Vanderbilt Law Review

Volume 3
Issue 2 *Issue 2 - February 1950*

Article 10

2-1-1950

Book Review

Journal Staff

BOOK REVIEWS

THE POWER IN THE PEOPLE. By Felix Morley. New York: D. Van Nostrand Co., Inc., 1949. Pp. xii, 293. $3.50.

To the professional reviewer, with his daily dozen of reviews to do, Morley's *The Power in the People* might seem just another book of political essays to be quickly skimmed and as quickly reviewed, with a few hackneyed but well chosen phrases, a few wise saws and modern instances. No professional reviewer, but a lawyer and judge, I shall certainly not review the book in that way.

A devout believer in, and supporter of, American constitutionalism[1] as the proven way of life for us, I am an equally earnest unbeliever in, and opponent of, creeping socialism, "the better way of life," the current form of authoritarianism now being offered us. Like the author, I distrust and fear the self-appointed messiahs, the self-seeking pressure groups, the European-minded radicals,[2] and the political demagogues who have been, and are, conspiring against our liberties and our way of life. I shall, therefore, do my best to catch and carry into the review something of the spirit of this fine and timely book.

I do not mean by this to suggest that I have a real hope that I can give to any reader of this review a realizing sense of the book's deeply spiritual quality, of the profound impression which it has made upon me, or of the strong appeal it will have for earnest and thoughtful readers.

Indeed, the author's truly American faith in, his penetrating analysis, his simple and clear exposition of, the principles on which the great society here was founded and has been, by the grace of God, maintained, cannot be thus conveyed. Neither can his thorough understanding and unmasking of the false pretenses of our enemies, foreign and domestic, or the lofty and spiritual tone of the book, be put into a review, no matter how skilfully and earnestly done. They can be gotten only from a reading.

Because this is so, because the book seems to me to have been written as an answer to the prayers of liberals—that is, persons who, in Priestly's stirring phrase, "stand in need of liberty and wish it for every creature of God"—and because I should like it to be most widely read, it is with great diffidence that I have undertaken to review it. It would trouble me greatly if, by some fault of under or over statement, I should diminish, if only by

1. HUTCHESON, LAW AS LIBERATOR (1937) (University of Virginia White Foundation Lectures).

2. Hutcheson, *New Instruments of Public Power,* CALIF. STATE BAR REP. 329 (1946) (California State Bar Morrison Lecture).

one, the readers of it, who, like-minded with, but less well informed than, the author, are greatly puzzled and confused by things present, more puzzled and confused by things to come.

Drawing on William Penn[3] for his arresting title, the author draws more heavily on James Madison, to whose memory the book is dedicated, the master builder and the interpreter to the people of the Constitution and of constitutionalism as the American way of life. He draws, too, on de Tocqueville and other later observers of the American scene, and, so drawing, has written a book as American in spirit and in message as the American way of life itself. In it he has set down for all to see the meaning of that way of life, and the menace to it of current political theory here.

Pointing out how, beginning with an increasing subordination of the people to the state, it has as its aim and end, by a kind of creeping socialism, to seize, for the state and the favored groups and classes, which elect and control its officers, "the power in the people," he calls us "to our tents and to arms."

He is completely aware of the false pretenses of those who, representing favored minorities and special political groups, pose as friends of liberty and of "the power in the people," and in that guise go about to destroy liberty and liberalism by vesting in the State "the Power" vested by the Constitution "in the People." He is, therefore, careful to make clear that when he speaks of "the power in the people," he is speaking not, as these dissemblers do, of "power in a majority," to have its unjust will. He is speaking rather of the power in the whole people, to establish and maintain the justice of the general will—that justice, the bond of men in states, which guards and protects the real, the substantial, rights of the minority, though the minority be only one person, as jealously as it guards and protects the real, the substantial, rights of the majority.

Written in a spirit, and in language, reminiscent of the elegant and eloquent political pamphleteering of the Federalist Papers, the first and second chapters[4] deal with the great importance, not only to Americans but to the human race, of a true understanding, and the continued maintenance here, of our constitutional way of life. In them the author takes the greatest pains to make clear the nature of the society and the government which the founders chose and the Constitution provided for, and the gulf fixed between that society and government and the societies and governments of other nations.

Declaring, in Chapter One, that underlying the whole plan of the Con-

3. ". . . we lay a foundation for after ages to understand their liberty as men and Christians, *that they may not be brought into bondage but by their own consent; for we put the power in the people* . . . " Penn's preliminary sketch for the government of West New Jersey, 1676, quoted in MORLEY, p. 139 (emphasis supplied).

4. (1) "The Purpose of the Republic"; (2) "The Nature of the Republic."

stitution there is, in Madison's fine phrase, *"that honorable determination . . . to rest all our political experiments on the capacity of mankind for self-government,"* [5] he laments:

> "Of recent years, it has been increasingly assumed that Americans are no longer capable of governing themselves. In view of conditions which have everywhere followed the destruction of self-government, a restoration of this faith would seem to be not only honorable, but actually essential for survival." [6]

In Chapter Two, declaring that we shall not understand the nature of our republic if we fail to realize that its organic law was the product of concession, and that adjustment of conflicting opinions by reasonable modification is moreover implicit in the Constitution, he continues:

> "If the United States were really a political democracy, as is so often loosely asserted, then this factor of conciliation would not be vital to successful government. . . . What we have is a representative republic and, in the language of *The Federalist:* 'It is of great importance in a republic, not only to guard the Society against the oppression of its rulers, but to guard one part of the Society against the injustice of the other part. . . .' [7]
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> "Concessions to the minority are not necessary in a democracy. Concessions to the majority are not necessary in a tyranny. But in a republic, designed to prevent and not to induce tyranny, concessions by both majorities and minorities are as oil to the machinery of government. . . . The spirit of conciliation, in short, is an essential part of the nature of a republic." [8]

In full accord with Madison, that:

> "In framing a government which is to be administered by men over men, the first difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." [9]

and that:

> "It is *essential* to such a government that it be derived from the great body of the Society, not from an inconsiderable proportion, or a favored class of it." [10]

the author declares that responsible "self-government is the heart and core of the American way of life." [11]

Stating: "To 'put the power in the people,' with any degree of permanence, it was necessary for the colonists: (1) to establish a system of government in which the individual would not be subjected to the State; (2) to

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5. THE FEDERALIST, No. 39, quoted in MORLEY, p. 3 (emphasis supplied).
6. P. 7.
7. The double quotation is taken from THE FEDERALIST, No. 51. Compare: "When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or intent both the public good and the rights of other citizens." THE FEDERALIST, No. 10 (Madison).
8. Pp. 33-34.
9. THE FEDERALIST, No. 51.
10. THE FEDERALIST, No. 39.
11. P. 50.

develop a form of Society in which the individual would be inclined to restrain himself through recognition of an alternative and higher authority," [12] the author re-emphasizes that "underlying the whole plan [was] 'that honorable determination . . . to rest all our political experiments on the capacity of mankind for self-government.' " [13]

These basic points established, the author, in eight additional chapters,[14] each in a way complete in itself, but each complementary to the others, discourses in clear, convincing and beautiful prose, upon the noble heritage of the Republic, the dangers which beset it, and the fact that only by preserving in the people a love of, and a capacity for, self government can this heritage be preserved.

With rare insight and a power of clear and simple exposition denied to most of us, the author analyzes and clearly defines for us terms and conceptions now being bandied glibly about on ignorant and self-serving tongues, and shows how, in our present state of political group hypnosis and tendency to subjection to mass and state control, these bandyings threaten to destroy altogether our constitutional way of life and the liberties it ensures.

I should like to see the book made required reading in the public schools, for it points out in a practical, simple, and down-to-earth manner, the real meaning of our American way of life and the very real and present dangers to it from the enormous engorgement of the central government through political seizure of the "power in the people."

It particularly puts its pointing finger on the age old truth, which designing politicians are busily engaged in obscuring, that encroachment on manly and independent ways of thinking and acting, in short, on "the power in the people," upon the pretense of an interest in the general welfare, has always been the road down which have come those who, beginning as demagogues, have ended as tyrants.

While it is difficult in a book, as wisely and charmingly written as this is, to point to any portion of it as more outstanding than another, it seems to me that in the precision with which it points its moral and in the nobility of its thought, the most spirited and moving passage in the book is to be found in Chapter 4 at pages 96 to 98.

Here the author, by reference to book and page, points up his whole argument, and, by the use of the deadly parallel, conclusively proves his case.

Declaring that constitutional restrictions alone never have saved and never can save the republic, that only the continuing loyalty of the people to

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12. P. 140.
13. P. 7, quoting MADISON, DEBATES, June 25, 1787.
14. (3) "The Heritage of the Republic"; (4) "Strength and Weakness"; (5) "State and Society"; (6) "The Issue of Authority"; (7) "The Meaning of Self-Government"; (8) "Free Enterprise"; (9) "The Fundamental Challenge"; (10) "To Maintain the Republic."

that local self government, in reliance on their capacity for which the Constitution was adopted, can do so, and quoting freely from de Tocqueville's *Democracy in America,*[15] the author contrasts the political philosophy prevailing in the Jacksonian era, when de Tocqueville's book was written, with that of the New Deal, Fair Deal, party, the dominant party of today, with its fortuitous concourse of unrelated prejudices, its illy assorted pressure groups, united only in a common thrust for power:

> "In 1840, the spirit of democracy was working to stimulate, rather than to repress, the activity of individual free enterprise in every kind of undertaking. By 1940 President Roosevelt could refer, with great satisfaction over the trend toward Socialism, to 'the multitudinous functions that the policy-makers in modern democracy assign to administrators in modern democracy.' This President rejoiced in the same centralization of administration that de Tocqueville feared. 'I am convinced,' Mr. Roosevelt added, 'that most people in the United States do have a sense . . . that we have at least been moving forward these later years in the right direction. . . . And one *of the manifestations of that new spirit is that there are fewer Americans who view with alarm.*'
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> "Thus, in the course of a single century, did the United States come to fulfill de Tocqueville's warning 'that democratic nations are most likely to fall beneath the yoke of a centralized administration.' Thus did an American President complacently attest the validity of de Tocqueville's assertion 'that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit.'
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> "It is indeed the manifestation of a new, and sadly diminished, spirit if the dissipation of a glorious heritage is insufficient to make the losers 'view with alarm.' As John Philpot Curran long since told the Irish House of Commons:
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> "'The condition upon which God hath given liberty to Man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt.'" [16]

JOSEPH C. HUTCHESON, JR.*

MEN AND MEASURES IN THE LAW. By Arthur T. Vanderbilt. New York: Alfred A. Knopf, 1949. Pp. xxii, 156. $3.00.

From Judge Vanderbilt's long and varied experience, as a practicing lawyer for thirty years, Dean of the New York University Law School from 1943 until he accepted the position of Chief Justice of the Supreme Court of New Jersey in 1947, he has been able to acquire a perspective not readily available to a lawyer who has confined his activities to either the practice,

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15. "I am of the opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may ensure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation." 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 87 (Bradway ed. 1945), quoted in MORLEY, p. 97.

16. Pp. 97-98 (emphasis supplied).

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the teaching profession or the bench. *Men and Measures in the Law* is a compilation of five lectures delivered by Judge Vanderbilt at the University of Michigan in 1948.

While Judge Vanderbilt stops to observe that our common law, supplemented from time to time by legislative acts, has well served our democratic system during its growth, nevertheless he hurries to point out its imperfections and does not hesitate to criticize and suggest improvements.

Chapters 4 and 5, entitled "Procedure—The Stumbling-Block," have a courageous and forthright examination of the administration of justice. He traces the history of the improvement in administrative procedure in the courts from Roscoe Pound's Lecture in 1906, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," [1] and the history of the struggle of the American Bar Association to have enacted into law in 1938 the present Federal Rules of Civil Procedure. The adoption of these rules culminated as a result of a crusade of untiring energy, led by Thomas W. Shelton, of the Norfolk, Virginia, Bar and chairman of the American Bar Association's committee on the subject. Senator Thomas A. Walsh, Chairman of the Senate Judiciary Committee, was able to defeat the enactment of the legislation, necessary for the adoption of the rules, for a decade in the twenties, but finally the matter was handed to a practical politician who also saw virtue in the legislation, and Attorney General Homer S. Cummings finally guided the act through the maze of legislative delay.

In the meantime, state bar associations, prompted by the many addresses delivered by Judge John J. Parker of the Fourth Circuit, had pressed for enactment modern "tools of the trade," such as pre-trial conference, adequate discovery rules, and summary judgment rules. David Dudley Field had advocated a code of civil procedure which was widely accepted, and in the meantime Prof. Edward Borchard had pressed, for a quarter of a century, the adoption of declaratory judgment law. Many states, through the guidance of their bar associations, began to adopt these processes of procedural improvement, until now the declaratory judgment acts have been adopted in the federal field and in 42 states, and the others mentioned are being generally accepted, although Tennessee has adopted none of them except the declaratory judgment act.

Recognizing the improvements in the field of procedure, Judge Vanderbilt then takes stock of the situation at the present time. He points out that the people and the state have certain things that they have a right to expect of the courts. They are:

> "(1) a prompt and efficient trial of his case, (2) at reasonable cost, (3) in which he is represented by a competent attorney, (4) before an impartial and experienced judge

1. 29 A. B. A. Rep. pt. 1, 395 (1906).

in the trial court, (5) with a jury that is a representative cross-section of the honest and intelligent citizenry, and (6) with a right to review the trial court's determination before an impartial and experienced appellate tribunal, which will decide his appeal promptly and efficiently." [2]

Judge Vanderbilt relates that litigants infrequently complain of a rule of law or of the final decision, but how often they feel aggrieved in the manner of its enforcement. He does not hesitate to criticize the judge who allows himself to be detained in chambers after the stated hour for opening of court. These delays must occasionally occur, "but the sagacious judge will reduce them to a minimum. For inattention, ill temper, or judicial arrogance, there never can be any justification; to indulge in them is to confess judicial unfitness. Any exhibition of ill temper or lack of interest in the proceedings will frustrate the satisfactory exercise of the judicial function and is not to be tolerated." He points out that it is as true today as it was at the time of the Magna Carta that "justice delayed is justice denied," and, too, the longer a judge delays, the harder he makes his own task and the more risk he runs of defeating justice.[3]

In his lecture on "Procedure—The Stumbling-Block," he relates the progress of the law by adoption in many states of administrative supervision, some similar to the functions of the Administrative Office of the United States Courts. He says:

"Even an ideal setup of the courts, however, will not work without administrative supervision. Judges, after all, are but men. It seems odd that in a country that has excelled in sound business administration we should have imagined that we could get along without responsible and effective administrative supervision in so complicated a business as the judicial department of any state." [4]

He relates the experience of Pennsylvania, which adopted a judicial administrative act to be administered by its chief justice, in 1937. A survey made in Pennsylvania immediately after the adoption of the act showed that in one-third of the courts there were cases undecided for more than six months. From this survey a report was published by the chief justice, listing the number of cases in arrears, the judges involved and the number of months or years that the decisions were in default. The survey had indicated that some cases had been under advisement for more than two years. Upon a publication of this report, the trial judges immediately cleared their dockets and under the rule adopted by the chief justice all cases held under advisement for more than three months were to be reported to him by the clerk of the court.

In 1943, when one judge failed to report on his arrearages, on motion

2. P. 133.
3. Pp. 133-34.
4. P. 135.

of the Attorney General the Supreme Court issued an order demanding the lower court to show cause why a writ of mandamus should not issue. The judge pleaded illness. The Court took judicial notice of the "illness—a matter of general notoriety as to make every reasonably well informed person within Westmoreland County and all of the members of this court well acquainted with it." The proceedings involved 36 cases, 26 of which had been pending from sixteen weeks to sixteen months after their submission. Following the order on the lower court, within three months the offending judge decided his cases.

Judge Vanderbilt deals with the subject of the selection and tenure of judges, observing that there is no single infallible method for obtaining good judges. The question of tenure, he observes, has a very direct bearing on the calibre of the judiciary, in that able men in their most successful years can hardly be induced to forsake their practice without some assurance of ample tenure and the risks attendant upon reappointment, or, worse yet, upon re-election. He advocates longer terms of office than exist in some states.

As a practicing lawyer, I was interested in his discussion of methods employed by appellate courts in assignment and disposition of cases. Every practicing lawyer, in this state at least, has often wondered whether or not his case has the real scholarly attention of judges other than the author of the opinion. The methods of arguing and the methods of deciding cases not only vary widely from court to court, but differ greatly in efficiency. He observed that a surprisingly large number of appellate decisions are really one judge's decision, though the court may consist of five, seven or nine judges, and this fact can be elicited by inquiry as to methods pursued by the court. He suggests for a cure of this evil, that the courts impose upon themselves certain rules. He suggests that a study of the briefs and records should be made by the courts before oral argument, and that the courts hold a preliminary conference on the case in advance of argument, not discussing the merits but to ascertain the points that the judges think vital or troublesome, and then invite counsel to discuss these questions. The fact that counsel knows that the courts have examined the briefs in advance inevitably makes for better argnment. Time is conserved by this method rather than wasted.

He suggests that the judges then immediately confer after the oral argument and then, and only until then, shall the case be assigned to a particular judge for an opinion. Thereafter, the opinion of the judge can be examined by his colleagues who will be armed with information and understanding of the case. Judge Vanderbilt points out that to follow this course effectively, the appellate courts should hear a few cases and then recess and arrive at their decisions before hearing other cases.

We have often felt that this is a reform that should emanate from the

courts themselves, and not be one that will eventually have to be called to the attention of the appellate courts by the Bar and the attendant embarrassment which would come from having the matter fully discussed. The "one-judge opinion" is so prevalent in Tennessee that practicing lawyers often hear an appellate judge say, while referring to a case decided by his court, that "this was not my case. Judge 'Smith' wrote that opinion." In this statement he is denying any responsibility for the inaccuracy or invalidity of the decision, and disclaiming responsibility therefor. This should not be the case.

Judge Vanderbilt does not hesitate to touch on many of these subjects which have been taboo in the profession. Throughout these lectures, one feels that Judge Vanderbilt is pointing out these imperfections so as to preserve what he believes to be a great institution but which, he further believes, will fail unless it keeps step with the demand of an ever more enlightened public who are willing to examine these institutions, that the good may be preserved from the inroads of the radicals.

W. RAYMOND DENNY *

THE CASE OF GENERAL YAMASHITA. By A. Frank Reel. Chicago: University of Chicago Press, 1949. Pp. v, 324. $4.00.

When I finished reading the book, the following impressions, aside from the legal aspects, stood out:

(1) The zeal, sincerity and effectiveness of the defense of the accused by Captain Reel, the author, and the other United States Army officers. Every honorable legal defense was provided with high professional skill and ability.

(2) The good qualities, professional character and reputation of the accused have been magnified. His military exploits were glorified. The opening sentence to chapter 9 concerning his achievements on the field of battle reads, "Early in the war Yamashita had electrified the world when he led his troops down the hitherto 'impassable' Malay Peninsula and conquered the supposedly impregnable bastion of Singapore from the rear." (P. 53). The next chapter is devoted to the biography of the accused. Throughout the book he is generally referred to as "General Yamashita." Unlike many other war criminals who were tried following the cessation of hostilities of World War II and who were stripped of all evidence of rank, decorations and military advantages, the accused in this case was permitted to wear his uniform, his campaign ribbons and be addressed as "General." All of the defendants in the Trial of the Major Axis War Criminals

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* Member, Nashville Bar; President, Tennessee Bar Association.

at Nuremberg were stripped of their rank and decorations and were "common" war criminals during the long trial. None of them was ever addressed during the trial proceedings as "General," "Marshall" or "Admiral."

(3) The evidence adduced before the Military Commission was not analyzed by the author. On the contrary, there is a theme running through the book that may be described as a combination of sympathy, alleged injustice, speed of trial and no legal basis for the accusations.

(4) The author continually refers to "an unjust conviction" and devotes his final chapter to a subject entitled, "More Lasting Harm." In the beginning of the chapter, he states, "General Yamashita was condemned unjustly . . . (P. 241). He justifies such a statement in this language, "In my opinion, even then the condemnation was unjust because Yamashita was held accountable for crimes committed by persons other than himself, crimes committed without his knowledge and, in fact, against his orders." (P. 242). Finally, he says, "He was hanged because he was in command of troops who committed atrocities on the losing side." (P. 245). Likewise, he attempts to compare his client's conduct with crimes by officers in the Lichfield Prison Camp in England and raises the issue of the alleged unlawful use of the atomic bomb by the United States in the last days of the war against Japan. He also presents the question of ex post facto laws.

It is difficult for me to determine whether the objective of the book is to show the alleged illegality of Yamashita's trial or a general complaint against the trial of any enemy officer for alleged war crimes. Captain Reel and his co-counsel not only had the benefit of their defense before a Military Commission but also by the Supreme Court of the Philippines and review by the Supreme Court of the United States. My impression from the book is that he was surprised when the United States Supreme Court requested oral argument. The death sentence against his client was stayed until after the Supreme Court of the United States had passed upon Yamashita's petition for certiorari. Also, it is significant that the War Department immediately ordered Captain Reel and two other able co-counsel to proceed via the highest air priority to Washington to prepare and present the case. Yamashita was ably defended before a Military Commission and two Supreme Courts.

Was the conviction illegal and unsupported by evidence? Captain Reel assigned three main reasons before the Supreme Court of the United States for setting aside the conviction of his client.

First, was the Military Commission the proper tribunal to try Yamashita? Apparently, Captain Reel admits that, had the alleged offenses occurred prior to the surrender of the Japanese and during the active stages of the war, the Military Tribunal would have been a proper forum for his trial. He concludes by this statement, "During wartime or during some domestic

crises, martial law, quick justice, and absence of delay are essential. But the moment the emergency ends, the necessity for streamlined convictions ceases." (P. 211). The Supreme Court of the United States in Ex parte *Quirin*,[1] commonly known as the saboteurs case, clearly held that the creation of Military Commissions for the trial of enemy combatants for offenses against the law of war was proper. Also, the Supreme Court in the instant case reaffirmed such a doctrine.[2] The Supreme Court considered the question as to whether or not petitioner could be placed on trial before a Military Commission "after the cessation of hostilities." As was properly pointed out in the opinion, the practical administration of the system of military justice under the law of war would fail "if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial." [3] Yamashita was not being tried for offenses committed *after* the cessation of hostilities, but Captain Reel's objection is that he should not be *tried* after cessation of hostilities before a military tribunal.

Second, defense counsel contended that "there was not charged or proved or found any violation of what had ever been held to be the laws of war. The laws of war were based on known standards, and they had never encompassed 'command responsibility.'" (P. 211). Captain Reel complains of the doctrine of command responsibility. While the Supreme Court did not consider the evidence, yet there is no denial in the entire book that horrible atrocities under Yamashita's command did occur. It is even admitted that there was slight evidence showing that Yamashita had knowledge of the atrocities. Yet, such knowledge was generally attacked as being hearsay. This sounds very similar to the pleas of Goering, Ribbentrop and Kaltenbrunner in the Trial of the Major Axis War Criminals (European) when they disclaimed any knowledge of the horrors of the concentration camps. Yet, abundant evidence was offered of their issuing or approving orders which created the camps and which permitted the horrors to occur. Also, the plea rings a familiar note of thinking to the effect that no military man is responsible for the acts of subordinates or superiors. If this doctrine is sound, then there would be no responsibility from the king or ruler to the humble private soldier, for under the theory of sovereignty "the king can do no wrong." Under the theory of defense counsel, in this case there is no such offense as "command responsibility." Keitel, Hitler's Chief of Staff, was not given the death penalty for following orders or losing a war, but because he issued such inhumane orders as the "commando order." under which hundreds of Allied soldiers were "ruthlessly murdered" when caught

1. 317 U. S. 1, 63 Sup. Ct. 1, 87 L. Ed. 3 (1942).
2. Matter of Yamashita, 327 U. S. 1, 66 Sup. Ct. 340, 90 L. Ed. 499 (1946).
3. 327 U. S. at 12.

behind enemy lines, whether in a uniform or not. Keitel was not convicted for losing a war but because he participated in the planning, making and waging of an aggressive war in violation of solemn treaties to which his nation was a party. Yamashita was certainly responsible for his command. Can it be said that a military officer is immune from personal liability regardless of what happens under his command?

Third, the final point was that Yamashita had been denied "the fundamental right of a fair trial." Captain Reel further admits, "This, we agreed, was our strongest point." (P. 211). Can it be said that, because he was tried before a military tribunal, the trial was unfair? He argues that no member of the Military Commission was a lawyer. Also, he refers to the fact that none of them had combat experience during the war. He complains of the speed of the trial and of a disregard of fundamental principles of justice afforded to citizens as guaranteed under our Constitution. The laws of war as set out in the Hague and Geneva Conventions were in effect many years before the alleged atrocities occurred. They were recoguized not only by the United States but also by Japan. International law recoguizes the laws of war. It is common knowledge that Germany and Japan also invoked the laws of war, as enunciated in the Hague and Geneva Conventions during World War II.

I gain the impression that Captain Reel does not subscribe to the doctrine of individual responsibility under international law. There is a well recognized school of thought among lawyers, international and domestic, that international law *only* operates upon states but never upon the individual. However, this concept is condemned by many courts, jurists and international legal scholars. I think the contrary of Captain Reel's argument is best summarized in a paragraph from the opinion of the International Military Tribunal at Nuremberg, which reads: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." [4]

Dr. Philip C. Jessup, our Ambassador at Large and probably our outstanding international legal scholar, summarizes the question of individual responsibility in his latest book, *The Modern Law of Nations,* as follows:

> "Two points in particular are singled out as keystones of a revised international legal order. The first is the point that international law, like national law, must be directly applicable to the individual. It must not continue to be remote from him, as is the traditional international law, which is considered to be applicable to states alone and not to individuals." [5]

Since dictating this review, I have just received a Memorandum concerning this trial prepared by General Courtney Whitney, Chief, Govern-

4. NAZI CONSPIRACY AND AGGRESSION—OPINION AND JUDGMENT 53 (1947).
5. JESSUP, THE MODERN LAW OF NATIONS 2 (1948).

ment Section of General MacArthur's Headquarters, which I most heartily commend as *must* reading in connection with Captain Reel's book. General Whitney not only reviews the horrible crimes that were charged against Yamashita but quotes convincing evidence from the record that establishes both the knowledge and guilt of the accused. It is also significant that General MacArthur, in approving the judgment of the military commission, devoted a paragraph of his approving order concerning the warning he had given to the Japanese military leaders, as Commander in Chief, as follows:

> "It is appropriate here to recall that the accused man was fully forewarned as to the personal consequences of such atrocities. On October 24—four days following the landing of our forces on Leyte—it was publicly proclaimed that I would 'hold the Japanese military authorities in the Philippines immediately liable for any harm which may result from failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and the protection to which they are entitled.'"

ROBERT G. STOREY*

TAX PLANNING FOR ESTATES. By William J. Bowe. Nashville: Vanderbilt University Press, 1949. Pp. 93. $2.00.

Professor Bowe of the Vanderbilt Law School has succeeded in taking a complex and cumbersome subject and writing a very practical book about it in simple, non-technical language. While it is concise, it contains a wealth of information, and the legal conclusions are supplemented throughout the entire book with computations showing the approximate tax consequences in dollars and cents of various plans. It is well documented with footnotes citing authorities and presenting additional explanations of some of the statements in the text, thus furnishing guides for further study on specific problems.

The book begins with an appropriate word of caution that no plan should ever be adopted solely for tax reasons, but that the security of the owner while he lives and the welfare of his family following his death, are the prime considerations. That this principle is kept constantly in mind by the author is evident from the fact the various tax saving plans or suggestions are frequently closely related to accomplishing a non-tax objective. The practical advantages and disadvantages are not overlooked in an effort to present the tax benefits and pitfalls of various transactions.

The first chapter presents a typical estate plan illustrating many tax saving possibilities depending upon how "Mrs. Brown" chooses to dispose of her wealth. Next is a discussion of the various types of death taxes and

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