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RELATIONS BETWEEN THE FEDERAL AND STATE COURTS. By Mitchell Wendell. New York: Columbia University Press, 1949.

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a short skirt," and similar cynical maledictions. But, as Mark Twain said about the weather, everybody talks about it, but nobody does anything about it. Perhaps Judge Frank's caricature may incite people to action.

Most readers will be impressed by the author's intelligent criticism of our legal system and his bold suggestions for legal reforms. They will be even more impressed by his style of writing and the scope of his inquiry. Judge Frank's fluent style of writing (accentuated by vicious invectives, sterling similes, meteoric metaphors, and perhaps unconsciously hypercritical hyperboles), combined with his phenomenal erudition in a myriad of subjects, and interspersed with good sense and nonsense, give this book a satirical, titilating tingle like that of a Gilbert and Sullivan operetta.

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RELATIONS BETWEEN THE FEDERAL AND STATE COURTS. By Mitchell Wendell. New York: Columbia University Press, 1949. Pp. 298. $4.00.

To many it is familiar learning that the pronouncements of the United States Supreme Court indicating the instances in which federal courts exercising a concurrent jurisdiction with local state courts in which they apply state law, may or may not reach results at variance with those of the local state courts, have deep governmental as well as legal significations; and each of these meanings draws substance from the other. Lawyers who fail to see beyond the legal dogma in these decisions to their meaning in terms of division of governmental power, take a myopic and one-sided view of the judicial process which can result only in an incomplete understanding of the law. Political scientists who do not understand the pragmatic relations of these legal dogmas to our federal system of government can hardly understand that government, for in a real sense the nature of our government is largely what it is because the judicial evaluations and policies behind these dogmas have made it so.

Mitchell Wendell's *Relations Between the Federal and State Courts*, No. 555 of the Studies in History, Economics and Public Law, edited by the Faculty of Political Science of Columbia University, assumes that while political scientists are familiar with the governmental significance of judicial decisions interpreting the due process and commerce clauses of the United States Constitution, most of them do not understand the importance to the science of government of the judicial decisions in the field which lawyers commonly describe as federal jurisdiction and procedure. They do not even recognize that there exists any connection at all between such decisions and the science of government. The author finds that most political

scientists "are not familiar with the more technical aspects of law" and "have been led to assume that the bulk of the litigation in the lower federal courts and in the state courts has little or nothing to teach us about the nature and operation of our federal system."[1] The misconception of political scientists entertaining this view should be corrected. Having found that the researches of the legal profession are inadequate for this purpose because they "seldom treat judicial federalism in such a way as to bring out its governmental significance,"[2] Dr. Wendell offers this study "in the hope of shedding some light on this neglected phase of our judicial federalism."[3] As an extra contribution unannounced in the author's prefatory statement of purpose, Dr. Wendell offers to the reader the benefits of his appraisal of the dual judicial system and a suggestion for the solution of problems created by the exercise of the diversity jurisdiction of the federal courts.

In law and politics, as in archaeology, the location, breadth and depth of an excavation is properly determined by what the explorer hopes to expose. The success or failure of the expedition must be judged by whether the explorer has exposed what he sought to expose. Mitchell Wendell's intellectual excavations are well adapted to their purpose. The author's topical outline of the subject adequately covers the field. On the whole, his analysis and selection of cases illustrating by type the situations in which problems arise of dividing governmental power between state and nation, is good. In presenting the cases, the author does not always content himself with merely stating the facts, the decision, and the significance of the decision to the science of government, but, in addition, frequently makes critical appraisals of these decisions from the standpoint of a political scientist. Understanding of the cases discussed and the discussions is facilitated by historical summaries which, as in the case of the summary of the development of the dual system of courts and law enforcements,[4] the author uses to good effect to introduce the reader to major topics. As an introduction to *Erie R.R. v. Tompkins,* there is a valuable survey and discussion of the cases decided before *Swift v. Tyson* and after *Swift v. Tyson* to the *Erie* case, in which the author brings out the economic as well as the political factors behind the decisions,[5] thus illuminating the *Erie* problem from an angle that is frequently neglected. Also helpful to understanding is the author's talent for lucidity of expression and conciseness of statement. It is believed that no political scientist who has read this book can leave it reasonably unconvinced that the litigation in the lower federal courts has

1. P. 6.
2. *Ibid.*
3. *Ibid.*
4. Pp. 11-47.
5. Pp. 113-181.

much to do with shaping the contours of our federal system of government; that Dr. Wendell has exposed what he sought to expose; and that his intellectual expedition is therefore a success.

In the final chapter of his book, Dr. Wendell makes an appraisal of the dual judicial system and attempts to answer the question of how jurisdiction should be divided between state and federal courts. He believes that the dual judicial system is highly desirable because of the need for effective legal administration, to insure against frustration of federal policy by misinterpretation in local courts, and for state control over the content of state law.[6] Dr. Wendell concludes that the only serious difficulty with the present division of judicial labor between nation and states is to be found in the exercise of the diversity jurisdiction[7] of the federal courts. His main argument is that the exercise of that jurisdiction produces inequities resulting from the opportunities afforded for forum shopping and that while *Erie R.R. v. Tompkins* swept away the worst features of the *Tyson* rule, there still is substantial room for this type of legal maneuvering. The author's position is summarized in the following statements:

> Since *Erie v. Tompkins* and the new Federal Rules of Civil Procedure, the all-important question has become whether something is substance or procedure. If it belongs to the former category, national courts will follow state decisions; if the dispute is over a matter in the latter category, the federal judiciary will not apply state law but will follow its own rules.[8]
>
> In practice . . . these differences in procedural rules can be of the utmost importance.[9]
>
> Differences in federal and state procedural law encourage litigants to shop for the forum before which they are likely to make their best showing in much the same way that they were accustomed to do when *Swift v. Tyson* held out the promise of different interpretations of substantive law.[10]

Dr. Wendell agrees that there is a need to protect litigating non-residents against local prejudice.[11] He must therefore make a choice of sacri-

6. "Nor is the need for effective legal administration the only reason for the existence of separate federal and state courts. The provisions of appeal to the Supreme Court in cases involving federal law contained in the Constitution and the first Judiciary Act demonstrate an early recognition that some insurance against frustration of federal policy by misinterpretation in local courts is necessary. The need for state control over the content of local law is equally as great." P. 287.

7. "The only serious difficulty without present division of judicial labor between nation and states is to be found in the exercise of diversity jurisdiction by the federal courts." P. 289.

8. P. 229.

9. *Ibid.*

10. P. 230.

11. "Undoubtedly there is need to protect a limited number of suitors against the local prejudice which forms the only reasonable justification for diversity jurisdiction." P. 289.

fices between the need for removing the inequities of forum shopping and the need for protecting litigating non-residents against local prejudice. Whereas most opponents of the diversity jurisdiction choose to sacrifice the need for protecting litigating non-residents against local prejudice and favor complete elimination of diversity jursdiction, mainly because there are practical difficulties preventing its satisfactory modification, and the damage done by diversity jurisdiction outweighs the gains accruing from the system, Dr. Wendell opposes complete elimination. He proposes that Congress drastically restrict the operations of the federal judiciary in diversity cases to the specific situations needing attention for protection of litigating non-residents against local prejudice,[12] but he does not undertake to offer any suggestion for satisfactorily separating these legal goats from the sheep.

It is an oversimplification to say that since *Erie R.R. v. Tompkins* the all-important question has become whether something is *substance* or *procedure,* and this is as true when the statement is applied to cases decided after enactment of the Federal Rules of Civil Procedure as those decided before their enactment. *Ragan v. Merchants Transfer & Warehouse Co.*[13] teaches that the "something" which must be evaluated for the purpose of determining the applicability of the *Erie* doctrine in a case involving both a state law and a differing provision of the federal rules covering the same subject, is not the provision of the federal rules but the state law; that the court's approach is not different where a provision of the federal rules is involved from where some other type of judicial pronouncement is involved; that it is not different in cases decided after enactment of the federal rules from cases decided before their enactment.[14]

12. "However, the needs of this group, insofar as the federal court may possibly afford them a haven from hostile local sentiment, could be served by a much more narrowly drawn diversity statute that would apply specifically to the situations needing attention." P. 289. "Congress . . . by regulating the jurisdiction of the federal courts can restrict the operation of our federal judiciary to areas of genuine national concern." P. 290.

13. 337 U.S. 530 (1949).

14. In the *Ragan* case the facts were these: under Kansas law, highway accident suits are barred if suit is not commenced within two years. An action is deemed "commenced" at "the date of the summons." Rule 39 of the Federal Rules of Civil Procedure provides that "a civil action is commenced by filing a complaint with the court." A highway accident occured in Kansas on Oct. 1, 1943. A complaint was filed in the Federal District Court for Kansas on September 4, 1945. Summons was not served until December 28, 1945. The court held that the action could not be maintained in the federal court because it could not be maintained in the local state court. The case turned on an evaluation of the Kansas statute rather than Federal Rule 23. The valuation was made on the basis of the effect on the cause of action in the particular case of a failure to apply the Kansas statute concerning commencement of actions. It was found that failure to apply it would give the cause of action longer life in the federal court than it would have in the state court. "We may not do that consistently with *Erie R.R. v. Tompkins.*" Justice Douglas' approach was not substantially different in this case, than in *Palmer v. Hoffman* 318 U.S. 109 (1943), which involved conflicting rules as to burden of proof of contributory negligence.

Whether the "something" in state law is or is not within the scope of the *Erie* doctrine is dependent upon something much deeper than the question whether it is *substance* or *procedure*. For reasons pointed out by Walter Wheeler Cook seventeen years ago,[15] it is a mistake to reason from the assumption that there is a clean-cut line of division between these categories, or, that within the idea of *substance* and/or *procedure*, as these terms have been used, there are invariable elements with which such a line can be drawn when applied to undifferentiated material. Neither Justice Rutledge nor Justice Reed, both of whom have indicated in their dissents a preference for explaining their views in terms of *substance* or *procedure*,[16] has claimed that such a line had been drawn, or that either concept contains such invariable elements. In *Guaranty Trust Co. of New York v. York*,[17] the inutility of the *substance-procedure* test as a criterion of the scope of the *Erie* doctrine was pointed out and this test rejected in the opinion for the majority of the court. In *Cohen v. Beneficial Industrial Loan Corporation*,[18] Justice Jackson, speaking for the majority, indicated that there may be cases where the *Erie* doctrine is applicable even when the state law is admittedly procedural.[19] The doctrine has been held by the Court to be applicable to such state statutes sounding in procedure as a statute requiring complainant stockholders in certain derivative actions to give security for the reasonable expenses, including counsel fees, which may be incurred by the corporate defendant;[20] a statute specifying that an action is commenced when summons is served;[21] and a statute providing that a foreign corporation may not sue in the courts of the state unless it has qualified to do business.[22] While the words *substance* and *procedure* are convenient symbols frequently used in discussion as suggestive superscriptions, their use in the *Erie-type* cases confuses the issue by concealing the crux of the matter which is that it is the effect on particular litigation of the application or non-application of a particular state law, and not the character of the law applied, which is the all-important question in determining whether *Erie* applies.[23]

Fears that the *Erie* doctrine leaves substantial room for *Swift v. Tyson*-

15. Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333 (1933).

16. For Justice Rutledge's view see his dissent in Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99 (1945); for Justice Reed's view see his dissent in Angel v. Bullington, 330 U.S. 183 (1947).

17. See note 16 *supra*.

18. 337 U.S. 541 (1949).

19. "Even if we were to determine that the New Jersey Statute is procedural, it would not determine that it is not applicable. Rules which lawyers call procedural do not always exhaust their effect by regulating procedure." See note 18 *supra* at 555.

20. Cohen v. Beneficial Loan Corporation, *supra*.

21. Ragan v. Merchants Transfer & Warehouse Co., *supra*.

22. Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

23. This illustrated by the *Ragan* case, *supra*.

type evasion of state law by shopping for important preceptive advantages thought to be obtainable under the Federal Rules of Civil Procedure find no basis in anything the United States Supreme Court has said or done. The theory advanced in the majority opinion in the *Guaranty Trust* case[24] that in adjudicating state-created rights solely because of the diversity of citizenship of the parties, a federal court is in effect "only another court of the State," gave notice that such forum shopping as a policy of lawyers handling litigation is frowned upon by the Court and is not likely to be productive of an advantage substantially affecting the enforcement of the right given by the state. Reaffirmance of this theory in *Angel v. Bullington*[25] and more recently in *Wood v. Interstate Realty*,[26] serves to re-emphasize the point. While Justice Frankfurter, who wrote the majority opinion in the *Guaranty Trust* case,[27] never did succeed in persuading all the members of the court to accept the theory advanced by him in that case, all decisions of the Court subsequent to the *Guaranty Trust* case are consistent with its theory. In none of these cases has the Court permitted a litigant to institute proceedings in a federal court, circumvent a state law imposing restrictions or liabilities in the enforcement of a state created right, and obtain the benefits of a more lenient provision of the Federal Rules of Civil Procedure. In *Ragan v. Merchants Transfer & Warehouse Co.*,[28] where such a maneuver was attempted, the Court refused to apply a provision of the federal rules differing from the correlative state law and reached the same result that would have been reached if suit had been instituted in the local state court.

This is not to say that there may not be cases where the Supreme Court will sanction application of the federal rules in preference to state laws differing from such rules on the same subject. The existence of such cases is assumed by Justice Frankfurter in the *Guaranty Trust* case,[29] by Justices Douglas and Frankfurter in their dissent-in-part in the *Ragan* case,[30] and

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24. See note 16 *supra*.

25. *Ibid.*

26. See note 22 *supra*.

27. See note 16 *supra*.

28. See note 13 *supra*.

29. "When, because the plaintiff happens to be a nonresident, such a right is enforceable in a federal as well as in a State court, the forms, and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." See note 16 *supra* at 108.

30. In his dissent in Cohen v. Beneficial Industrial Loan Corporation, *supra*, in which Justice Frankfurter concurred, Justice Douglas was of the opinion that Rule 23 of the Federal Rules should have been applied and not the New Jersey statute which the majority held applicable.

by Justices Jackson and Burton in their dissent in the *Woods* case.[31] But if there are cases where the differing federal rules will be applied, we are left in the dark as to what a majority of the court would agree on as being their distinguishing characteristics. The facts gleaned from the majority and dissenting opinions in the cases which refuse to apply the federal rules would seem to justify the conclusion that it is unlikely that the Court will prefer to give effect to a federal rule rather than to the correlative state law except, perhaps, (a) where the federal rule is less advantageous to the non-resident than the state law, or (b) the difference between the correlative state and federal rules does not substantially affect establishment or enforcement of the state-created right.

In conclusion it may be pointed out that it is unlikely that a diversity jurisdiction which has survived, in modified form, the pre-*Erie* attacks of opponents striking with arguments built around powerful existing evils, will succumb to substantially the same arguments now made by proponents of modification after the worst features of these evils have been removed. If it is desirable to eliminate even the unsubstantial inequities of forum shopping in these cases, may not implementation of the *Guaranty Trust* theory by cooperative state and national legislation for the purpose of eliminating differences in rule, be preferable as a solution to drastic curtailment of the diversity jurisdiction?

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THE SEXUAL CRIMINAL. By J. Paul de River. Springfield: Charles C. Thomas, 1949. Pp. 281. $5.50.

THE author of this book states that it is intended primarily for those who are interested in knowing the sexual psychopath. Ostensibly, the author is desirous of making clear the dynamics underlying abnormal sexual behavior, for the subtitle of the book indicates that he employs the psychoanalytic method in the study of sexual deviants.

As far as this reviewer can see, the present volume has little to recommend it. In none of the case histories presented is there adequate material to give the reader anything at all approaching an understanding of the psychological motivation underlying sexual crimes. The sexual offense itself

31. In his dissent in Woods v. Interstate Realty Co., *supra*, in which Justices Burton and Rutledge joined, Justice Jackson was of the opinion that a Mississippi statute denying to a foreign corporation which had not qualified to do business in the state the right to sue in any of the courts of the state should not be construed so as to deny to the corporation the right to sue in the federal courts.