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OF INCOME TAX, by Francis Eugene LaBrie.
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one part, and the federal government of the other, and that the former in national convention were to be frequently assembled to decide on the constitutionality of the latter's acts." Then he continues: "Jefferson regarded the compact as exclusively between states, but he regarded the amendment process as furnishing the states the opportunity of being the final arbiters of what the Constitution means." (p. 155)

Jefferson was more an actor and a stimulator of action than a theorist. Mr. Patterson, however, shows us a Jefferson in the study and not a Jefferson in the ring. But this is no distortion; rather it is an aspect of a many-sided man. This Jefferson, the aspect of him justified by the title of the book, is a man of fertile thought and immense energy expressed through a tireless pen. Mr. Patterson selects what deals with the organization of American government from the great fund of his writings, and gives the reader a good summation of these thoughts, sometimes contradictory but generally harmonious. Unlike Professor Crosskey,² he has nothing earthshaking to say of the Constitution, or of Jefferson's principles. He has not revealed a new Jefferson. He presents the self-stated evidence.

The chapter on Jefferson the lawyer will be of particular interest to those who, as little expert on Jefferson as I, have failed to appreciate the attainment and promise of Jefferson's few years in the profession before he entered upon his more brilliant career of public service.

*William G. Rice**

THE MEANING OF INCOME IN THE LAW OF INCOME TAX, by Francis Eugene LaBrie. University of Toronto Press, Toronto, 1953. Pp. 380. \$15.00.

It is Professor LaBrie's announced intention to present in this treatise "a complete picture of the case law on the meaning of income and then to superimpose on this law the text of the Canadian statutes." (p. vii) This formulation of approach calls to mind Dean Griswold's aphorism that "[t]here is no use thinking great thoughts about a tax problem unless the thoughts are firmly based on the controlling statute." Fortunately Professor

2. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

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LaBrie's announced approach deters him very little from making the only kind of analysis one really can make of a statute-dominated field of law: What does the statute say? What have the courts said it says? When the statute hasn't said, how have the courts filled in the interstitial spaces? In filling the interstitial spaces, real or imagined, to what extent have the courts been guided by superficial analysis informed by "common experience" and to what extent by rigorous analysis of the actual economic and social experience which has guided legislative and administrative policy-making?

In his foreword Professor LaBrie also indicates that he has made this purely a legal treatise by deleting from it the discussions of economic and accounting concepts of income. This makes for clearer comparison of Canadian and English experience in the judicial interpretation of a complex and many-sided income tax statute with the American experience. The disadvantage most evident in this approach is that it does not keep in quite as sharp a focus the extent to which judicial interpretation has distorted legislative intent by disdaining economic and accounting conceptions.

One notes from this book that the English courts are theoretically more limited in their review of tax questions than the Canadian courts. As in the case of review by our own federal judiciary, however, the English courts, as the author puts it, "have the power to decide the meaning of the terms used throughout the English Act, to decide whether any question arising before them is one of fact or of law, and to reverse the commissioners' finding on all questions of fact where they are of opinion that there was no evidence before the commissioners to support that finding. Where the courts have chosen to give any term used in the English Act an "ordinary meaning" they thereby permit any ruling of the commissioners thereon to stand as being a question of fact. But they may at any time attribute a special connotation to a word or phrase of the Act; and, having done so, they can hold there to have been no evidence before the commissioners to support their finding, in the light of the extended or altered meaning placed on the phraseology in question." (p. 19) It seems hardly necessary to note that there is ample room within this sweep of power for substitution of a judicial for a legislative conception of what facts underlie statutory words.

The book contains much excellent insight into the develop-

ment of a conception of income so narrow as to exclude capital gains to the substantial extent they are excluded under English and Canadian law. From the author's analysis the genesis of the exclusion seems to lie in the judicial determination that "profits or gains" intended to be taxed are only those arising from the carrying on of a trade or business or in pursuit of gain. (p. 23) Casual profits made on an isolated purchase and sale escape taxation unless they are merged with similar transactions sufficient to constitute a trade or business. But they also escape taxation because it is thought that a tax on such transactions would be a tax on principal. Thus the English cases contain unctuous House of Lords pronouncements that "it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it." (p. 136) Yet such interpretations seem the sheerest gloss on statutory language which contains no hint of such limitations (p. 10); the effect has been to plunge the English and Canadian courts into a morass of litigation concerned with determining whether a capital increment was realized while in pursuit of gain and hence taxable or a mere realized accretion in the value of an investment. Professor LaBrie summarizes that "income does not include the realized value (which is a source of income)," (p. 22) a proposition for which Canadian courts, he notes, draw support from *Eisner v. Macomber*. (p. 137) Thus, despite the inadequacies in the income definition contained in *Eisner v. Macomber* recognized by our courts, in Canada it is still a touchstone that income is "the gain derived from capital, from labour, or from both combined." (p. 22) The Canadian courts might better have searched beyond *Eisner v. Macomber* (252 U.S. 189) and examined *Doyle v. Mitchell Brothers Company* (247 U.S. 179, 185) and other early American cases interpreting our statutory language, "gains . . . from . . . dealings in property." (INT. REV. CODE § 22(a) (1939)) As a matter of fact, however, the very language taken as a touchstone is accompanied by a proviso that such language "be understood to include profit gained through a sale or conversion of capital assets. . . ." There seems nothing but judicial fantasy behind the English notion that levying a "duty" upon the *gain* on a sale of property is the same as levying a duty on the *price* of the asset sold. Professor LaBrie's criticism of the confused meaning of income emerging from English and Canadian case law is nonetheless gentlemanly, thus:

"In spite of the fact that the principle that income does not

include capital gains can only be of assistance in determining the meaning of income in the limited class of cases wherein gain results from selling activity, the English courts have managed to adhere generally to that test and avoid separate investigation into the meaning of income without at the same time producing decisions too far out of line with the dictates of common sense (though it is not meant to suggest that the test has not enabled a great deal of gain to be sought and won without the payment of income tax). . . . Wherever absurd results might be seen to arise in the 'in-between' type of case they have been fairly well avoided through an extension of the meaning of trading." (p. 72)

The author notes that as a result of English judicial insistence on linking "profits or gains" inextricably with "trade" so as to exclude capital gains not enjoyed in trade, there has not been the judicial examination of capital gains as an independent phenomenon which would otherwise have been possible. His criticism, however, goes no further than to say, "the question in distinguishing income from capital gain should be, not whether there is a trade being carried on, but whether there is an intention to pursue gain through that method." (p. 80) While a shift to this test and away from the test of "trade" would immeasurably simplify the administration of the tax, this reviewer had anticipated LaBrie might go further and advocate the Congressional approach, long since upheld by the judiciary, of subjecting all "gains . . . from . . . dealings in property" to tax and softening or deferring the impact of the tax where the gains are long-term in character or in other respects qualify for special treatment. The congressional approach has at least the virtue of drawing no invidious distinction between the dollars earned by turning over "sources of income" and those earned through some less colorful "trade or business." (p. 100)

As Professor LaBrie's analysis of the English and Canadian cases unfolds it takes on, here and there, an almost Alice in Wonderland quality. Juxtaposed against the willingness shown on the part of the judiciary to let a great deal of gain escape tax on the ground that to tax it would be to "impose a duty on that which is not profit derived from property, but the price of it" is exposed a past unwillingness on the part of the judiciary to exempt from tax a clear capital element contained in annuities on the ground that such capital has been "converted into income." (p. 142) It has taken the findings and recommendations of a Canadian royal commission to demonstrate the inequity of taxing

annuity payments in full. (p. 147) By way of comparison one might note that Congress has almost from the inception of modern income taxation recognized the capital element in annuity payments and has now completely recognized financial realities in adopting a "life expectancy" method. (INT. REV. CODE § 22(b) (2) (1939); INT. REV. CODE § 72 (1954))

Until recently, Professor LaBrie notes, lump sum payments received in exchange for the unconditional right to use a patent for a designated number of years have been regarded in England and Canada as a receipt of capital. (p. 157) He notes further, however, that more attention is now being paid to the fact that patent and copyright values arise through the inventors' or author's labor and that such payments, whether by way of assignments or licensing agreements, are by way of deferred income for personal services. (p. 162) No doubt as the problem grows more acute some compromise solution such as that provided by Congress in the 1954 Code will appear desirable. Thus Congress now accords long-term capital gains treatment to payments received under a transfer of patent rights whether received in installments or in a lump sum. (INT. REV. CODE § 1235 (1954)) However, no such handy device as an expedient extension of long-term capital gains treatment is available unless capital gains are given more formal recognition by the English and Canadians than at present.

The author's analysis of the English cases indicates a curious reversal of roles between the courts and the revenue commissioners in the area of deductions from gross income. Thus "the question whether deduction of the expenditure is expressly prohibited by the Act . . . is considered as a question of fact within the exclusive jurisdiction of the commissioners, subject to there being evidence to support their finding" whereas "the question whether or not an expenditure constitutes a proper debit item in the computation of the balance of the taxpayer's profits and gains is . . . a question of law for the courts to be decided with reference to those business and accounting principles which they regard as sound and are, therefore, prepared to accept." (p. 242) There follows this startling statement: "This question of law is comparatively free from legislative control under either the English or the Canadian acts. . . ." (p. 243) If such freedom from legislative control has existed in Canada, the legislature seems to be moving rapidly away from it in the direction of identifying and describing permissible deductions in detail; a

disposition on the part of the Canadian courts to flout the detailed directions of their lawmakers in favor of English or Canadian case-law precedents to the contrary seems hardly likely.

Thus, while still much simpler than our Internal Revenue Code, the Canadian Income Tax Act of 1948 moves appreciably in the direction of the kind of detailed treatment of deductions, as well as of other income tax matters, which we have found essential to uniform administration. The delightful disregard for economic and accounting realities which is continually appearing in Professor LaBrie's collection of case materials has no doubt had a great deal to do with this development.

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