regionally formulated, as seems to be the direction of federalism's evolution in Brazil and, in the reviewer's opinion, in the United States as well. Save for Binkley, the emphasis is not upon the variations which time and place have wrought in the concept of federalism; the adaptations which these papers reveal strongly point, however, to the fact that even as other nations during the last one hundred and fifty years have found help in our pioneering with what Mecham well describes as "the most complicated and delicate governmental mechanism ever devised by man," so we today may well profit in turn from the efforts of those countries to derive the political values that are federalism's and yet mesh that philosophy with the economic and social realities of the twentieth century.

Fittingly enough, the world-wide perspective which Part III of the volume imparts to the great American experiment in constitution-making is bounded fore and aft by papers which seek to evaluate the eighteenth and nineteenth centuries' universal faith in constitutions. Both Geoffrey Brunn and Carl Becker, the latter especially, trace the constitutional cult to the forces which were loosed by the Age of Enlightenment and which gave to man a faith in himself that he had never known before. For the constitutional cult was a faith of religious and romantic tenor, a faith in man's ability to build Utopia in the here and now. If today there is less faith in the ability of a written constitution itself "to delimit with precision the realms of social compulsion and individual liberty," surely there should be the more faith that in the effective balancing of these two basic values the constitutional cultists found the secret of man's political salvation.

FRANK R. STRONG.†

GOODRICH ON THE CONFLICT OF LAWS. Second Edition. By Herbert F. Goodrich. St. Paul: West Publishing Company, 1938. Pp. xiv, 562.

The author has accomplished to a high degree his aim as expressed in the preface to the first edition of giving "a fair view of the subject, in general, with a more detailed treatment of some interesting and important parts." The work comprehensively covers representative and especially important decisions and a substantial amount of juristic thought in the main conventional divisions of the Conflict of Laws. The discussion of cases and decisions is concrete to a very commendable extent; the descriptions of holdings and judicial views are accurate. It is clear that the temptation to overdraw or color particular phases of judicial handling has been avoided painstakingly. The work is not dogmatic; on the contrary, constant effort to be fair and impartial in the presentation of differing viewpoints is conspicuous. To hold to that is especially difficult in this field in which there is so much diversity of adjudication and so much sharp difference of opinion regarding fundamental modes of approach and analysis. Despite the Restatement, so much of the subject remains dependent for its future directions upon social-economic *desiderata* and the methods of treatment by which their demands may be woven into the legal pattern that the presentation of non-

† Associate Professor of Law, Ohio State University.

judicial juristic thought, as well as of judicial holdings and views, is more important, on the whole, than in most legal fields. The author has to a very practical extent stated or referred to the views and criticisms of legal writers within the limitations of his space. The decisions have been described in many instances in terms of the factual situations to which they were applied, and the expressed grounds of decision have either been quoted or stated accurately. Thus the book enables a practitioner as well as a student to get a working understanding of the subject without causing him to be lost in transcendentalisms.

The first sentence of the first chapter states, as did that sentence of the first edition, that "The Conflict of Laws is that part of the law which deals with *the extent to which the law of a state operates* and determines whether the rules of one or another state should *govern* a legal situation."[1] Later the statement is made that "The problems in Conflict of Laws concern, in part, the questions of how far a state may through its legislative and executive departments govern the legal consequences of acts done in that state or elsewhere * * *,"[2] but the erroneousness of the indication in the quoted extracts that one state can adjudicate, legislate, or ordain extraterritorially dispositions which another state cannot avoid making and that the latter thus can be subjected involuntarily to control exercised by the former is rebutted by the following statements on later pages and further clear explanation in amplification of those statements: "Upon careful analysis, the application of the principles of Conflict of Laws does not impair in the least the sovereignty of the state applying the rule of another state to a legal problem. Nor does the law of the foreign state have extraterritorial operation."[3] In reference to a concrete illustration, the definite statement is made that "The only law operative in Wisconsin is Wisconsin law."[4] It would have been better to have eliminated from the quoted definitions any indication that one sovereign state can be subjected extraterritorially to the *law* of another. Of course, the language objected to is simply a vestigial relic of Professor Beale's approach. One is reminded of his statement that "Though a foreign right must be recognized as existing, it does not follow that it will be given any legal force."[5] But, while Professor Beale and his more fervent disciples insist, in spite of resort to the factitious distinction between "recognition" and "enforcement" of rights, that a state, though sovereign, may be subjected inescapably to another state's law for the disposition of a conflict of laws case, Dean Goodrich cancels unequivocally the indication to that effect which, unfortunately, has remained in the definitional first sentence of his book. He has omitted the following quotation which appeared in the first edition:[6] "Some proper law must have governed the juridical situation at the moment of its occurrence; the effort of the court is to determine what that law was; and that is the question

1. Italics supplied.
2. P. 3.
3. P. 9.
4. P. 10.
5. Beale, *Conflict of Laws* (1916) sec. 48.
6. At p. 1.

of the power of some particular law to extend to and rule the juridical situation."[7]

It would take too much space to comment more than sketchily on each chapter. Thoroughness of discussion, carefulness of selection of cases described, and clearness of explanation are consistently observable throughout the book. Much thought and much work has been condensed into a single handy volume, which is all the more useful because of its conciseness. The method and quality of treatment is uniform from chapter to chapter. Only a few of the chapters will be commented on further.

The first chapter deals with general matters. There is an interesting discussion of *renvoi* and a suggestion that its limited application might be desirable. Also interesting is the suggestion that it would "have a salutary effect for the Supreme Court to continue to take jurisdiction in cases where it feels that a state court has gone badly astray in a Conflict of Laws case."[8] The question may be raised whether there can be such a thing as a court's "going astray" in any conflict of laws case in any but a subjective sense in reference to any other court which steps in as a critic by self-oppointment, and, therefore, whether the "due process" clause ever should be made a vehicle by the United States Supreme Court for intervention. There is, of course, the great *desideratum* of uniformity, but have we reached a point advanced enough in the development of the subject to have arbitrary uniformization attempted? Finally, in the first chapter, the Supreme Court's destruction of the doctrine of *Swift v. Tyson*[9] by the decision of *Erie Railroad Company v. Tompkins*[10] is explained.

The treatment of Domicile in Chapter Two is extensive. Different phases of this topic are discussed separately, and from the footnotes it appears that the collection of striking cases is very complete. The diversity of holdings in reference to quite identical or, as in the *Dorrance* case,[11] even the same factual situation is clearly brought out. The proposition that a person can have only *one* domicile, *i. e.*, in respect of all possible purposes, also adopted in the Restatement,[12] is set forth,[13] although there would seem to be little, if any, basis from past decisions for predicting with assurance that one court, having held a person domiciled in a particular state for one purpose, *e. g.*, taxation, would not on the same set of facts of location hold that, in reference to a different purpose, *e. g.*, determination of jurisdiction in a suit for divorce, that person was domiciled in another state, the fundamental consideration being treated as that of the juridical consequence of the allocation of the domicile and not that allocation of itself, as, I believe, Professor Cook has suggested.

The subjects of Taxation in Chapter Three and of Jurisdiction of Courts in Chapter Four are covered thoroughly and with discussion of a good

7. Beale, op. cit. supra, note 5, sec. 1.
8. P. 23.
9. (1842) 41 U. S. 7.
10. (1938) 304 U. S. 64.
11. Discussed in the text at pp. 32 and 43.
12. Secs. 7, 11.
13. P. 26.

number of important decisions. The consideration of jurisdiction *in personam* to command positive and negative conduct of a defendant in a state other than that of the forum is very fully and well presented, with clear explanation of conflicting views.

In Chapter Five on Substance and Procedure there is a slight recidivism to the Beale "extraterritoriality" in the statement that "What the secondary right is must necessarily be determined by the law creating it."[14] However, his statement is a holdover from the first edition.[15] The artificiality of the distinction between "substance" and "procedure" is pointed out by a quotation from Chamberlayne;[16] also, the suggestion of Professor Cook that the determining factor should be inconvenience to the court of applying a foreign rule of law is mentioned.[17] The significant point made by Professor Cook that a particular issue may be procedural or be so treated in reference to one kind of juridical purpose and yet be substantive or be so treated in reference to another kind of juridical purpose and vice-versa[18] is not mentioned here or elsewhere in this chapter. The text states that "The ordinary presumption is not a rule of substance but one of procedure,"[19] but the comprehensive footnotes at least suggest the thought that in particular types of situations a *prima facie* presumption, because of the difficulty of production of the kind of proof needed to sustain a burden of going forward with evidence, may better be treated as substantive than as procedural. And, in dealing specifically with "the burden of going forward with the evidence on particular issues," *e. g.*, that of contributory negligence, the point is made concretely and clearly that the incidence of the burden of going forward with evidence should be treated as substantive.[20] In the same chapter, the discussion of decisions relating to the Statute of Frauds, brings out briefly the divergence and variety of holdings, the arguments which have been made and the considerations involved, including the important one of uniformity, in this field in which there could not be greater judicial confusion than there is. A good collection of cases illustrating the various lines of decision and judicial expressions is contained in the footnotes.

In the chapter on Tort Obligations, besides stating the views applied in English and American decisions, Dean Goodrich discusses a number of important cases instructively and interestingly. He explains the "foreign-created rights" or "*obligatio*" theory in application to tort actions, as employed by Justice Holmes in *Slater v. Mexican National Railway*[21] and by Judge Cardozo in *Loucks v. Standard Oil Company*.[22] He is under no

14. P. 188.
15. P. 158.
16. P. 188, n. 2.
17. P. 189, n. 4.
18. See Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L. J. 333.
19. P. 198.
20. Pp. 199-200.
21. (1904) 194 U. S. 120.
22. (1918) 224 N. Y. 99, 120 N. E. 198.

illusion that the court of one state is compelled to apply the same legal consequence which a court of another state in which the injury happened would presumably impose had the action been brought in the latter state, but, in what probably is the best statement to be found in justification of the "foreign-created rights" theory, explains that the theory stresses the ideal of uniform judicial disposition. He says: "The correct position is that the foreign law has no extra-territorial effect, but that when the alleged tort occurred certain rights and obligations arose between the parties, and that as a matter of fairness to all the parties concerned, those rights and obligations ought not to be varied, any more than may be necessary for practical reasons, because of the fortuitous choice of a forum by the plaintiff."[23] Attention is called to the criticism of this theory by Professor Cook;[24] an earlier article by the same author, dealing particularly with *Loucks v. Standard Oil Company* and presenting a clear-cut method of analysis which avoids the necessity of the explanation in connection with the "foreign-created rights" theory that it is not literally true, might also have been referred to very usefully.[25]

The subject of Contract Obligations is treated thoroughly in Chapter Seven. The description of the decisions pictures realistically the diversity and uncertainty which exists in this field. Practical arguments for and against application of different possible rules are stated and important contributions of research and thought in this field, especially those of Professor Lorenzen, are discussed. The topic of measure of damages for breach of contract is treated in the chapter on substance and procedure. The author favors the views adopted in the Restatement that questions relating to the character of performance required for fulfilment of a contract duty and to the measure of damages for breach of a contract duty should be determined by the rule of the place of performance, even though determination of so-called "essential validity" in the particular case concerned is referred to some other rule. Both of these types of questions may be considered to relate to the scope of the contract duty effected by the promise or agreement in question. Besides, is it practicable or sensible to cut a "contract" into pieces and put each piece into a different compartment for isolated legal treatment? The topic of assignment of contract rights is treated partly under the heading of Intangibles in the chapter on Property, which is thorough, well organized, and well written.

RAYMOND J. HEILMAN.†

23. P. 232.

24. The Logical and Legal Bases of the Conflict of Laws (1924) 33 Yale L. J. 457.

25. Recognition of "Massachusetts Rights" by New York Courts (1918) 28 Yale L. J. 67.

† Associate Professor of Law, College of the City of New York.