# REVIEWS

THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS. By Walter Wheeler Cook. Cambridge: Harvard University Press, 1942. Pp. xx, 473. $5.00.

THIS volume contains a collection of Cook's articles on the conflict of laws which have appeared in varied periodicals since 1919. A little more than one-fifth, represented by Chapters III, VII, IX, XII, XVI-XVIII, consists of new material. In these chapters Cook deals with "legislative jurisdiction" of states as used in the Restatement of the Conflict of Laws, domicile, renvoi, the characterization of "things" as "tangible" and "intangible," "movables" and "immovables," capacity to contract, capacity to marry, and jurisdiction to divorce. A number of the articles previously published contain "Supplementary Remarks, 1942."

In his introduction to *Principles of Private International Law*, Professor Nussbaum calls attention to the fact that the subject of the conflict of laws has had a fascination for legal scholars in all lands. In this country the subject has had a special appeal to men like Hohfeld and Cook, whose primary interest was in the fundamental conceptions as applied in judicial reasoning. Hohfeld's independence of mind made it impossible for him to accept his Harvard teaching in the conflict of laws with its underlying theory regarding legislative jurisdiction and foreign created rights. According to Professor Beale, no state but the one in which the operative facts occurred, and thus the state which had legislative jurisdiction, could impose a tort liability. In *Machado v. Fontes*,[1] however, the Court of Appeal of England held a person in damages for a libel published in Brazil, assumed not to be actionable under Brazilian law. In his course on the conflict of laws at Yale, *Machado v. Fontes* became the cornerstone upon which Hohfeld's new "local law theory" of the conflict of laws was built. Unfortunately for legal scholarship, Hohfeld had only started his work of developing a new legal analysis in the field of the conflict of laws when his untimely death took him from our midst, making Cook his literary executor. Cook had been trained as a mathematical physicist and had kept abreast with the newer experimental methods of investigation in the natural sciences as well as with the modern developments in philosophy, psychology and logic. His ideas in legal philosophy were greatly influenced by John Dewey, with whom Cook gave a joint seminar on jurisprudence at Columbia.

In 1923, while a member of the faculty of the Yale School of Law, Cook was asked by the Association of American Law Schools to present his views on the fundamental legal conceptions concerning the conflict of laws before a round table of the Association. The remarks there presented were later given permanent form in an article published in the YALE LAW JOURNAL under the title "The Logical and Legal Bases of the Conflict of Laws,"[2] reprinted as

1. [1897] 2 Q. B. 231 (C. A.).
2. (1924) 33 YALE L. J. 457.

Chapter I in the present volume with the abbreviated title of The Logical Bases of the Conflict of Laws. In this article and those that followed, Cook develops Hohfeld's legal conceptions of the conflict of laws along realistic lines and in the light of the modern scientific method. He starts with Holmes's definition of law as "the prophecies of what courts [3] will do in fact," which he accepts as a workable definition from the standpoint of Anglo-American law. Stressing the necessity of ascertaining what the courts have actually done instead of what they have said, Cook asserts that they have not supported any of the current theories advanced for the solution of the problems of the conflict of laws, such as Story's theory of comity, Dicey's theory of vested rights, or Beale's theory of territoriality. Cook then concludes that our courts never enforce foreign law or foreign rights in the conflict of laws, but that they necessarily create their own rights identical with or very similar to those created by some foreign law. The same view was expressed somewhat earlier by Judge Learned Hand, who said in *Guinness v. Miller* [4]: "No court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."

In criticizing the current theories or generalizations in the conflict of laws, Cook endeavors to show "that the old fundamental axioms are not only inadequate, but are not even applied consistently by their advocates; also, that if they were consistently applied they would often not lead to socially useful results." Cook admits, of course, that principles and rules are indispensable and his aim is merely to call attention to their nature and limitations. But he points out that they cannot be applied automatically and by mere logic to "new" situations, although they enable us to dispose of the great majority of cases which are merely routine and do not require thought.

Other writers in this country have taken a realistic approach to the conflict of laws, but none of them has gone so fully into the logical aspects of the subject as has Cook. In support of his contention regarding our logical processes and the approved modern scientific method, Cook refers freely to the writings of philosophers and scientists, notably to those of John Dewey.

In the nature of things, much of what Cook has to say is negative. The old legal structure has to be torn down before a new one can be erected upon more solid foundations. Fortunately, however, Cook's articles do not stop with destructive criticism. He sets forth again and again the positive method that should be pursued by our courts in a given situation. To illustrate: Some years ago it was the opinion of the writer of this review that parties should not be allowed to choose the law governing a contract when its *validity* was involved, since matters affecting validity rest upon considerations of public policy which could otherwise be nullified by a simple declaration in the contract that it should be governed by some other law which would validate the

3. At p. 15, Cook suggests that the word "courts" should include some other more or less similar officials.

4. 291 Fed. 769 (S. D. N. Y. 1923).

contract. Cook has pointed out that when a contract has a substantial connection with different states or countries, there may be no objection to permitting the parties to choose their law from the states or countries concerned. This would seem to be correct, at least when the validity of the contract rests upon technical considerations rather than upon stringent social and economic policies. In the field of torts, Cook regards the "last event" doctrine to have been reached largely "by confused reasoning based upon ambiguous language." He contends that it might be sensible to allow the plaintiff to select whichever of the two or more domestic rules involved in the situation is most favorable to him, a solution adopted by the German courts. As regards *Gray v. Gray*,[5] Cook observes that the question there was one of "capacity" of a wife to sue her husband, involving considerations of policy concerning domestic relations which might very well be subject to the law of the domicile of the parties. Cook's observations regarding the validity of a mortgage by a married woman to secure her husband's note also deserve serious attention. The law of the situs is said to govern, but according to Cook the courts should inquire whether the statute of the situs was intended to cover all conveyances of land in the state no matter where and by whom the conveyance was executed, for it might well be that it was not intended to apply to married women domiciled in other states.

Many other instances might be given where Cook offers helpful suggestions regarding the formulation of conflict of laws rules. In view of the outstanding merits of Cook's contribution to the study of the conflict of laws, it would be ungracious to dwell at length upon the shortcomings of his work in this field. In his chapter on Domicile, Cook stresses the fact that the verbal symbol "domicile" has not been given precisely the same meaning by the courts in matters of taxation, intestate succession, divorce, etc., and properly so, the courts being influenced by the particular problems before them. Theoretically, of course, domicile may be given different meanings for different purposes, but have our courts actually done so? It would be difficult to indicate concrete instances, with the possible exception of jurisdiction to divorce.

In his treatment of renvoi, Cook adds nothing of a constructive nature. His statement that the renvoi should neither be rejected nor adopted as a whole is approved by many conflict of laws students at the present time. The real problem today is in which situations and in what sense it should be accepted, and in which situations it should be rejected. Cook has only one suggestion to offer, namely, that in the matter of distribution of movables upon death, assuming uniformity of distribution to be the end in view, the renvoi be rejected in cases involving a foreign country because uniformity is unlikely and be accepted in cases involving a sister state because uniformity is likely. This suggestion is devoid of practical significance, for there is no fundamental difference in the law of our states concerning the meaning of domicile, nor in the rule governing the distribution of movables upon death (barring Illinois and Mississippi), and hence there is little occasion for the application of renvoi.

Nor does Cook's discussion of the characterization problem throw any new light upon that question. As regards the meaning of domicile Anglo-American courts and most writers are agreed that the term should be defined in ac-

5. 87 N. H. 82, 174 Atl. 508 (1934).

cordance with the *lex fori.* Cook objects and says that if uniformity in the distribution of personal estate upon death is the objective, the meaning given to domicile by the law of the place of residence cannot be disregarded. In view of Cook's conclusion that uniformity with foreign countries is probably impossible, the question is again narrowed to sister states, and as their notions of domicile are identical, there is little point to the discussion. If, for the sake of argument, it be assumed that there is a difference in the conception of domicile between the states in question, there is no reason why the law of the place of residence should be consulted. For example, if the decedent was domiciled all his life in state X but happened to reside in state Y at the time of his death, leaving personal property in states X, Y and Z, why should not the courts of state Z look to the law of state X to determine whether the decedent had acquired a new domicile in state Y if uniformity is the primary consideration? And what would Cook do if the decedent had a residence in various states at the time of his death?

Cook's *The Logical and Legal Bases of the Conflict of Laws* is of exceptional importance because it is the first volume in which the method of the American realistic school and its application to a considerable number of fundamental problems is set forth in detail. The same point of view was presented some years ago by Professor Stumberg in his *Principles of the Conflict of Laws,* but his book was written as a brief textbook for students, covering the entire field of the conflict of laws, and he consequently was unable to develop as fully and effectively the scientific method underlying the realistic approach as Cook has done. Cook's views cannot be accepted, of course, by adherents of the international school who feel that the rules of the conflict of laws are imposed by international law or at least have some international basis. Nor can they be approved by members of the nationalist school of jurists who regard the rules of the conflict of laws as part of the law of each country and who do not accept Holmes's definition of law. From the standpoint of Anglo-American law in its present development, however, it would seem that Cook has made out a strong case in favor of the realistic approach. If it is felt that this approach leads to uncertainty and confusion, the answer is that in the routine cases courts will apply the existing rules as they have done heretofore. Only in new situations will they be called upon to determine, in the light of social and economic ends, whether one of the existing rules should be applied or a new rule created. Cook admits that taking cognizance of the social and economic purposes in view may necessitate the breaking up of larger groupings into smaller ones and the formulation of additional rules to govern the smaller groups. But this is inevitable in view of the complexity of modern social and economic life which renders the broader generalizations inadequate for reaching socially useful decisions. The contention that the mode of approach advocated by the American realist school is as unproductive as the theory of vested rights or foreign created rights which it combats, is not well founded, for it rests either upon a rejection of Holmes's definition of law or upon a failure to grasp the method so brilliantly set forth in Cook's *The Logical and Legal Bases of the Conflict of Laws.*

ERNEST G. LORENZEN †

† Edward J. Phelps Professor of Law, Yale Law School.

CONSTRUCTIVE INCOME TAXATION. By Irving Fisher and Herbert W. Fisher. New York: Harper & Bros., 1942. Pp. xiv, 277. $3.00.

*Constructive Income Taxation* is a new book only in the sense that it was published recently. With the exception of a "legal" section written by Herbert W. Fisher, the book contains little more than a lengthy description of a "proposal for reform" that has long been associated with Professor Irving Fisher's name, and a presentation of arguments in favor of the proposal that have already been subjected to intensive critical consideration. To a great extent, therefore, this review consists of a summary statement of Professor Fisher's familiar plan and of its alleged advantages, and a restatement of objections already raised by others.

The purpose of Professor Fisher's plan is the exemption from taxation of all savings, both corporate and personal. The purpose would be achieved through the elimination of the present sort of individual income tax as well as the separate income taxation of corporations, and the imposition of a levy on individuals assessed in accordance with the amount of their expenditures for consumption. In support of his proposal, Professor Fisher argues on grounds of equity, benefits to the economy and the exchequer, and administrative simplicity.

Professor Fisher has two things to say about the inequity of present taxation as compared with his proposed spendings tax. He contends, first, that "income taxation" is a misnomer of the levies that we currently call such because "true income" is nothing more or less than personal consumption. He argues, next, that the exemption of savings is the only way of eliminating a particularly invidious and destructive form of "double taxation" implicit in our present system.

The second of these contentions rests upon the first; and the first, upon a definition that is little more than arbitrary.[1] If Professor Fisher's definition of income is accepted, savings are being taxed at least twice, first when earned and again when their "fruits" (yield) are received. But if something akin to accretion to economic power is held to be the desirable income concept for tax purposes, the contention loses its validity. It is true enough that the taxation of savings results in the imposition of a greater burden than if they were exempted; the choice, therefore, appears to be not between "single" and "double" taxation in any abstract sense, but between more and less taxes,[2] or between different sorts of taxation. In any event, a decision for tax policy purposes must be made upon a more pragmatic basis than a recourse to definitions. It seems to the writer that Professor Fisher wisely makes somewhat less of these particular contentions in the present volume than he has in years past and asks rather to be met on the really pertinent issue of the effects of the adoption of his proposal and their desirability.

1. It should be noted that Professor Fisher is not so grossly guilty of circular reasoning in his first argument as may appear to be the case, for the definition of "true income" upon which it rests has long been a friend of his and was originally developed in connection with theoretical researches that had little to do with income taxation.

2. See Crum, *On the Alleged Double Taxation of Savings* (1939) 29 AM. ECON. REV. 538.

The immediate effect of the adoption of his "reform," Professor Fisher tells us, would be a substantial increase in savings, both because the reward for saving would be increased (as well as the penalty for spending) and because taxpayers would be left more money from which to save after taxes. Greater savings would mean more investment—an increase in our stock of productive facilities—and after a time more and cheaper consumer goods. Corporations, furthermore, freed from the onerous compulsion to distribute their earnings, could utilize more of them than currently for expansion, development, etc. Professor Fisher develops a good deal of his argument through the use of an illustration, "an imaginary case . . . a man named Henry Forward. . . ." Forward is assumed to live in a country that wisely refrains from taxing savings. Over a forty-year period he manages, by virtue of annual profits at a forty per cent rate entirely retained in the business, to rise from possession of a smithy worth $1,000 to sole ownership of an automobile enterprise valued at about $700,000,000. Professor Fisher points out that if a tax on his annual profits at a rate as modest as twenty per cent had been imposed, Forward's growth would have been so stunted that his fortune at the end of the period would have totaled merely $66,500,000. Not only would Forward have been poorer, but the automobiles produced by the smaller plant would have been an inferior product and would have cost more than those produced in the larger one. Professor Fisher holds, furthermore, that the tax revenues would have suffered from the imprudence of the government that imposed the annual tax on savings. Whereas the twenty per cent tax, collected for forty years, would have aggregated only $16,600,000, a five per cent death tax imposed at the end of the forty-year period would have yielded, if no annual tax had been levied, more than twice this amount. Thus Professor Fisher claims to have established the "three-fold advantage" of the exemption of savings—"to the public, to Mr. Forward, and to Uncle Sam."

If we accept the assumption implicit in the illustration that the growth of Forward's automobile business was limited to the amounts of profit he plowed back each year, there can be no argument with Professor Fisher's conclusions. But if this unrealistic assumption is abandoned, no necessary reason remains why the enterprise might not have achieved equally vast proportions if an annual tax had been levied. The difficulties with Professor Fisher's generalized argument are even more serious. He is correct, in all likelihood, when he contends that exemption from taxation would encourage savings. He is by no means justified, however, in assuming that an increase in savings necessarily leads to an increase in real investment. To say that increased savings will mean more factories is to say that the volume of savings, if not for the increase, would have effectively imposed a limit on the volume of real investment, *i.e.*, that every dollar of the smaller amount of savings would have been invested, and that extra dollars would also have been called for but would not have been available. It would be difficult for Professor Fisher to demonstrate that such a situation has prevailed over the past decade; and recent theoretical analysis of the determinants of the volume of investment renders his failure to justify this crucial link in his reasoning a serious fault. Although the issue was raised by Professor Fisher's critics at least

four years ago,[3] he goes no further in the present volume than the identification of the problem of the relationship between savings and investment with Keynesian thought and its dismissal with the statement that the "truth seems to be not so much that Keynes has influenced economic thought on this subject on its merits as that he has unwittingly become a convenient instrument for the rationalization of projects of powerful political interests." [4]

If no significant increase in investment resulted from the adoption of Professor Fisher's "reform," two of his promised benefits—the benefits to the public and to Uncle Sam—would fail to materialize. The output of consumer goods and the yield from death taxes would be no greater than if savings had not been exempted from taxation. The third of Professor Fisher's triumvirate —the advantage to Henry Forward—would arise, however. For it is certainly true that the fortune an individual could accumulate in his lifetime would be far greater if savings were exempted. Standing thus alone, this "advantage" seems a dubitable one indeed.

It has already been mentioned that Professor Fisher envisages both the administration of his spendings tax and taxpayer compliance therewith to be a good deal simpler than is the case with present income taxes. It is true that the spendings tax would raise less problems in the case of the small number of taxpayers with sizeable amounts of income from investments, and the elimination of the separate taxation of corporations would of course reduce administrative problems considerably. In the case of the vast majority of taxpayers, however, where wages constitute either all or nearly all the income, the spendings tax would almost certainly be less simple than the present income tax, both for taxpayers and for the Bureau of Internal Revenue.[5] Certain problems unique to a spendings tax would arise at the outset and would soon disappear (*e.g.*, anticipatory buying and the hoarding of cash prior to its adoption); other difficulties in our present system (*e.g.*, the discrimination in favor of homeowners relative to renters) would be accentuated under the spendings tax. It should be noted, furthermore, that the institution of information returns of an entirely new sort (bank balances, insurance payments, etc.) would increase the complexity of the collection of the revenue, and that none of the present information requirements could be eliminated to compensate for the new burden. With low exemptions and a consequently large number of wage-earner taxpayers, the virtue of relative simplicity would probably not lie with the spendings tax.

An additional word should be said with respect to the section of the book entitled "legal" and written by Professor Fisher's brother, Herbert W. Fisher. A case is argued for the constitutionality of the spendings tax, and the judi-

3. See, *e.g.*, Musgrave, *A Further Note on the Double Taxation of Savings* (1939) 29 AM. ECON. REV. 549.

4. Appendix C, p. 229. Professor Fisher responded to Musgrave by writing that "The idea . . . that 'saving' does not necessarily imply 'investment' is important under certain circumstances, notably during deflation when there is hoarding or during the New-Deal hounding of business." See Fisher, *Rebuttal to Professor Crum and Mr. Musgrave* (1942) 32 AM. ECON. REV. 111.

5. See Vickrey, *The Spendings Tax in Peace and War* (1943) 43 COL. L. REV. 165.

cial history of the income tax is reviewed. It is found that the Sixteenth Amendment could well encompass "constructive income taxation" and that the Supreme Court has had a lot of trouble with income taxes over the past three decades. The reviewer finds these legal considerations no more convincing a pair of arguments in favor of the exemption of savings from taxation than he found Professor Irving Fisher's arguments on economic grounds.

CHESTER L. HIRSCH †

THE THEORY OF CAPITALIST DEVELOPMENT. By Paul M. Sweezy. New York: Oxford University Press, 1942. Pp. xiv, 398. $4.00.

AN ESSAY ON MARXIAN ECONOMICS. By Joan Robinson. London: Macmillan & Co., 1942. Pp. x, 122. 7s. 6d.

THESE are both important books. Their almost simultaneous appearance creates a significant landmark in the development of economic thinking. The books and their authors are, however, very different. Dr. Sweezy's book is much more ambitious; it is the first modern comprehensive and systematic exposition of Marxian economic theory in the English language. The importance of Mrs. Robinson's essay lies more in its symptomatic nature. It is an attempt to find common ground between Marxism and the modern heterodoxy associated particularly with the Keynesian theories of employment. Dr. Sweezy has for long been known as one of the very few outstanding scholars of Marxism in the English-speaking world. Mrs. Robinson, though always, and with some justice, anxious to be regarded as an opponent of orthodoxy, has nevertheless until recently been a strong critic of Marxism. In their new books, both authors show a considerable measure of development. Mrs. Robinson's is more striking. Not so very long ago she could find little of value to the modern economist in Marxism, though her criticism referred not so much to Marx's own writings (to which she has only recently devoted serious study) as to the writings of his followers and popularizers. She accused Marx of sharing the classicist's erroneous belief in the law of the market. She urged those who were discontented with so-called neo-classical and equilibrium economics to seek a positive inspiration in the theories of Keynes. There have been signs in recent years that she was preparing to reconsider this view. In a recent reprint in a collection of essays of one of her more critical articles on Marx, she toned down some of her more extreme statements. She still, however, refused to face the issues and took refuge in a highly epigrammatic, if arid, discussion of an epistemological character. However, she must have decided to pursue the problem, for in a recent article in the *Economic Journal* she presented a more penetrating analysis which was quite favorable. She even went so far as to quote with approval Marx's statement that the ultimate barrier to capitalist production was capital itself. In the present book, the preface

† Division of Tax Research, Treasury Department.

contains an open expression of her belief that modern economists have much to learn from Marx.

There is also evidence in Dr. Sweezy's book of an intensive re-reading not only of Marx's own writings but also of the older, little-known literature. There is evidence, too, that Dr. Sweezy has thought out again the bases of the economic analyses of Marx, notably the significance of the labor theory of value. He has clearly not been content to repeat the assertion, which is still fashionable among many economists who are favorable to Marxism, that an acceptance of the more advanced conclusions of Marx's theory does not involve a "belief" in the "discredited" labor theory of value. This book is the result of a courageous and intensive effort on the author's part, first to understand most fully and then to expound most clearly.

The structure of Dr. Sweezy's book has been carefully thought out to present in the clearest manner Marx's theories from their simplest and most abstract economic categories to their most complex conclusions concerning the real world: the present stage of economic development and its political concomitants. One of the author's most remarkable achievements is that, in developing an easy expository structure and style, he has avoided the failing, common to most previous English writers on the subject, of distorting the theory itself in a schematic and mechanistic direction. One may say that Dr. Sweezy has managed to preserve the living essence of this dialectic subject better than one would have thought possible within the limits set by a moderate sized volume dealing with a wide range of problems and by the avowed aim of serving as a guide to even the least initiated student.

The book is divided into four parts, and the analysis proceeds from the economic categories of value and surplus value through the Marxian dynamic of accumulation and crises to a consideration of monopoly and finance capitalism, imperialism, fascism, and war. It is clear from this order and from the increasing length of the chapters that the author, faithful to Marx himself, regards the economic theory in the narrow sense as only an instrument. His interest becomes more intensively engaged as he reaches the problems of the real world and as the requirement, and possibility, of practical and political solution becomes more pressing.

After a brief introduction designed to show the inadequacy of orthodox economics, the book begins with an analysis of Marx's method. Dr. Sweezy makes good use of Marx's own statements in the *Critique of Political Economy* (much neglected by many other expositors) to explain the use of abstraction with particular reference to the problem of value and the significance of Marx's formulation of the labor theory of value. It is not possible to recapitulate here the proof which Dr. Sweezy gives of the essential need for this abstraction. What he does show is that the labor theory of value is the basic abstraction of the social relations in a commodity-producing society. A particularly successful section of this analysis is the part devoted to Marx's theory of commodity fetishism. It is to be hoped that Dr. Sweezy's discovery of "reification," a perfectly good English translation of the difficult German word "*Verdinglichung*," will help to make this difficult part of the theory more widely understood.

The two outstanding features of the second section, which deals with the more dynamic aspects of Marxian economic theory, are the more extended treatment and emphasis given to the theory of the industrial reserve army and the penetrating analysis of the transformation of values into prices. The former is subsequently used as an important part of the theory of crises. The latter disposes very successfully of the old and largely exploded notion of the contradiction between Volumes I and III of *Capital*. In this connection Dr. Sweezy resuscitates a number of very interesting studies of Marx's theory of prices by Bortkiewicz together with the latter's very interesting critique of Marx's law of the falling tendency of the rate of profits.

The third section deals with crises and depressions. Dr. Sweezy has evidently been impressed with the difficulty experienced by previous writers in stating Marx's theory of crises without doing violence to its dialectical complexity. He has, therefore, taken care to state all the elements which go to make up the Marxian theory, and he has paid special attention to one which, hitherto usually neglected, provides a significant link with many modern theories, such as that of Keynes. This aspect of the theory is treated in Chapter X in which Dr. Sweezy makes excellent use of the material in Volume II of *Capital* which deals with what one might call the subordinate market phenomena of a moving economy, namely, the conditions of preserving a balance between different branches of production through the appropriate realization of their products. The "breakdown" controversy is given another separate chapter. Here, as in one or two other parts of the book, the reader is at first inclined to wonder whether the revival of ancient polemics is not a somewhat pedantic and scholastic pastime. But it soon becomes evident that the author has not resuscitated the half-forgotten theories of authors whose names many of his readers have never heard purely because of an antiquarian interest in his subject, still less to prove his erudition. The conflicting theories which are here analyzed are still very much alive, even if those with whom they were originally associated are now little known. These theories live in many different guises, but they have this in common, that it is a matter of considerable significance in the contemporary political scene whether they are accepted or rejected. For this reason, Dr. Sweezy's analysis of Rosa Luxemburg and Kautsky, Tugan-Baranowsky and Henryk Grossmann, should be regarded as an important stepping-stone to the later discussion of political issues.

In the final part, the author reaches the subject of present-day politics. Here the author walks on paths which are probably better known to those of his readers who are not economic specialists. Although this part is more definite in its attitude and more outspoken in its implied advocacy of a particular political doctrine, it is, in a sense, less controversial than the rest of the book because something much more like an all-out adoption or rejection is possible. The nature of Dr. Sweezy's analysis, on Marxian principles, of present-day capitalist society is well-known. It begins with a study of the state and its relation to the economic structure of society. It then proceeds to describe the growth of monopoly capitalism and the increasing role of finance in modern economic life and to analyze the significance of this development in terms of the previously analyzed "laws of motion" of capitalism.

At this point, the analysis turns to the international field. A consideration of the growth of imperialism leads to a study of war and fascism and finally of the present war and of the future of international relations. Here the analysis follows familiar lines, and novelty is to be sought in the exposition rather than in the argument. In some respects, and in spite of the freshness of the style, this part of the book is perhaps most open to criticism, not so much in itself but as it relates to the rest of the book. It is true that a Marxian treatise such as this must cover not only the economic theory of Marxism, but also the political analysis and advocacy which is based upon that theory. It is, nevertheless, extremely difficult to treat both these elements in the same manner. And even Dr. Sweezy in this admirable work has not escaped a certain dualism. The level of the discussion in the economic chapters is perceptibly different from that in the later political ones. And the transition from a technical discussion which at times uses quite intricate mathematics to a fairly popular exposé of Marxist doctrine on the current political situation is a little disconcerting. This, however, is a very minor criticism of a book which is sure to remain the leader in its field for a long time to come.

Mrs. Robinson, in her essay, is not faced with any such dilemma as must have confronted Dr. Sweezy. Her book is addressed exclusively to the expert who must, moreover, be familiar with the latest intricacies of advanced economic theory if he is to derive the full benefit of a very closely-knit argument.

Mrs. Robinson begins by acknowledging that there has been an apologetic strain in academic economics. She then states the Marxian theory of the industrial reserve army (or of employment) in terms which can be understood by a modern academic economist. Thereafter she proceeds to discuss the movement of the modern heterodoxy both in the direction of Marx (as regards employment, monopoly and exploitation) as well as away from him (as regards the theory of wages). Finally, she enumerates and briefly analyzes what appear to her to be the unsolved problems still facing those who are prepared to look upon the present economics with critical eyes.

It is impossible to enter here into any of Mrs. Robinson's arguments in any detail, for it would take at least another essay to analyze the very condensed treatment which she gives to her subject. But it may be said that while Mrs. Robinson now shows a much greater knowledge of Marx, or at any rate of *Capital* (which is freely quoted), she has not really understood Marxism in the way in which Dr. Sweezy has presented that doctrine. Her essay exemplifies the impossibility of detaching a few elements of Marx's thought from the whole complex structure. However well Mrs. Robinson has chosen these elements and however carefully she has analyzed them, there is still missing an appreciation of the essential unity of Marx's system and above all of its foundation, the analysis of the contradictory nature of a commodity-producing society.

Nevertheless, this book shows freshness of thought, and one may confidently expect it to be the forerunner of others in which the author will really come to grips with the problem of the present-day relevance and adequacy of the theories which she has discussed.

ERIC ROLL †

† Professor of Economics, University College, Hull, England.

CONDITIONS OF PEACE. By Edward Hallett Carr. New York: The Macmillan Co., 1942. Pp. xxiv, 282. $2.50.

PROFESSOR Carr's prescription for peace has alarmed many readers while it fascinated them. It has alarmed both conservatives and liberals, for it talks in terms of a revolution against "liberal democracy." But it fascinates by its penetration and cogency. For this reviewer, there is no other one book which sheds more light on the European aspects of peace-making. And as one who calls himself both a liberal and a democrat, I find little with which to quarrel in Professor Carr's proposals.

The author himself apologizes for having charted his book before the invasion of Russia and having virtually completed it before Pearl Harbor. To limit it further, it presents an Englishman's perspective on Germany and western Europe rather than a world view. It largely ignores the problems of Asia, India and colonial imperialism, as well as the integration of the Americas in a new world order. The revolution that has engulfed the world is described with several important parts missing, notably the rising consciousness of racial equality in the East, and the end of "white supremacy" brought about by Japan. Yet Professor Carr has so vivid and fresh a consciousness of other phases of the world revolution that one can only hope his words will be pondered by those who write the peace.

The revolution, as he sees it, is threefold, being against "liberal democracy," against *laissez-faire* capitalism, and against national self-determination. The major error of the victors of the last war was neither their vengefulness nor their liberality, but their belief in the possibility of reviving a world that was already passing away. The strength of Hitler was his ability to capitalize on the new trends.

Carr's disposal of "liberal democracy" probably sounds more ominous to American ears than British. But what he is referring to was the naïve faith of Wilson that the world could be made safe for democracy by fostering parliamentary regimes in all the petty states of Europe. A democracy which means merely the right to vote on election day is likely to mean little to unemployed industrial workers or landless peasants. But rather than being opposed to democracy, Professor Carr demonstrates the need for basing it on social equality and economic freedom and on a widening participation by the individual in the administrative process.

In the case of his prophecy of the end of nineteenth century capitalism, likewise, he would probably have less opposition in England than in this country. For devotion to the ideals of *laissez-faire* and free trade hangs on more tenaciously in this country than in England. Yet he is perhaps most open to legitimate criticism for his vague sketch of a new mixed economy of "planned consumption," taking its cue from our present war economies. He shows little familiarity with the dominant line of progressive current economic thought stemming from Keynes.

The third feature of the revolution, as he sees it, is the most convincing, and it is here that his major contribution lies. For in citing Wilson's emphasis on the "self-determination" of nations to be states, he puts his finger on the error that must above all others not be repeated at the end of World War

II. And in the final chapters of the book, where he tentatively lays down some rules for the treatment of Germany and of Europe on a non-national basis, he is at his most constructive.

He intimates that it would be folly to try to revive the European patchwork that Hitler destroyed. And to deal with Germany as a national criminal will only perpetuate and heighten national feeling. The European objective should be to lessen the force of nationalism by means of a program of relief and reconstruction that minimizes national boundaries. Local authorities should be encouraged in the administration of the program, and the program as a whole should be in the name of "Europe" rather than of any nations, conquered or conquering. The way to destroy the malignant nationalism of which the Nazis are the most extreme symptom is to make individual Germans feel they are partners in the "European" enterprise. This is surely enlightened statesmanship. Whether the present governments in exile, victims as they are of nationalism run wild and thirsting for revenge, will be capable of such statesmanship or whether they will have to be ignored in the long slow process of peace-making is a question tactfully ignored by Professor Carr.

This book was written as a guide to England's future European policy. Though schemes for international federation, European or otherwise, are impatiently dismissed as too simple, the question of England's relation to future "European" agencies must be faced, and Professor Carr lays himself open to the charge of advocating a new kind of Anglo-American imperialism by avoiding it. One might ask, too, why he devotes no attention to the problem of America's share in the future, beyond emphasizing that we cannot once more evade responsibility for Europe's peace.

But he has not called his book "The Conditions of Peace," but only "Conditions of Peace". In less than three hundred pages he has packed much wisdom without claiming to have solved all the world's problems. If peace were to come tomorrow, his should be one of the indispensable handbooks in the briefcase of every American official, no less than of every British official, charged with bringing order to Europe.

ALFRED M. BINGHAM †

MUNICIPALITIES AND THE LAW IN ACTION 1942. Edited by Charles S. Rhyne. Washington: National Institute of Municipal Law Officers, 1943. Pp. 610. $7.50.

THE National Institute of Municipal Law Officers for the last five years has been making its proceedings available to the public under the above title. The publication is unusual in that its attitude on every question is completely predictable. The legal profession has the benefit of the annual reports of the Section of Insurance Law and the Section of Municipal Law of the American Bar Association, but these excellent publications are sponsored by groups comprising both those on the inside looking out and those on the outside looking in. Not so the members of the National Institute of Municipal Law Officers. They are for the municipality first, last and all the time. Theirs is no

† Editor, *Common Sense.*

mere academic interest in the problems of municipal law. Their book is as different from the ordinary report of the chairman of a bar association committee on current developments of the law of municipal corporations as the brief of a lawyer fighting for the economic existence of a client is from a law review article.

To the Municipal Law Officers, right is right and wrong is anything that the municipalities do not like. Shot through the volume are references to the infamous case of *United States v. City of New York*.[1] In 1930, Mayor Walker of the City of New York agreed with the Secretary of the Treasury that if the United States would turn over the federal building site in City Hall Park to the City, the City would sell to the United States a court house site in the civic centre for $2,450,000 and would pay for a new site for the post office of the same area as the old site. The state legislature authorized the sale of the civic centre site to the Government "in connection with an agreement between the city of New York and the United States government for the removal of the old federal building at the southerly end of City Hall park in the borough of Manhattan, and the acquisition of a new site in said borough by the United States government for the construction and erection of a new post-office building." The civic centre site was thereafter conveyed to the Government and the agreed purchase price paid to the City. The new site for the post office was obtained, and, in 1936, the United States presented a bill to the City for $4,336,985.79. The then mayor replied to the Secretary of the Treasury expressing surprise and disappointment at hearing that the Government expected payment for the conveyance of the old post office site to the City. Nevertheless, the United States brought suit to compel the City to live up to the other mayor's agreement. Judge Clark in the United States district court held that the City was lawfully obligated to pay, but the National Institute of Municipal Law Officers spurred to the rescue. The president of the Institute in his report to the conference spoke with pride of the introduction of the practice of the Institute's filing briefs *amicus curiae* in cases in which all cities are vitally interested. As an example, he said, "We also filed a brief in the case of *United States v. City of New York* in the United States Circuit Court of Appeals for the Second Circuit to oppose a district court holding that a mayor can bind a city by an ordinary letter to a contract liability in excess of five million dollars in violation of express municipal charter contractual requirements." Mayor LaGuardia, in addressing the Institute, began by saying, "I can't even open my remarks by saying, 'The town is yours,' not now, since the Judge Clark decision in the Post Office case, for if I were to say that, you could all sue me for specific performance." True, the circuit court of appeals held that the legislature had, by implication, dispensed with the necessity for the usual formalities in this case, and the City was held to be bound by the agreement of its mayor, but the National Institute of Municipal Law Officers had made its fight for the rights of the municipalities of the United States.

Do not make the mistake of thinking that this polemic attitude detracts from the value of the book. There is something about a municipality that seems just about suited to mankind at mankind's present stage of evolution. A country is too big. It is a byword that a world is beyond the capacities of man.

1. 45 F. Supp. 226 (S. D. N. Y., 1942), 131 F. (2d) 909 (C. C. A. 2d, 1942).

Mere size creates a psychic barrier. For some reason, a mind that can deal with facility in thousands balks at the problem when three extra ciphers are added and its owner tries to force it to deal in millions. Our city attorneys deal with no such impossibilities. They really grasp the problems with which they are dealing. They are not subject to be misled by that delusion, endemic in nations, that the state is something different from the people. Until we can develop our brains to the point where we have enough world citizens with the cosmic grasp of a Churchill or a Madame Chiang Kai-shek, we must rely on the next best thing, the aggregate wisdom of the men like the authors of *Municipalities and the Law in Action* who are running the smaller communities that they know and understand. That instinctive reliance is probably the basis for the irrepressible heresy in municipal law that the state exists by sufferance of the towns.

In Mayor LaGuardia's address to one of the sessions of the Municipal Law Officers, he warned against the "ambition of jurisdiction" of the Federal Government. He expressed the devotion of the selectman to his town thus: "It is an old principle of law that elected officials must not impair their government and must transmit it to their successors without impairment. Therefore, many times, though we may sympathize with the reasons, we must not permit encroachment upon the rights of local government. You and I have been up against that all of the time in relation to our own state. That is something that municipal government must protect all of the time as against its own state."

The Mayor pointed out the impossibility of the enforcement of decrees of the War Labor Board with respect to the wages of municipal employees more cogently than he has ever been known to sum up the impossibility of the enforcement of similar decrees of the unions of the City's transit employees.

Of the seven resolutions which it adopted at its last session, the Institute directed one against this jurisdiction of the War Labor Board, giving it a place with the inevitable resolution of thanks to the retiring officers and the immediately following resolution of appreciation of the leadership of Franklin D. Roosevelt. Then came resolutions against federal action unreasonably impairing municipal revenues and federal taxation of the interest on municipal bonds and resolutions in favor of the maintenance of autonomy of local governments and the extension of federal benefits for injuries sustained by volunteer civilian defense workers. In other words, the corporation counsel were unalterably opposed to federal interference unless it had something to offer.

A committee suggested local ordinances exempting municipalities from liability arising out of civilian defense activities, but sadly conceded that such ordinances were of doubtful validity, adding: "If cities could adopt ordinances and exempt themselves from various liabilities, they would of course include more activities than those of civilian defense." Nothing could be more typical of the healthy selfish attitude of municipal government. A state or a nation might, as the State of New York has done,[2] waive all restrictions upon its liability. And a state court might say, as the New York Appellate Division has said, that such a waiver eliminates the basis for municipal exemption from tort liability in governmental activities.[3] But a municipality itself, never.

2. Court of Claims Act, N. Y. Laws 1920, c. 922, § 12a.

3. Holmes v. County of Erie, 4 Law Report News No. 41, p. 2 (App. Div., 4th Dep't, May 12, 1943).

While the officers gave their resolution of appreciation of the leadership of the President the place of honor immediately after the customary resolution of appreciation of their own officers, they were not quite as respectful to the President when it came to the discussion of federal taxation of the income from municipal bonds. The report of the Special Committee on Tax Immunities is headed "The Attempt to Tax Municipal Bonds—A War Claim Disproved." It states, "The opening gun was fired on January 7, 1942, when the President in his budget message to Congress urged the taxing of income from all future issues of State and municipal bonds," and mentions the President's declaration in his Labor Day message that "we must eliminate the tax exemption of interest on State and local securities and other special privileges or loopholes in our tax laws." From then on, the story of the gallant fight of the municipalities continues and at last concludes with a statement that "the proponents of the tax finally conceded that it would not raise any immediate war revenues, thus admitting that the issue had been misrepresented as a war revenue measure by the Treasury Department."

Perhaps the Municipal Law Officers with a little more perspective would have refrained from criticizing an illogical use of the war as an argument. Their 1942 meeting was called a "War Conference," and the report of the Committee on Federal, State and City Relations is published under the caption "Federal, State and City Relations in Solving War Problems," although among its discussions it treats the anti-poll tax bill, the exemption of city owned vehicles and boats from the federal use tax, the regulation of employment agencies, federal control of sizes and weights of motor vehicles, the extension of the Municipal Bankruptcy Act, and the amendment of the Natural Gas Act.

Indeed, the municipalities are a little inclined to be disappointed that the war is not doing everything that it should for them. The committee just referred to, under the caption "City-State Relations," laments that "wartime has not helped cities in their age-old fight to secure home rule and freedom from State interferences in the conduct of local affairs." There speaks the voice of the intelligent self-interest on which we must build until all philosophers are kings and all kings philosophers.

EDWARD J. DIMOCK †

THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON, 1772-1773. Edited by John T. Farrell. Washington: The American Historical Association, 1942. Pp. lxv, 293. $7.50.

WILLIAM SAMUEL JOHNSON was a judge of the Superior Court of Connecticut during the years 1772-73. For a little more than three months of this period he kept a diary, or record, of the cases which came before the court. This diary, the foundation on which Dr. Farrell's book is built, in itself comprises only a part of the volume. The entries in the diary are usually brief and seldom of more than moderate length—they are in the nature of notes

† State Reporter, New York.

taken by the Judge for his own use, rather than reports of cases for the benefit of others. To these brief entries the editor has added a mass of valuable supplementary material taken from the records and files of the Superior Court. This data, now in print for the first time, is at least quite as informative as the diary itself on the law of the times, is of far greater value to the historian as a source of general history, and will undoubtedly prove the most interesting part of the book to persons who are neither lawyers nor historians. In addition to the diary and the excerpts from the records, there is a well-written introduction dealing with the court system, the procedure in civil actions, criminal process, and a sketch of Johnson and his contemporaries. In this introduction, Dr. Farrell, who is first and foremost an historian, shows a commendable knowledge, on both the technical and the practical side, of colonial and contemporary English law. His considered judgment is that "this framework of the law in an eighteenth century corporate colony is a picture of the framework of the law of England at the same time." There were, however, two actions which Swift in his *System of the Laws of Connecticut* thought peculiar to Connecticut alone; one was the action of book debt, and the other a real action brought for "the surrendry of seisin and possession." Both of these are discussed by Dr. Farrell in his introduction.

Usually the material from the records and files greatly augments the information given in any particular item in the diary. Now and then Johnson's entry will contain details not apparent from the official record. Thus, in the case of *Smiths v. Russell* we learn from the files practically nothing more than that it was a case of trespass to land involving fishery rights.[1] The diary inserts a number of interesting additional facts. Plaintiff made title to a piece of land laid out in 1725, bounded on the west by the Connecticut River. Defendant's ancestor was owner of the land on the opposite side of the stream, with right of fishery. At the time the action was brought, the river, by gradual and regular yearly change, had moved some eighty rods to the east of where it had flowed in 1725. The defendants argued that the river, wherever it ran, was the boundary between them and the plaintiff. The latter claimed that the eighty-rod strip between the then west bank of the river and the original west boundary belonged to him. It was held that the plaintiff could come over the river and follow his old bottom, and that the defendants in fishing on the eighty-rod strip had committed a trespass. This was clearly a case of alluvion which the court decided by the rules usually applying to avulsion. The decision was contrary to English law in general, to the principles of Roman law which the English law on this particular point seems to have adopted, and to later Connecticut law.[2] The matter of fishing rights is involved in a number of other cases in this volume—a reminder that in those days the barrel of salted fish in the farmer's cellar was a welcome addition to his usual winter's fare, and the right of fishery which enabled him to get it was a right for which he was willing to fight.

By and large, these cases savor of rural life and an agricultural background. Even the largest towns were still not big enough to be unaffected by the same general atmosphere. The smallness of the communities made it more or less

1. P. 32.

2. *Cf.* Welles v. Bailey, 55 Conn. 292, 10 Atl. 565 (1887).

inevitable that everyone should come into rather close contact with everyone else and should know to a large extent everyone else's business. This would seem to account, in a measure at least, for the numerous actions for slander which appear on the docket. A good name was not only desirable but necessary for anyone who would maintain any standing of respectability and enjoy its rewards. Consequently, one's reputation was jealously guarded, and any slur upon the character of an individual was more likely than in our own time to give rise to an action at law—not so much for the damages that might be recovered, we venture to say, as to enable the plaintiff publicly to repudiate before his neighbors the disreputable things said about him.

One is apt to think of the colonial period as a time when mismated men and wives bore their lot in a spirit of self-abnegation—a conception of early New England life which these court records do not substantiate. If we have counted correctly, in the short three months during which Johnson kept his diary, at least thirteen divorce cases came up for adjudication. The alleged grounds, in order of frequency, were adultery, desertion, bigamy (Johnson calls it "Poligamy") and cruelty. In his foreword, Judge Clark says that one is struck by the freshness and modernity of the cases in this book as a whole. Some of the divorce cases equal in sordidness anything of a similar nature that modern journalism delights to peddle to the public today.

Strikingly numerous are the arraignments for counterfeiting. The counterfeiters attempted to imitate both coin ("gold coin commonly called half Joes," "Spanish Milled Dollars," "Gold Coin of the Kingdom of Portugal . . . commonly called half Johannes and half Josepus's") and bills of credit ("Bills of Credit of the last New York Emission," "Bills of Credit of the Province of New Jersey"). Temptation to counterfeit was doubtless increased by the high value of the genuine coin; the half Joes were worth forty-eight shillings, and the silver Spanish dollars, six shillings. The face value of the New York bills is not given, but in the case of the Jersey bills, the counterfeiters made one hundred bills in imitation of a fifteen shilling bill, but raised the denomination to twice that amount.[3] In one case a defendant was indicted for uttering counterfeit New York bills after a Connecticut statute had denied the genuine bills any currency in the colony. The prosecution maintained that this later statute did not repeal an earlier act which made it a crime to counterfeit "any Bills Emitted by the Province of New York." After much discussion, the charge against the defendant was quashed; Johnson dissenting, and the chief justice doubting.

Many cases, which are of but slight interest to one concerned only with legal history, contain an abundance of material for the student of social, financial or cultural history. Thus for the lawyer, *Clark v. Kinney* is a simple routine case, hinging on whether a carrier was guilty of negligence in losing plaintiff's goods.[4] For the student of New England colonial history, the official report of the case, with its many depositions, is a document rich in historical information. Late in February, 1772, two teams, one of which belonged to Kinney, left Boston for Pomfret, their carts loaded with "West India English goods," which in Kinney's load included at least one hogshead of rum. He

3. Pp. 43, 61, 68, 97, 208, 222.

4. Pp. 193-96.

also was carrying two barrels of brown sugar (489 lbs.), and a sixteen pound loaf of white sugar, said sugars being consigned to Clark at Pomfret. By night of the second day the teams had reached Mendon, Massachusetts. At a certain brook in that town, Kinney, instead of using a passable ford, attempted in the darkness to drive his team over a bridge which was in none too good a state of repair. One of his wheels failed to hit the planking of the bridge, and the cart and its contents were thrown into the stream and the sugars destroyed. Apparently the colonial roads were not too bad to allow cartage over long distances even in the worst part of winter and at a fairly good rate of travel. In this instance at least, Boston, rather than some town in Connecticut on Long Island Sound, was the port of entry for West India goods that found their way into northeastern Connecticut. If we may judge from the figures given for the brown sugar (5.52 pence per pound wholesale in Boston, with 36/100 of a penny per pound asked by the carter for carriage to Pomfret), the price of these goods in inland communities could hardly be attributed to the cost of overland freight.

India goods are again mentioned in the case of a burglar who broke into the store of a Danbury merchant, said to have constantly kept on hand a large quantity of "English and India Goods Wares and Merchandize." The burglar on conviction was sentenced to be branded on his forehead with "the Capital Litter B on a hot Iron and have one of his ears Nailed to a post and Cut off and also Whipt on his Naked body fifteen Stripes." [5] Branding, which seems to have been given a fresh impetus in Elizabeth's reign, was fairly common in both Connecticut and Massachusetts in colonial times. Nailing the culprit's ear to a post probably originated in English local law and custom.[6] The mention of "earnest money" to bind an agreement to sell five pieces of land, recalls another old custom that was common in England and the law merchant at least as early as the twelfth century.[7]

A number of references to negro slaves are reminiscent of the fact that in the colonial period the holding of slaves in Connecticut was not only legal but countenanced by public opinion. The difficulty of making the institution of slavery fit into the habits and customs of New England life, as well as the possible inconvenience of slaveholding to a master in this northern colony, is shown by a very interesting case concerning the manumission of a slave who was clearly of more trouble than use to his alleged owner.[8]

His latest biographer has said that at twenty Johnson was "a classical scholar of standing"—which makes one wonder if at double that age he could have written *ore tenno* (for *ore tenus*) as attributed to him.[9]

GEORGE E. WOODBINE †

5. P. 91.

6. A local law of Portsmouth, the original from about 1272, reads: "Also if there be any small pikers that is under the valur of xii d. ob. his ere to be nayled to the pelery, he to chese whether he woll kytt or tere it of". 1 BATESON, BOROUGH CUSTOMS (Seld. Soc. ed., v. 18, 1904-06). There were various other local laws having to do with the nailing or cutting off of ears. *Id.* at 56-57.

7. P. 114.

8. Pp. 182-93.

9. Pp. ix, 245.

† George Burton Adams Professor of History, Yale University.