FEDERAL INCOME TAXATION, Cases and Materials. By Stanley S. Surrey and William C. Warren. Brooklyn: The Foundation Press, Inc., 1953. Pp. xlvii, 1308. $9.00.

I

For some years now, good legal writing has been almost entirely confined to law review articles because law teachers were no longer writing legal textbooks. Since law schools were preponderantly using the casebook method of teaching, they had no use for a legal textbook as such and apparently the demand for textbooks by practitioners alone was not sufficient to justify the effort of producing a really good treatise. But of late the practice has grown up of including text materials in casebooks designed for classroom use, with the result that these books now have a field of usefulness much broader than the classroom. Being written by experts and specialists, they reflect the foremost legal thinking in their respective fields and in this way may become valuable tools for practitioners as well as law students.

The book under review is this sort of book.

It does three things: (a) it furnishes a remarkably complete presentation of the federal income tax law as it now exists; (b) it evaluates the law dispassionately and without shunning the imperfections; and (c) it explores the areas in which improvement and change may take place.

The 1953 edition does not differ greatly from the first edition.[1] Recent developments in the law have been noted and the important cases are included. The fact that the book is intended not only for use in the basic income tax course, but also in seminars for advanced study has justified the inclusion of even the more subtle and complicated problems. This again is a reason why the practitioner need have no hesitation in consulting the book because it is a "schoolbook." The American Law Institute draft for the revisions of the income tax provisions of the Internal Revenue Code has been freely availed of in this edition.[2]

The 1953 edition may carry a little farther the tendency of the first edition to place reliance on text matter rather than upon decided cases, but this is all to the good. The old familiar and necessary cases are included. Sometimes a case is in a footnote which this reviewer would have preferred to see treated in full, such as the *Crane* case.[3] Sometimes, on the contrary, a case is treated *in extenso* which might have been dealt with

1. A review of the first edition, by the author of this review appeared in WASH. U.L.Q. 607 (1951).

2. Too much cannot be said in favor of the work of the American Law Institute in preparing the draft of proposed changes in the Income Tax law. It is to be hoped that wide currency will be given to the proposals and that as many as possible will be ultimately adopted by Congress.

3. Crane v. Commissioner, 331 U.S. 1 (1947), Casebook, p. 538. This case held that where a mortgagor, not personally liable on a mortgage, transfers the property subject to the mortgage and receives an additional consideration, the mortgagor receives a benefit in the amount of the mortgage as well as the additional consideration and may thereby incur an income tax greater than the amount of the additional consideration. In this way the mortgagor could be worse off by selling the property than by abandoning it.

adequately in a footnote; *e.g.*, the *Sunnen* case.[4] But in general the bestowal of emphasis is judicious.

II

The authors make the point,[5] also made in the earlier edition, that Internal Revenue Code Section 22(a), which states what income is subject to tax, is not open to the criticism that it uses a term to define that same term. But this section states:

> "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property . . . also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

Surely much could be said for the view, which is believed to be quite generally held, that where the statute states that gross income includes income, it is a clear case of "using a term to define the term." The authors' statement that "gross income" is but a phrase to indicate a step in the computation of income and that the term "gross statutory amount" could have been used instead does not seem to meet the issue. This is all the more true in view of the language of the Sixteenth Amendment, "The Congress shall have power to lay and collect taxes on *incomes*. . . ." The Amendment does not say "Congress shall have power to lay and collect taxes on *gross statutory amounts*, without apportionment, etc.," but confines its grant of power to taxation of "incomes."

Illegal incomes are treated at length.[6] There is room for improvement in the law at this point because the Supreme Court of the United States has held in the leading case of *Commissioner v. Wilcox*,[7] that proceeds of embezzlement do not constitute income, while the same court has later held in the *Rutkin* case[8] that money obtained by extortion is income. The United States Court of Appeals of the Fifth Circuit held that proceeds of "swindling" do constitute income.[9] The practical result, therefore, is that the gains from certain forms of knavery are exempt from income tax while proceeds of other forms are taxable, so that it has been sarcastically stated that if one contemplated a transaction of this sort, he should make sure that it is embezzlement and not swindling.

On the other side of the platter, that is, the treatment of expenses, the famous *Lilly* "kickback" case is now included.[10] This case permitted deduction as ordinary and necessary expenses of payments made by persons engaged in the optical business to doctors who prescribed the eyeglasses which they sold. It appeared that competition made these payments

4. Commissioner v. Sunnen, 333 U.S. 591 (1948), Casebook, p. 775. Here a husband was taxed on income to his wife derived from license agreements over which he had complete control.
5. p. 80.
6. p. 107.
7. 327 U.S. 404 (1946).
8. Rutkin v. United States, 343 U.S. 130 (1952), Casebook, p. 107.
9. Akers v. Scofield, 167 F.2d 718 (5th Cir. 1948), Casebook, p. 116.
10. Lilly v. Commissioner, 343 U.S. 90 (1952), Casebook, p. 190.

necessary. It remains to be seen, of course, how far this decision justifies deduction of payments made in other situations where the compulsion due to competition may not be present.

III

This book has a forward looking attitude. The reader is constantly kept aware, not only of what the law is now, but what it may or should be in the future. Examples are: consideration of the advisability and constitutionality of levying an income tax upon the income from municipal bonds,[11] concepts of taxable income differing from the current statutory concept,[12] and differential taxation of earned income,[13] which, it will be remembered, was formerly in the law but has been abandoned.

Doubtless, matters of this kind will be taught primarily in a seminar rather than in the basic income tax course, but the inclusion of material of this kind is one of the features which make the book so valuable for all who have an advanced interest in income tax legislation.

Few omissions have been noted. One point which this reviewer did not discover in the book and which may have been omitted is the fact that an annuity for an employee need not conform to the requirements of Internal Revenue Code Section 165 if purchased by an employer which is an organization exempt under Section 101(6).[14] In such case the employee need not include the value of the nonconforming annuity in his income for the year in which it is purchased *even if the right to it is entirely vested*, but may defer inclusion of income until the annuity payments are received.[15] Granted that the privilege might be abused and the exemption denied on the ground of subterfuge, it would seem that here is a valuable opportunity to supplement the advantages granted to a teacher in a college or university which should not be overlooked, especially in a book designed to be used in colleges and universities.

IV

In conclusion, one need only say that Professors Surrey and Warren have rendered a real service in so promptly revising their original casebook on the same subject. Having used the first edition in the classroom, this reviewer has first hand information as to its accuracy and adaptability, so that he has no hesitancy in recommending the present revision as possibly the best of its kind for classroom use. In addition, the volume is a valuable and almost indispensable addition to a tax practitioner's library.

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11. p. 137.
12. p. 163.
13. p. 230.
14. See INT. REV. CODE § 22 (b)(2)(B).
15. See BLACKWELL, CURRENT LEGAL PROBLEMS OF COLLEGES AND UNIVERSITIES 14 (1951-1952), and Casebook, p. 454 *et seq.*

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