that the training of personnel for military occupation was the outstanding failure of military government. Who is right? Where authority is non-existent, *melior est tacere quam disputare*. The entire "survey" of Military Government at page 15 is so superficial as to be useless.

A criticism which applies to many, if not most, of the articles in the Survey is applicable to this particular one; namely, an almost exclusive emphasis on current views and policies, with relatively little tracing of the sources from which the current views have emanated. There is practically no evaluation of the new in the background of the old. The alternative method obviously requires much time and thought, but such effort is warranted if the Survey is to attain its full potential usefulness.

The article on Conflict of Laws contains a comprehensive treatment of State-Federal and Constitutional problems; there is little discussion of problems of local law. More emphasis might well have been placed, it would seem to this reviewer, on the significance of the decision in *Haas v. Haas*, 183 N. Y. Misc. 870, 51 N. Y. S. (2d) 931 (1944), commented on at pages 47-48, concerning the effect given in New York to foreign alimony decrees by Sections 1171-1172 of the Civil Practice Act.

The article on Constitutional Law entitles its author to membership on

the reviewer's all-American team. It is perhaps over-captious to voice a regret at the cursory treatment, undoubtedly due to limitations of time and space, of trends in state constitutions, briefly discussed at page 58. Occasionally there is too severe compression of treatment, as in the discussion of *Skinner v. State*, 189 Okla. 235, 115 P. (2d) 123 (1941) at page 99, where chronological treatment would seem to be perhaps more understandable than the "flash-back" method adopted. At page 154 there are two unfinished sentences in succession, a fault of the editor rather than of the author. At page 159 Judge Lehman's dissenting opinion in *People v. Winters*, 294 N. Y. 545 is too briefly set forth to be readily understandable, another instance of over-compression.

The foregoing are small flaws indeed in an over-all admirable treatment of the topic. The author of the monograph consistently employs the method of treating decisions cumulatively, recognizing fully the effect of older decisions and rarely neglecting, where necessary, a comprehensive comparison of the new with the old. The article is interspersed with many brilliant highlights, one of the most delightful of which is the excellent discussion, at page 163 *et seq.*, of the *Screws* case and its overtones. The author of the article is one of the few writers who have appreciated the effect of this decision in at least partly opening the door to adequate national protection of fundamental rights.

The 1375 pages of the Survey afford none too great space for tracing the development of the law in fifty-two different fields. In view of space limitations it would seem desirable to have confined the discussion of current decisions to those which declare new variations of judicial thought or which settle issues previously in doubt. There seems little point in including, in an annual survey of this character, discussion of decisions which merely reiterate accepted doctrine. The article on Administrative Law seems especially to offend in lack of selectivity in the choice of materials treated. Random instances of decisions of no novel significance are *N.L.R.B. v. Lipschutz*, 149 F. (2d) 141 (C. C. A. 5th), holding that the Board's cease and desist order must be limited to unfair practices of the kind committed (p. 198), a doctrine already firmly established, as applicable to all save exceptional situations, by *N.L.R.B. v. Express Publishing Company*, 312 U. S. 426, 61 Sup. Ct. 693; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209 (D. C. E. D. Mo.), holding that where at one stage of a proceeding parties were permitted to file written agreements but were denied oral argument, there was no lack of due process (p. 193); *Neville Coke & Chemical Co. v. C.I.R.*, 148 F. (2d) 599 (C. C. A. 3d), holding that a government agency is not required to credit uncontradicted testimony even of expert witnesses (p. 217); *Employees Protective Ass'n of Norfolk v. N.L.R.B.*, 147 F. (2d) 684 (C. C. A. 4th), holding that judicial review of orders directing elections can be had only on final order prohibiting unfair labor practices (p. 210); *N.L.R.B. v. Servel, Inc.*, 149 F. (2d) 542 (C. C. A. 7th), holding that a Board finding of discriminatory discharge based upon reasonable evidence cannot be reversed by the court (p. 218); and *Gulley v. Budd*, 189 S. W. (2d) 385 (Ark.), holding that a court is without power to review the Governor's discretion in issuing a pardon (p. 252). If such decisions have a proper place in the Survey, then most of the other articles err for lack of completeness.

The criticism, in the same article, of *Samuel H. Moss, Inc. v. F.T.C.*, 148 F. (2d) 378 (C. C. A. 2d), at page 195, is justified, but is entitled to far

greater emphasis than it receives. The case is also discussed under Unfair Trade Practices, but is ignored under Labor Law, a subject under which the decision poses problems of great importance. The ill effect of the decision is that it places the trial examiner at great disadvantage in requiring him to exclude evidence at his peril. The effect of the decision is to encourage the admission of all evidence, making the trial examiner merely an official reporter rather than a judge, his true function.

The article on Federal Taxation is one of the best in the Survey. The author is obviously at particular pains to make his meaning clear to the non-expert reader. A particularly excellent treatment of tax problems relating to trusts, presented in *Hall v. Commissioner*, 150 F. (2d) 304, and in *Helvering v. Hallock*, 309 U. S. 106, appears at page 397. The editor of this topic employs the same method pursued by the author of the article on Constitutional Law, of tracing the history of judicial changes in doctrine, lending greatly to the understanding of the true effect of the current decisions.

The article on Local Government contains a superficial treatment of the vast problem of balancing statism against local self-government. Perhaps the author's difficulty is due to the fact that the topic is not, in its essential nature, legal.

The article on Public Utilities adopts a novel method of review of decisions by first stating the principle decided, then giving the facts and analysis. The article has the particular merit of clear explanations of the legal principles announced.

Illustrating the general quality of unevenness of the Survey as a whole, the article on Unfair Trade Practices is far too sketchy. The article on Labor Law lacks the quality of integration of the current decisions with fundamental principles necessary to make the new rulings intelligible to one who is not an expert in the particular field. An example, found at page 664, is the summary discussion of the important topic of the right of organization of supervisory employees.

A criticism of the article on Contracts is of a somewhat different nature than the foregoing. Throughout the article are to be found statements of very general principles, usually without citation of authority, which might well be subject to question or even criticism. Examples are the statement (at p. 694) concerning "The earlier tests of reasonableness in time and space limitations in restrictive covenants, inferentially replaced by the modern test of balancing the interests to be protected," the statement (at p. 682) that "An abstract idea of commercial value, communicated to another *with the stipulation* (italics mine) that if used compensation will be paid therefore, (*sic*) will be protected on the theory of contract implied in fact . . .," and the statement (at p. 696) that "Frustration constitutes a defense to non-performance only where the value of the counter performance has been totally or almost totally destroyed." This method is less desirable than the method adopted in certain of the articles of citing and, better yet, discussing the originating cases. The method used in the Contracts essay seems to be a distortion of the method of historical treatment, preferring a rather flaccid enunciation of general principles to the more specific source-tracing employed in, for example, the notable article on Equity by the late Professor Walsh.

The article on Agency is, to borrow a phrase employed by its author on page 709 to characterize a Connecticut opinion, refreshingly "compact and scholarly." One would have welcomed a fuller expression of the author's own views on the topics discussed. It is difficult for this reviewer to detect any relevancy to the topic in the quotation in the last paragraph of the article.

The article on Equity is a model of what an annual survey should be. This article, together with that on Constitutional Law, measures up quite fully to the classic examples of annual surveys found in the Law Review writings of Pound, Scott, Beale, Chafee, Sydney P. Simpson and Frankfurter, and in some of the topical surveys put out by the Practising Law Institute. They are, unfortunately for the reading public, among the rare exceptions in the Survey.

The article on Trusts is on the whole very complete and with careful explanation of the effect of the currently decided cases. There is to be observed in this article, especially at page 994, an occasionally too unqualified acceptance of current holdings; for example, of the rule that a person can be trustee for himself for life, with remainder to another, the holding in *Re Erdman's Estate*, 42 A. (2d) 546 (Pa.), without consideration of the difficulties discussed in *Weeks v. Frankel*, 197 N. Y. 304, 90 N. E. 969 (1910). The same observation might apply to the treatment of the effect of exculpatory clauses briefly discussed at page 1001.

The article on Crime and Delinquency is illuminated by a brief but penetrating analysis of the juristic basis of the Nürnberg trials, especially at page 1136. The glossarist there points out that the prosecutors at Nürnberg "have taken the realistic position that murder is prohibited by the criminal laws of all civilized states" and adds that "murder is murder whether it involves the killing of one human being or of four million as at Auschwitz." The point could not be better expressed.

With respect to the important requirement of style, the article on Criminal Law is written in an extremely readable, interesting and narrative style, holding the attention of the reader to an unusual extent. Many of the commentators might have given heed to the reminder by the author of the article on Jurisprudence, at page 1234, that "surely there is nothing about law or its philosophy which necessitates bad syntax, constant repetition and colorless phrases."

The article on Jurisprudence contains an effective and restrained attack, worthy of especial comment, on the "dogmatic absolution" of the Kelsonian theory of law. This article in itself justifies the entire work. There is a particularly fine resumé of books published during 1945 which might otherwise have escaped for some time the attention of returning lawyers and students; among them the remarkable discovery of a Jeremy Bentham mms. written 163 years before and never before published. Mention should be made of a fine footnote at page 1245 giving a criticism of Positivism from Anatole France, in which the latter refers to "*la folie délicieuse d'explorer les profondeurs du ciel.*"

The article on Legal History should be read with pencil and note-book in hand; the author discusses various sources, including Law Review articles, of great value. Of especial interest on the doctrine of *stare decisis* is the

observation, quoted from an article in 31 A. B. A. J., that the courts must furnish the American "legal system with stability in the sense of patterned progress by voluntary adherence to the flexible American doctrine of *stare decisis*, which requires a careful weighing in each doubtful case of the advantages of adherence to precedent and the necessity for judicially planned social and economic progress to supplement legislative process." The article notes an important problem for law teachers posed by Professor Radin in his article, "The Dilemmas of Legal Teaching," 30 Iowa L. Review 325; the law teacher "must include studies in strictly legal doctrine while also covering the expanding fields of human activity which are becoming the subject matter for application of the doctrine."

The quotations in the article on Legal History are particularly well selected; almost all are unusually provocative. One of the most striking statements in the article, for law teachers, is that "the very function of teachers of law is the investigation of the history, philosophy and science of law, the inculcation of the result of such inquiry upon their students, and the presentation of their ideas to public and court through the written word" (p. 1284).

By this time, if ever, the forest should emerge from the trees. A general comment applicable to the Survey as a whole is that it serves a purpose of real benefit in that a great deal of the general body of substantive law is necessarily brought to the reader's attention in connection with the discussions of the current cases. This beneficial effect is unfortunately lost in most of the articles through a failure to develop the integration of the new with the old. Praiseworthy exceptions are the articles on Constitutional Law, Trusts, Federal Taxation and Equity.

Another pertinent general comment is that the allocation of cases to topics is uniformly good, again with certain exceptions. In the subjects treated in most of the articles there is a refreshing minimum of overlapping. An example of this judiciously exercised self-restraint is the treatment at page 208 of the cases of *American Power & Light Co. v. S. E. C.* and of *S. E. C. v. Okin*, involving the question of what persons shall be accorded the right to obtain review, under Administrative Law rather than Constitutional Law. An example of necessary duality of treatment, on the other hand, is the *Bridges* deportation case, discussed at page 215 under Administrative Law and at page 181 under Civil Rights.

A further general comment is warranted on the choice of main topics. Are "Social Security and Welfare," "Public Housing" and "Cooperatives" really topics primarily legal in their nature? Civil procedure has been wisely omitted, although Criminal Procedure is briefly treated; but where is Federal Practice?

A particular advantage of the Survey to law teachers is the horseback view afforded of many branches of the law which would be otherwise unexplored because lying outside the orbits of the teacher's fields of special interest.

A general comment on space allocation by topics, involving the problem of over-all editing, would raise inquiry as to the soundness of the decision in this regard. "Public" Law has 504 pages; "Private" Law and Adjective Law combined, 723 pages. The relatively large space allocation to topics of

"Public" as contrasted with "Private" Law would seem to indicate that the allocation is fortuitous rather than planned.

Too great a burden has been placed on some individuals. A notable example is Professor Laurence P. Simpson, who has been called upon for far too many articles, five in all, necessarily affecting the comprehensiveness of some of his surveys. This illustrates the necessity of a wider originating body of writers than is available in any single institution.

The volume abounds with typographical errors and omissions. Illustrations are the misprint of a date at page 18, where the United Nations charter is stated to have been ratified by the United States in 1944; an unintelligible sentence beginning at line 26 on page 169; the two incomplete sentences, already referred to, at page 154; a misprint at line 12 of note 1 on page 598; the use of the word "litigative" at page 624; an ungrammatical expression at line 20 on the same page; absence of reference to the state where a federal case arose, in the citation at page 697 of 149 F. (2d) 558; an error in the use of "or" for "on" at line 8 on page 978; a typographical error in "of" for "or" at line 24 on page 1146; "charge" for "charged" at line 17 on page 1188; and reference by one writer to the "U. N. O." (at p. 57) after the author of the preceding article had pointed out that the proper reference is "U. N." (p. 19).

Legal research has become much too cumbersome for adequate handling perhaps even by the law teacher, certainly by the practitioner. For this reason the idea of an annual survey of American law is a constructive step forward in legal education. The project is of sufficient importance to warrant the enlisting of the best effort of our best legal talent. The quest for assistance from broader fields should be, in view of the importance of the purpose, one of easy fulfillment.

The Survey is on the whole a striking achievement for a single law faculty. Its usefulness could be greatly increased by entrusting the function to an all-American team of experts.

RALPH A. NEWMAN.

TAXABLE INCOME. (Revised edition.) By Roswell Magill. New York: Ronald Press Co., 1946. Pp. viii, 491, table of cases, index. \$6.

The Income Tax has now been an integrated part of the fiscal policy of our government for more than thirty-three years. The imposition of a tax on income from its very inception raised numerous fundamental questions on the nature of income. "What is income" was and still is a perplexing question. Is it what the economist means by income? Or the accountant who is so intimately concerned with financial statements and the income concept? What does the average man conceive as income?

When the first of the current series of income tax laws was passed in 1913, Congress probably had in mind the average man's concept of the term. To the extent that the legislators were familiar with the economist's concept they probably found it too broad, while the accountant's concept with which