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BOOK REVIEWS

THE HEARSAY RULE. By R. W. Baker. London: Sir Isaac Pitman & Sons, Ltd., 1950. Pp. xxi, 180.

Professor Baker has expounded the existing English law governing hearsay and has demonstrated how little the courts have done to make it consistent or common sensible. He finds the English Evidence Act of 1938 entirely inadequate. He believes that the present approach to the exclusionary rules should be reversed. Indeed, he agrees with the great Thayer that the fundamental rule should be that all logically relevant evidence is admissible and that exceptions to this rule should be made only for compelling reasons of policy. This would require radical legislation for which the English bar is not prepared. Professor Baker, therefore, contents himself with pointing out inconsistencies and needless limitations in the currently accepted rules and suggesting modifications which he believes might easily be made in the near future.

After discussing the origin and theory of the hearsay rule, he examines each of the recognized exceptions in detail and sets forth his deductions from the judicial authorities, often indicating the views of leading commentators. With the accuracy of his statements of the several rules I should not venture to disagree. His book seems to me an invaluable guide to the practitioner in the English courts as well as a stimulus to reform for the student of law. But on much of his theory I do take issue.

Definitions.—Every author must be accorded the privilege of setting the limits of the subject which he proposes to discuss, and it may be ungracious to find fault with his definition. As Professor Baker remarks, any definition of hearsay is open to criticism, and it is with some trepidation that he submits this: "Hearsay consists of out-of-court assertions of persons who are not called as witnesses offered as proof of the matters contained therein."[1]

I suggest that in framing a comprehensive definition of hearsay one should put as its basis the situation of a witness on the stand. The function of the witness is to convey information to the trier of fact. In so doing he must act under the sanction of an oath or its equivalent and be subject to cross-examination by the party against whom the information is offered. He may use words, gestures or other conduct which will enable the trier to understand

1. P. 1.

what he is trying to communicate. Whether conscious of the process or not, the trier must answer each of the following questions: What is the content of the information which the witness intends to convey? When that is determined, does the witness believe it to be the truth? If so, does it correspond to what the witness at the time of the event or condition thought he was perceiving, that is, is he remembering accurately or is his present belief due in whole or in part to some other cause? To the extent to which his memory is accurate, did what he thought he was perceiving correspond to the actual event or condition? In short, if the trier is to find as a fact what the witness intended to communicate, the trier must rely upon (1) the use by the witness of the means of communication, usually his use of language, (2) his sincerity, (3) his memory, and (4) his perception. In determining the degree of reliance to be given to the testimony the trier has the advantage of knowing that the witness is speaking under the truth-telling stimulus of the oath and the expectation of being cross-examined; and, where an intelligent cross-examination has occurred, the trier has been furnished information concerning each of the pertinent factors affecting the value of the testimony.

Now assume that the testimony of the witness describes the conduct of another, call him *A*, and that the evidence of that conduct is offered for a purpose which requires the trier to treat *A* as if he were a witness; that is, as if he were making assertions for the purpose of persuading the trier to find the matter asserted. Obviously if *A* were present, he would not be heard except under the conditions prescribed for a witness. To offer his conduct as the equivalent of testimony is to offer evidence that has all the defects of hearsay. This is too clear for argument where his conduct is an express assertion, and it is no less true where the trier is to use the conduct as if it were an assertion. Hearsay, then, should include evidence of any conduct of a person not occurring at the trial which is offered for a purpose that requires the trier to treat that person as if he were then and there testifying. In some situations it will be clear that *A*, unlike the witness, did not intend his conduct to operate as an assertion, but that the proponent offers the evidence for a purpose which requires the trier to use *A*'s conduct as if *A* did so intend. This means that *A* is to be treated as if performing all the functions of a witness. Consequently, the evidence should be classed as hearsay.

With this conclusion Professor Baker seems to agree in his interpretation of *Wright v. Tatham*.[2] There on the issue of testator's testamentary capacity letters written to him by several persons were offered in evidence; none of them contained a statement of the belief of the writer as to the mental condi-

2. 7 A. & E. 313, 112 Eng. Rep. 488 (Ex. 1837), *aff'd*, 5 Cl. & F. 670, 7 Eng. Rep. 559 (H.L. 1838).

tion of the testator. No letter was offered as tending to prove the truth of any statement contained in it. There was nothing to indicate that the writer had in mind any consideration of the testator's mental capacity. Each letter was relevant only on the theory that its content was such as the writer would have addressed to a person who was mentally normal. That is, the writer's conduct was the basis of an inference to the writer's state of mind; namely, his belief concerning the testator's sanity. But this belief, in and of itself, was entirely immaterial and was relevant only as a basis for an inference to the conduct of the testator as observed by the writer. The evidence was offered as an assertion by the writer that the observed conduct was that of a sane man. Professor Baker thinks that the judges correctly excluded the letters as hearsay.

It is, therefore, somewhat puzzling to find him classifying as nonhearsay evidence of the signature of an attesting witness offered as tending to prove execution of the attested document by the purported maker. He accepts Baron Parke's theory that the attester's signature shows only that he put his name in the place and in the manner in which in the ordinary course of business he would have done had he actually seen the document executed. "The proof of attestation is not proof of a declaration but of a fact, the fact being presumptive evidence of due execution, as otherwise the name would not have been placed on the document."[3] Just what does this mean? When a person is asked to sign as a witness to a signature, does he not understand that he is asked to put his name down as evidence that the signature is that of the purported maker? What else can he understand? And if he puts his name down, is he not thereby intending to assert that the signature is that of the purported maker? The evidence of his handwriting tends to prove that he signed as a witness, and his signing as a witness is an assertion that he did act as a witness. If the signature is preceded, as is often the case, by the word "Witness" or "Attest," is there any escape from reading the word and the signature as an assertion? And if such a word is lacking, isn't the conduct in signing offered as an assertion? Is Baron Parke's pronouncement anything more than a declaration that a person will not put his name down as a witness, that is, assert that he saw the execution, unless he did see it? What did he mean by ordinary course of business? Certainly not that the attester was in the business of witnessing documents, or that the purported maker was in the business of executing documents; probably he meant only the ordinary course of human conduct in the same circumstances. Isn't Baron Parke's explanation the same as that by which the court in *Doe v. Turford*[4] sought to make admissible entries in the regular course

3. P. 162.
4. 3 B. & Ad. 890, 110 Eng. Rep. 327 (K.B. 1832).

of business? It states the theory upon which Greenleaf classified such entries as res gestae, and upon which Professor Strahorn would make admissions nonhearsay.[5] Nothing is to be gained by calling the signature evidence of a fact rather than of a declaration. The signature is in effect an assertion, and the evidence of it is offered for the truth of the matter asserted.[6]

No doubt, as a matter of history the evidence was not recognized as hearsay. But the same is true of extrajudicial admissions. Professor Baker agrees that Greenleaf's view that an admission is a waiver of or substitute for evidence cannot be supported, nor can Wigmore's original theory that an admission could be used only to impeach the position of the admitter. He considers admissions out-of-court statements offered to prove the truth of the matters asserted; evidence of them has always been received, and the hearsay rule has never raised a barrier.

Professor Baker's treatment of res gestae is likewise subject to some question. He contends that there is no exception in England for spontaneous statements, and he gives good grounds for his conclusion. He insists also that statements accompanying a relevant act, when admissible, are received as original evidence and not as tending to prove the truth of the matters stated. Where the statement, regardless of its truth, is itself legally operative, this is beyond debate, as where words of sale, gift, loan, or bailment accompany the manual transfer of a chattel. But where, as in *Bedingfield's* case,[7] they merely "throw light" upon the act, they are offered for their truth. As I understand the case, according to its exposition in the famous dispute between Cockburn and Pitt Taylor,[8] the injured woman's statement "Oh, Aunt, see what Bedingfield has done to me," would have been admissible, if the evidence had not shown that the defendant had ceased to pursue her. If so, it would have been admissible evidence of the fact asserted; namely, that it was Bedingfield who inflicted the injury. An explanation of this sort of itself is of no substantive legal significance. Unless true, it has no relevance for the proponent. It is an out-of-court assertion of a person not called as a witness offered as proof of its truth and for nothing else. The same is true of *Manchester Brewery Co. v. Coombs,*[9] as Professor Baker interprets it, for he assumes that the conduct of the customer was relevant and that the

5. Strahorn, *A Reconsideration of the Hearsay Rule and Admissions,* 85 U. OF. PA. L. REV. 484, 491, 564 (1937).

6. Professor Baker has seen the manuscript of this review and has submitted some comments. As to this paragraph, he says: ". . . bearing in mind that what we must look at is what the courts are doing rather than what they say they are doing, I am prepared to . . . admit that you are right."

7. 14 Cox C.C. 341 (1879).

8. See Thayer, *Bedingfield's Case,* 14 AM. L. REV. 817 (1880); also in THAYER, LEGAL ESSAYS 207-19 (1908) (the woman's statement is quoted at page 218).

9. 82 L.T. 347 (1901).

offered evidence was a declaration of a customer "made when throwing away a glass of beer." The opinion of Farwell, J. makes it clear that the declaration must have been an assertion as to the taste or the poor quality of the beer offered to prove the fact stated.[10]

By his definition Professor Baker excludes from hearsay former testimony. He treats the subject briefly under "Depositions." He states the orthodox English view that the former testimony is admissible only where the proponent of the former testimony and the opponent against whom it is offered, or their respective predecessors in interest, were parties in the former action. But he omitted to discuss why testimony upon the same issue between other parties does not equally fall without his definition. It is certainly not "out-of-court assertions by persons not called as witnesses," and yet it is rejected as hearsay. Why isn't there complete satisfaction of the requirement of his definition where the present opponent had full opportunity to cross-examine the witness in the former trial, and how is the requirement satisfied when the evidence is offered against a privy any more fully than when it is offered against a stranger? On what theory can *Morgan v. Nicholl*[11] rationally be harmonized with the orthodox English decisions? The recent cases in America and Wigmore's discussion seem worth a word as suggestions for a modification of the English rule.

Professor Baker does not examine prior contradictory statements of a witness offered for their truth. They fall without his definition of hearsay, for

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10. In speaking of the objection to the question "Have you received complaints from customers?", he said that he thought the question had always been allowed, and continued: "Counsel can certainly ask as to the facts.—Did the customer order beer? Did he taste it? Did he finish it? What did he do with it? If the matter is left there with the answer that he tasted it and left it or threw it away, the judge cannot avoid an inference, and the cross-examining counsel is driven to ask for some explanation. It is simpler, therefore, to allow the statement of the customer of the reason for his conduct to be given in chief." 82 L.T. at 349. (The official report in [1901] 2 Ch. 608 does not include this discussion.)

The context makes it clear that Farwell, J., was treating this evidence as offered, not on any question as to the extent of harm which may have resulted to defendant from poor quality of the beer, but upon the issue whether the beer furnished defendant by plaintiff was of poor quality. On this issue it is obvious that what any customer of defendant did with the beer is entirely immaterial except as a basis of inference from his conduct to his subjective condition, thence to the fact causing that condition; that is, from the act of throwing it away, to his subjective perception that its taste was bad, thence to the fact that its taste was bad and its quality unsatisfactory. On the issue of quality his statement is an out-of-court statement offered for the truth of the matter asserted and hearsay by Professor Baker's own definition. If the poor quality of the beer had been otherwise shown, and if its effect upon customers was an issue, the customer's reason would have been relevant and his assertion, while hearsay, would have been admissible under Professor Baker's exception for a declaration of physical or mental condition.

Professor Baker comments: "I feel that the *Bedingfield Case* proves nothing, nor do I think that I endcavored to show that it proved anything. But I must admit that the point you make with respect to *Manchester Brewery Co. v. Coombs* has a great deal of force in it and would require careful reconsideration. . ."

11. L.R. 2 C.P. 117 (1866).

while they may be out-of-court assertions, they are by a person who is called as a witness. The courts, in holding them hearsay, point out that the statement when made was not made under the conditions required for testimony in court. The witness may now be under oath and subject to cross-examination but he was not so situated when he made the statement. Evidence of prior consistent statements presents a similar problem, and a word by Professor Baker concerning the treatment of this subject as compared with the use of memoranda to refresh recollection would have been helpful.

Origin of the Hearsay Rule.—Professor Baker accepts the orthodox notion that the rule is the product of the jury system.[12] But he does not make quite clear whether he means only that if the jury had continued to exercise its original functions, the rule would never have developed. If so, no one will disagree. But if he means that the rule owes its origin to the notion that the jury could not be trusted to put a reasonable value upon hearsay, I think he has made no case. It is true that the judges in the early 1800's gave this explanation, but they offered no data to support it, and Professor Baker has supplied none. It is all very well to say that the jurors were originally witnesses, but that is only a half-truth. They did perform the function of the modern witness for they made known what they had personally perceived, but they also gathered evidence from those whom they deemed worthy and thus listened to and weighed the testimony of persons not on oath and not subject to cross-examination; and there is nothing to indicate that they had to get their information from percipient witnesses alone. Furthermore, there can be little doubt that when testimony of witnesses was received during the 1400's, it was as a privilege granted the parties to give additional information to the jurors; and the jurors were until after the middle of the 1600's legally permitted to prefer what they had learned by their own efforts to that which was presented to them in court.

The earliest case cited by Professor Baker[13] in which a distrust of hearsay is mentioned points out that the jury gave it little weight. Gilbert attributes its rejection principally to lack of oath, a reason which has no peculiar application to jury trial. He says that the court must not rely on the credulity of the witness; he says nothing about the credulity of the jurors, and an early case emphasizes the lack of cross-examination, which is a distinguishing characteristic of the adversary system. Furthermore, as Professor Baker concedes, hearsay received without objection is usable for its

12. Professor Baker's comment: "I do not wish to join issue with you on the question of the origin of the hearsay rule. There is doubtless much to be said for your point of view. A much more detailed research than appears at present to be available is required before anything like positiveness can be expressed for either opinion."

13. Rolfe v. Hampden, 1 Dyer 53b, 73 Eng. Rep. 117 (K.B. 1541). The remark of Newton, C.J., in Y.B. 20 Hen. VI 20, 16 (1441) is too cryptic to be regarded as an authority.

inherent value, and no one suggests that actual cross-examination is required, or that cross-examination by any one other than the adversary or his predecessor in interest will suffice. Thus the jury's protection against the misleading qualities of hearsay is in the hands of the adversaries.

My contention, therefore, is that the hearsay rule owes its origin to the rise or revival of the adversary system of litigation, and that its ascription to the frailties of jurors is an *ex post facto* rationalization by the English judges of the early 1800's, who substituted that notion for their earlier notion that it was but a branch of the best evidence rule.[14] There is no doubt that those judges did put great emphasis upon the inability of jurors to weigh testimony, culminating in the astounding statement of Mr. Justice Coleridge in *Wright v. Tatham,* which denounced as a fallacy the proposition that "whatever is morally convincing, and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury."[15] This judicial distrust has no doubt hampered the development of exceptions to the rule, and it may be fair to say that this offspring of the adversary system was by judicial fiat in the first third of the 19th century, formally made the child of the jury.

Background of Hearsay.—Professor Baker seems to me to be on solid ground when he says that hearsay is not excluded because logically irrelevant; but I fail to see what is to be gained by distinguishing the logically relevant from the legally relevant. This can be no more than saying that courts consider irrelevant what is in fact relevant; and there is certainly no way of determining what relevant matter is to be treated as irrelevant until after the court has spoken. It seems to me futile to use the term, legally irrelevant, as a mere synonym for inadmissible. Hearsay is, as Professor Baker says, rejected for reasons of policy. Under our system the adversary has the right that the jury be not subjected to the danger of being misled by second-hand evidence; but in certain situations the danger is thought to be sufficiently minimized, or countervailing reasons of policy are deemed controlling. But as Professor Baker recognizes, it would be idle to contend that the precedents reveal a logically consistent and reasonable framework into which these situations may be fitted. It may be possible to find some circumstance respecting each excepted situation which distinguishes the utterance from ordinary hearsay. But it would require naivetè to the point of credulity to be convinced that in many of them there was anything approaching the equivalent of oath and cross-examination.

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14. I have discussed this problem in *The Jury and the Exclusionary Rules of Evidence,* 4 U. OF CHI. L. REV. 247 (1937), and in *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177 (1948). Professor Baker cites the latter and disagrees with my conclusions.

15. 5 Cl. & F. 670, 690, 7 Eng. Rep. 559, 566 (H.L. 1838).

Professor Baker believes that this analysis requires the rejection of Greenleaf's and Thayer's classification of the hearsay rule under media of proof. I cannot see the force of this argument. The fact that relevant evidence is rejected for reasons of policy when the percipient witness is not produced may well be thought of as a regulation of the medium through which the evidence is offered. And the reason may be that the objectionable medium prevents the adversary from testing the value of the evidence or the jury from making a proper evaluation of it. After all, the purpose of classification is merely to arrange for effective discussion and understanding.[16]

These expressions of disagreement with Professor Baker must not be taken as indicating disapproval of his work. He has rendered a service to the profession by his careful examination of the precedents, and has shown the need for reform. It is to be hoped that his book will have the wide reading that it deserves, and will serve to awaken the English Bar from its somnolent satisfaction with the present rules.

EDMUND M. MORGAN*

SELF-INCRIMINATION: WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? By Fred E. Inbau. Springfield, Illinois: Charles C. Thomas, 1950. Pp. x, 91. $2.50.

This book is Publication Number 93 of the "American Lecture Series" and is characterized as "A Monograph in American Lectures in Public Protection." It is a short study by a competent authority and supplements a similar undertaking of the same author some fifteen years ago. Its content is more aptly described by its sub-title, "What Can an Accused Person Be Compelled to Do?", than by its main title, for it deals but scantily with the history or basis of the testimonial rule against inquisition. All its chapters but one are devoted to circumstances where the existence of the rule has influenced courts to question the competency of evidence not wrung verbally from the lips of the accused but somehow connected with his person,—foot, finger, blood, whiskers, stomach contents, nail scrapings or clothing,—and called for to be used in demonstration.

Such chapter subjects as truth serum and lie detectors, blood grouping and intoxication tests, calligraphy and the removal of disguise, are in themselves enough to indicate how the ramifications of the rnle struggle to be

16. Professor Baker: "With your remarks that there is no point in using the term 'legally irrelevant' I am in complete agreement. And I have, for a long time, been unhappy over my discussion of the media of proof question. . . . I should happily have had that deleted from the book after it appeared."

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extended and often become the ascribed support for results that could better be charged to the account of other procedural regulations. The resounding asseveration of John Lilburn that it is "contrary to the laws of God, nature and the kingdom, for any man to be his own accuser," seems still to serve as a pillar of cloud or fire even for courts equipped with a Wigmore compass. Thus the suppression of evidence discovered by unlawful search, the rejection of confessions obtained by torture, or even mere decencies of courtroom decorum are hastily assumed to be the consequence of the rule against a demand for self-incrimination. Like Browning's doctor whose admiration was kindled by the way scalp disease and leprosy mingled their symptoms, a legal philosopher must note the phenomenon that principles of law are often confused because they happen to lead to the same result.

One who regards the recent cases cited by Professor Inbau will be impressed by the continuing vitality of the rule against compulsory self-incrimination notwithstanding the assaults that have been made upon it by logicians, although the psychological root of its strength is still conjectural. Whether it be what Jeremy Bentham called the Old Woman's Reason, " 'Tis hard," or the Fox Hunter's Reason, "A fair chance for his life," or any of the other grounds ridiculed by that scholar's sarcasm, it must be conceded that the tree stands pretty firmly fixed and that rather than be troubled for its withering, we need be more concerned with keeping it properly pruned.

ALBERT WILLIAMS*

ADMINISTRATIVE LAW. By Kenneth C. Davis.[1] St. Paul: West Pub. Co., 1951. Pp. xvi, 1024. $8.00.

ADMINISTRATIVE LAW: A TEXT. By Reginald Parker.[2] Indianapolis: The Bobbs-Merrill Co., 1952. Pp. x, 344. $5.50.

ADMINISTRATIVE AGENCIES AND THE COURTS. By Frank E. Cooper.[3] Ann Arbor; University of Michigan Law School, 1951. Pp. xxv, 470. $5.00.

Professor Davis has written an excellent book. The subject matter is so difficult, and, in its present status, so unsettled, that it tends to baffle one. But Professor Davis has it in control throughout the book.

Many of the chapters of the book were the subjects of separate articles written by the author for law reviews in recent years. The author has thus

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been able to give second thought to the questions, and to take advantage of criticisms made by other scholars. Thus a book is written deliberately, and in the scholarly fashion of a series of legal essays, and not against a publisher's deadline.

The tone and attitude of the book are favorable to administrative law. Probably any reasonable current writer would at least have to accept administrative law on a big scale as existing, and inevitable. Since most of our historical developments in the field of government have been improvements, it would seem that this development, which has pressed on so persistently, must likewise be an improvement. The author's attitude, then, of accepting it, appraising it fairly, and suggesting betterments in its operations, is the right attitude.

Chapter 1 deals briefly with the history of the administrative process and the reasons why it has to such a degree supplanted court proceedings. It leaves the reader wondering whether the courts could have, by better attuning themselves to the needs of the times, retained the confidence of the legislators and thus prevented them from turning over to other bodies the making of many important decisions. One subject the author does not discuss, nor does anyone else, to my knowledge. Why did the courts, having the dogma of separation of powers at hand, permit the entry into the judging field by those who did not qualify under the Judicial Article of the Constitution, to engage in judging? The courts have shown some zeal to protect the legislative power from executive encroachment, even when the legislative tried its best to delegate its powers. They have, upon occasion, protected the executive from legislative encroachment. But so far as keeping trespassers out of the judging field, no real effort has been made. In modern times there has been reason to believe that the judges have not wanted to do some of the judging which new laws made necessary; that some felt that they were not qualified to do it because it required knowledge and skills which the traditional lawyer did not have; that others felt the subject matter was undignified and smacked more of the laboratory or the picket line than of the traditional court. If judging was to be kept in the hands of judges, perhaps it would have been necessary to create special courts of judges having the necessary particular qualifications for the new kinds of judging. This would have multiplied and diluted the judiciary. At any rate it hasn't been done, and much of the judging has passed into the hands of those who are not, in name, judges. The system in use on the continent of Europe, of courts of many members, but divided into senates or panels which deal only with special problems, has certainly diminished the prestige of judges, and has probably not produced a better quality of decisions than those of our administrators in their special fields.

Chapter 4, relating to the informal activities of administrative agencies, shows the reader what a large and important part of the work of these agencies is really beyond the reach of judicial review or of procedural safeguards imposed by Administrative Procedure Acts. The author says "Now that fiery resistance to the processes of the NLRB and the SEC has largely burned itself out, one of the hottest spots in the federal regulatory administration is the FCC's control of the content of radio programs." (P. 138.) He then proceeds to examine at length the Radio Commission's informal practices and accomplishments. The quoted statement, showing how completely public opinion can change within a decade, is an assurance that both agencies and their opposition can, by experience, learn how to enforce the laws and defend their clients without stirring up useless public excitement. Useful information for the practitioner as to what may be gained from agencies such as the SEC and the FTC by negotiation and stipulation, is in this chapter. Section 48 is entitled "Administrative Aggressiveness versus Administrative Apathy in Prosecuting." The author says, "With the passage of time administrative agencies, like men, lose their youthful vigor. . . . An outstanding example of administrative old age is founded [*sic*] in that patriarch of agencies, the Interstate Commerce Commission." (P. 164.) Whether the following discussion proves the point, this reviewer does not undertake to say, but he will say that when he was a member of a youthful agency, he envied the ICC the kind words which dignified persons used to use about it in public addresses. Is it worth noting that practically the only slip of language noted in the whole book is the one contained in the unkind sentence quoted above about the ICC?

Chapter 6, "Rule Making Procedure," and the extent to which it should or does permit participation by interested persons, should be required reading for administrators. They can learn what the law requires, what is fair, what is practicable, in this important process. There have been many experiments in recent years, and the author seems to have learned about all of them. The discussion of the sometimes attempted differentiation between rights and privileges (p. 248) is good. There is a thorough analysis of the decisions on the question of what sort of proceeding must precede the revocation of a license. The author rejects the idea that there is an essential difference between the rights of a doctor, on the one hand, and a dance-hall operator, on the other, and concludes that the decisions, minus the dicta, do not really make such a distinction. At page 256 there is a discussion of the question whether, because a legislature may make laws without a hearing, an administrative body may make legislative regulations without a hearing.

Chapters 7 to 13 discuss adjudication procedure in administrative agencies. Of these, Chapter 8, "Institutional Decisions," is especially interesting.

The first section is headed "Efforts to kill the institutional decision and its survival." The author favors the institutional decision, and disagrees with the statement in the *First Morgan Case*,[4] "The one who decides must hear." He describes what is actually done in the various types of agencies and one gets the impression that the deciding is done in the only way in which it is practicable to do it, considering the volume of work and the available hands. One might cite the medical clinic as an improvement over the individual practitioner to support the conclusion that an institutional decision is more likely to be sound than that of one or three or five individual agency members. Section 107, "The Institutional Decision, the APA [Administrative Procedure Act] and the Future" shows how little the APA, developed with conscientious deliberation over many years, resembled the hasty proposals of the American Bar Association.

Chapter 9, "Bias," is introduced by four quotations, two of which approve and two disapprove the holding, by a judge or other deciding officers, of strong personal views. When a legislature creates an administrative agency, it has in mind the accomplishment of a purpose, and wants the deciding done by persons who favor that purpose. And if the legislature continues to want that purpose to be accomplished, it will not long permit the agency to survive unless it accomplishes it, or does what it can in that direction. The author says "The theoretically ideal administrator is one whose broad point of view is in general agreement with the policies he administers but who maintains sufficient balance to perceive and to avoid the degree of zeal which substantially impairs fairmindedness." (P. 374.) This reviewer believes that practically all of the members of the federal administrative agencies fulfill that description.

Chapter 20, "Scope of Review," deals with judicial review of administrative decision. This has been, and is, one of the most troublesome problems of government. The difficulties are fundamental and there is no apparent solution. When an appellate court reviews the decision of a trial court, it is operating in its field of competence, and the decision is not often surprising or disturbing. But when a court reviews the decision of an administrative agency, it may be attempting to decide questions which it is quite incapable of deciding intelligently. The administrative decision may have been an "institutional" one, influenced by expert accountants, engineers, doctors or other technicians. The court has available no such assistance. So the agency, and the friends of the policy which the agency was created to promote, are critical, and sometimes rightly so, of the court's decision. That is one problem. Another one is the combined results of the constitutional doctrine of separa-

4. 298 U.S. 468, 481, 56 Sup. Ct. 906, 80 L. Ed 1288 (1936).

tion of powers, and of legislative lack of confidence in the competence of the courts to decide these questions and legislative desire not to burden the courts with the volume of work which their complete review would require.

Because of the separation of powers doctrine, the Labor Board, for example, cannot be given the power to enforce its own orders, for example to collect back pay from employers or fine or imprision those who disobey cease and desist orders. So the legislatures must turn enforcement over to the courts, and Congress lodges it in the United States Courts of Appeals. But, for the other reason mentioned above, the courts are given only a limited power of review, and must enforce the order if it is supported by the Board's findings of fact, and those findings are supported by "substantial evidence on the whole record." Thus the court may be required to use its powers to enforce a decision not made by it, and which it would not have made if it had had the responsibility of decision. Its situation is quite different from that in which it has only a limited power of review over the decision of a trial court. If it disagrees with such a decision, but cannot find that it is "clearly erroneous" and therefore cannot reverse it, it does not have to take any responsibility for the decision, or use its powers to enforce it. The trial court has its own enforcement machinery. Perhaps the only comparable situation is that of the trial court and the jury. The trial judge must frequently find it very distasteful to use the powers of his court to execute what he regards as a completely mistaken verdict of a jury.

Perhaps a part of the distaste which the United States Courts of Appeals feel when required to enforce orders of administrative bodies with which they disagree is due to the fact that Congress, in limiting their powers of review, expressed a lack of confidence in their capacity to decide such questions as ably and conformably to the spirit of the law as the administrative body could decide them. Their spirits may be somewhat assuaged by the more extensive powers of review given them by the Federal Administrative Procedure Act and the Taft-Hartley Act. But the basic arrangement is an unfortunate one, and does not make for good relations between the courts and the administrative bodies. No alternative seems to be suggested except the creation of an administrative court of appeals, and there is much to be said against doing that.

The closing chapter, "Scope of Review" contains an acute and thorough discussion of how courts approach the review of administrative decisions. Reasonable explanations are given of the inconsistent decisions. These explanations lie rather in the field of human equations, than in subtle analyses of legal rules. Generalizations, apparently important, have been promulgated by the Supreme Court, as in the *First Morgan Case* and in *Crowell v.*

Benson,[5] which have been repudiated or abandoned after only a few years. The difficulty of finding right answers to the problems is thus emphasized. But the author's treatment will be a great help to lawyers and scholars.

At the end of each chapter is a well-done condensation entitled "Summary and Conclusions." A lawyer familiar in a general way with the subject, or having read the book with care, could from time to time read these summaries and thus refresh himself on the important problems of Administrative Law.

Professor Davis should be commended for a fine piece of writing and lawyers should welcome such a good book in a field in which they need instruction.

Mr. Parker has given us a compact, well written text. The author's approach to the subject is shown in his preface. He says that the older view of administrative law was that it was the law of judicial review, of court control against administrative excesses. He, on the other hand, regards it as including also what the Government may do to protect itself and its constitutents against private abuses. This book then, like the Davis book, looks with favor upon administrative processes.

The discussions of the basic doctrine of separation of powers contains an acute historical analysis and some original views. But this author, like the others, does not discuss the baffling question of why the courts have made no serious effort to prevent a large part of the business of judging from being put, by the legislature, in the hands of those who are not judges, according to the constitutional definition.

At page 52, in his discussion of due process, the author accepts as valid the common assertion that, in the field of revocation of licenses, the law makes a snobbish distinction between "professional" licenses, such as those of lawyers, doctors and dentists, on the one hand, and licenses to operate pool rooms, dance halls and taverns for the sale of hard or soft beverages, on the other. Davis thinks that, disregarding *obiter dicta,* the cases do not support the asserted distinction.

The foundation elements, the historical separation of powers doctrine and the constitutional requirement of due process, having been discussed, the author, in chapter 4, introduces the Federal Administrative Procedure Act of 1946. He uses this statute, throughout the rest of the book, as the framework on which to hang the discussion of the problems of administrative law. He does not think that the Act made much new law and says that "the Act's chief merit lies in the fact that it has refrained from any telling

5. 285 U.S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598 (1932).

innovation." (P. 63.) One may compare the statement of Mr. Justice Frankfurter in *Stark v. Wickard*,[6] that "There is no such thing as a common law of judicial review in the federal courts." There was, however, by 1946, a great body of administrative habit and practice, and of judicial decisions, most of which was in accord with what was written into the Act. At page 63 the author quotes Savigny and discusses, with wisdom, the possibility of successfully codifying the law of any subject at any given time.

In the discussion of internal organization within administrative agencies the author says, of the separation of functions within agencies: "The Taft-Hartley Act has established a unique exception by making, to a certain degree at least, the Board's General Counsel a separate agency. This experiment has not proved to be an administrative success and is not likely to be repeated." (P. 108.) This would seem to be a too hasty conclusion. This reviewer has the impression that, currently, the experiment is working well enough, and that the dire predictions that it would prove to be an impossible arrangement have not been fulfilled.

On pages 111, 113 and 263 the author adverts, critically, to the doctrine of the National Labor Relations Board that it is privileged to refuse to take jurisdiction of cases which fall within its statutory powers if it thinks that its taking these cases would not effectuate the policy of the statute. The doctrine does have about it an air of royal grace which reminds one of the petitions addressed to the crown before the chancellor's function as a court of equity became regularized.

In the discussion of regulations and interpretations the author gives us the interesting information at page 196 that in Europe, in the absolute monarchies, it was permissible for a court to ask the monarch what he meant by his ambiguously worded statute, and that the French Civil Code expressly outlawed this practice. In the Office of Price Administration, during the last war, persons affected by price orders were invited and encouraged to inquire, when they were in doubt. The consequence was that, for one person, the lawful price was what regulation seemed to say it was while to another person who had inquired what the regulation meant, the lawful price was what the officials had intended to say that it should be. It would be quite impracticable, of course, to make such an inquiry of a legislature.

The subject of administrative decisions, what they must be based upon and how they may be made is disucssed with understanding. The recent important Supreme Court decisions in the *Universal Camera*[7] and *Pittsburgh*

6. 321 U.S. 228, 311, 64 Sup. Ct. 559, 88 L. Ed. 426 (1944).

7. Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 Sup. Ct. 456, 95 L. Ed. 456 (1951).

Steamship[8] cases are explained (p. 226), and their effects, so far, on lower court decisions are noted. The failure of the famous *First Morgan Case* decision to change the practice of "institutional decisions" is observed on page 231. There seems not to be in the book an adequate description of the institutional decision nor an appraisal of its merits and demerits.

The author disposes of the subject of enforcement of administrative decisions through the courts in two pages. (Pp. 283-84.) There is no mention of the tendency of this process to create friction between the agencies and the courts. The more pleasant part of the process, the weighing of the evidence and the reasoning out of a wise solution of the problem has, largely, been taken away from the courts by the statutes, and lodged with the agency. The less pleasant part, enforcement, has, for reasons largely of constitutionality or economy, been left with the courts. And they don't enjoy the chore, and sometimes do it grudgingly.

The last chapter is a short discussion of claims against the government for misadministration, which shows that, in general, such claims cannot be enforced. The Federal Tort Claims Act of 1946 did not include them.[9]

There is a large body of law concerning the interpretation of provisions commonly written into Government contracts, which provisions the Government uses defensively when it is sued for breach of contract. Decisions by contracting officers, by heads of departments or appeals boards acting for heads of departments, by the United States Court of Claims or, if the claim involves less than $10,000, by United States District Courts, and decisions of the Supreme Court of the United States, are numerous. The law and the practice of how the Government treats those who contract with it, are important. One wonders why it receives no treatment in textes on administrative law.

Professor Parker's book is a useful text on a difficult subject.

Mr. Cooper's book is one of the University of Michigan Legal Studies, and is worthy of that distinguished company of books. The title might indicate a somewhat narrow scope for the book, but one finds that court litigation has involved so many of the activities of administrative agencies, that the whole subject of administrative law is quite well covered by the book. The author is not as sympathetic to the administrative agencies as is Professor Davis, but is, on the whole, fair and realistic in his comments. He briefly gives the history of the development of administrative agencies, and the reasons why they were needed to cope with the problems of the times. He is unable, as

8. NLRB v. Pittsburgh S. S. Co., 337 U.S. 656, 69 Sup. Ct. 1283, 93 L. Ed. 1602 (1949).

9. Mr. Parker has subsequently written more at length on this subject. See Parker, *The King Does No Wrong—Liability for Misadministration,* 5 VAND. L. REV. 167 (1952).

everyone is, to fit them logically into a constitutional system whose ideal is the separation of governmental powers into three divisions. He thinks that when administrative agencies, by delegation, legislate, they exercise legislative functions, and when they by legislative authority, judge, they exercise judicial functions, and that the *quasi* prefix is only a fiction. He seems to think that the courts have not been effective in keeping administrative agencies within bounds, and that the legislatures must be looked to for such relief. (P. 47.) However, the book contains little discussion of the Federal Administrative Procedure Act, the most notable attempt to do what the author recommends.

Chapter 9, "Presentation of Evidence," contains the statement at page 180:

> "While often freed by statutory provision from the necessity of following the common-law rules of evidence—or, as it is not infrequently expressed, the technical rules of evidence—most agencies in practice, and often by specific agency rule, apply the fundamental principles of relevancy, materiality, and probative force in a manner not unlike that of equity courts. Partly, this results from their constant consciousness of the necessity of supporting all findings by 'substantial evidence,' in order to avoid the possibilities of judicial reversal of their determinations . . . ."

This patronizing suggestion that administrative officers do not act like idiots and waste their time listening to evidence that does not bear upon or tend to prove anything relating to the question in hand, but that they refrain from acting like idiots partly, forsooth, because with that acumen with which nature on occasion endows idiots, they know that if they don't act wiser than they are they will get caught at it, is really not worthy of the author or the book. There may have been administrative officers who thought that some evidence tended to prove something when some judges thought it did not, and either the officer or the judges may have been right, but the judges had the last word. The way in which the statutes are written tends to indicate that the legislatures think the administrators are more competent to judge how much certain evidence proves in the field assigned to the various agencies, than the judges do. And the judges recognize that, when it concerns the balance sheet for the rate schedule of a railroad. But as to labor relations, for example, not only every judge, but every man in the street and in the barber shop and tavern knows all the answers; and either there are no experts, or everyone is an expert—everyone except those rare judges and laymen who are so wise that they recognize their own possible limitations.

On page 190, the author, discussing the drawing of inferences, says:

> "Where the important question is not a matter of primary fact but of inference, it is inevitable that an agency approaching a case (as many administrative agencies

do) with a desire to reach one result, if possible, rather than another, will often find it easy to make an inference on facts which to a totally disinterested judge would not preponderate in support of the inference."

This reviewer can only say that, so far as the important federal administrative agencies are concerned, he has never known even one such agency as the author describes.

In the last chapter, "The Scope of Judicial Review," there is an interesting suggestion of possible reasons why the courts review some kinds of cases, and decisions of some agencies, more freely than others. There may be merit in the analysis, though there is something offensive in the idea that administrative agencies should be less carefully watched by the courts when they make decisions with regard to the conduct of public business than when they make decisions affecting private business. It may be rather that the differences lie in the age and respectability of the agency, the feeling of the judges that the subject matter is so unknown to them that they could probably not improve upon the administrative decision, and their sense of the "mood" of the legislature in enacting the legislation.

This is a thoughtful and carefully written small book which is a valuable addition to the growing literature about Administrative Law.

J. WARREN MADDEN*

PRODUCTS LIABILITY AND THE FOOD CONSUMER. By Reed Dickerson. Boston: Little, Brown & Co., 1951. Pp. xviii, 339. $7.00.

It is impossible for today's practicing lawyer to keep up with all the advance sheets of his state appellate courts and the federal reports, let alone the leading textbooks and law review articles. Consequently, we must have various capsulized versions of current legal works, even as we have vitamized and briefed forms of food products.

So, I presume the book reviewer preforms his "capsulized activity," if he himself, having had some experience in the particular field of which he reviews, does a vicarious reading, thereby recommending or disproving of the tome. (I remember the late beloved Max Radin's book reviews with something of awe. He was an exponent of the "capsulized version": he is the only man I ever knew who could review a book to thoroughness and still leave uncut many of the pages in it!)

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*Judge, United States Court of Claims; Chairman, National Labor Relations Board, 1935-40.

At the outset of our review, we unhesitatingly state that we approve the work *Products Liability and the Food Consumer,* by Reed Dickerson. We recommend it to anyone trying a case involving products liability.

Probably 70% of all tried civil cases are personal injury actions. A fair estimate would be to say that 10% of these are products liability cases. They, however, are not the "blue chips" of litigation. The reader will recognize in the cited cases injuries much more vexatious than disabling, this both to the plaintiff and the defendant. He must likewise be impressed with the fear, or hope, as the case may be, of the potentiality of his too becoming a plaintiff. For, unless he has no concern with the law of average, one cannot read about the amazing variety of defects in the startling array of invented commodities without to himself thinking, "But for a safer bottling method, there go I!"

Dickerson's art of writing has nicely blended in the economic with the legal. Under his topics of "Compensation" and "Prevention" he cites interesting statistics on claims presented for the particular type of action. Thus, for the X Dairy, 53% of foreign substance claims (70 out of 133) brought an average of $23.68. In another instance of the R. M. Grocery Co., 63% were decided in the plaintiff's favor, while the recoveries in which damages were awarded averaged $1,282.29, with a median recovery of $600.

This reviewer, having authored "The Adequate Award"[1] and "The More Adequate Award,"[2] hardly finds favor with some of these awards allowed. Of course there are more adequate and therefore more tragic examples. Says the author:

> "Each class of food product has its peculiar risks. Both claims and complaints tend to bunch around these risks and call attention to the sore spots. For large milk companies, the experience of the X Dairy in recent years is probably typical. In its metropolitan business, the X Dairy received 1,724 complaints of various kinds, of which about 700 represented claims for money. Two hundred of the 1,724 were individually examined. Of these, 69 were for glass, 17 for dirt, 10 for solder pellets (in canned milk), 12 for unclassified foreign substances, 5 for cockroaches, 4 for wire or tin, 3 for wood, 2 for soap, 2 for kerosene, and 1 each for tacks, lead soldiers, rubber darts, matchsticks, wax, cereal flakes, rust, snails, straw, bottle caps, pieces of meat, potash, hairpins, and tinfoil. There were also 14 cases whose precise cause, other than a peculiar odor or taste, were unidentified, 35 hand laceration claims caused by defective bottles or bottles to which broken glass adhered, 2 sour milk complaints, 2 defective caps, 2 defective hood wires, and one bottle explosion." (P. 248.)

The author shows that of the approximately 700 claims mentioned above, 395 were settled for an average of $24.58! Total: $9,710.85. He states that

1. 39 CALIF. L. REV. 1 (1951), also in 1951 INS. L.J. 577.
2. BELLI, THE MORE ADEQUATE AWARD (1952) (obtainable from the reviewer's office, 240 Stockton St., San Francisco).

"the pressure of claims is evident also in the experience of M. Packing Company during a recent one-year period. The total outlay for the period was $33,841, a figure well worth paring, even though the company had only one claim for each $2,000,000 of sales, or $.0005 for each dollar of sales!" (P. 249.)

Dickerson also examines the plaintiff and statement is made that claimants tend to come disproportionately from the "poorer classes" that otherwise are outside the circle of "nice" people who are reluctant to press legal claims. It is also stated that the rising claims consciousness developed since World War I.

It is interesting to note that the author states that not *for* the consumer, but *because of* the consumer's complaint, numerous preventive measures have been taken. The function of plaintiff and his personal injury lawyer may indirectly be seen herein:

> "A large national packing house, for example, reports that trichinosis claims led them to put in a 20-day freezing process for pork to be eaten without cooking. Cockroaches have tightened certain housekeeping measures. Metal in sausages has brought greater care in the inspection and use of shovels for handling sausage filler. Glass in sausages has resulted in rules forbidding workers to include milk bottles with their lunch boxes, or to wear wrist watches with glass faces. Thermometers have to be of shatterproof glass"! (P. 253.)

These reported instances by the author bring to this reviewer's mind the case of *Pillars v. R. J. Reynolds Tobacco Co.*,[3] which he had occasion to cite some years ago. Plaintiff had bitten into a plug of chewing tobacco. He found a human toe therein. Said the court in the understatement of that year, "someone has been very careless!"[4]

Here is a field, however, in which contributory negligence has seldom defeated recovery. Says the author: "As eater, the consumer has no legal incentive to examine what he is eating, and a failure to take this precaution is uniformly held not to bar recovery. At the table, or otherwise in the act of eating, most guards are down. . . . To require him to verify all suspicions might produce, in the words of an Illinois appellate court, 'hunger in the midst of plenty.'" (Pp. 77-78.)

We have tried our share of the products liability cases: toothbrushes in beer bottles, a mouse in a Cola bottle that beverage being drunk by a pregnant woman and claimed miscarriage, beauty aid burn cases, beauty shop hair curling cases. (We even tried one involving a preparation to straighten colored people's hair; it did, but only after the hair spontaneously detached itself from

3. 117 Miss. 490, 78 So. 365 (1918).
4. The full quotation is: "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless." 78 So. at 366.

the skull.) We have had exploding bottles,[5] decomposed meat in sandwiches, and ptomaine poisoning from a hamburger steak in a Chinese restaurant, which last case almost posed the problem of caveat emptor.

But the potential dietary jackpot is not truly contemplated, however, until one reads, on page 235 of the success of the hungry consumer in cases of trichinosis, botulism, lead poisoning, undulant fever, indigestion, stomach inflammation and ulcers, diarrhea, nausea, vomiting, cramps, hernia, hemorrhoids, fainting spells, lacerations of the tongue, gums, mouth, and intestinal tract, broken teeth or dental plate, loss of teeth, mouth burns, depleted vitality, loss of weight, impairment of general health, miscarriage, fever, pain, suffering, nervous shock, mental anguish and "humiliation," aggravation of existing disease, hospital expenses, X-rays and medical treatment, loss of work. This is only a partial list.

The more "adequate" cases are contained in the footnote on page 237, such as a mouse in kidney saute, mucuous substance in Coca Cola, mouse in Coca Cola, mouse in chicken pie, cockroaches in pie, fly in bacon, bug in bread, centipede in soup, mouse in preserves and so forth. (This is definitely a book not to be read at the supper table.)

Under the discussion of the problem of fraud, we believe the author is unrealistic in citing from the National Canners Association: "Thirty years experience . . . demonstrated that a large proportion of the claims are either grossly exaggerated or fraudulent. . . . Claims of this character have increased to such an extent in some cities that the local courts have found it necessary, with the co-operation of the local bar associations, to call for an investigation into the activities of certain attorneys." (P. 263.)

We regret that in an otherwise very realistic, practical and well-authenticated book, these remarks should be made. We do not believe them to be factual. It is difficult to believe that one would lay claim to having partaken, for example, of a mouse kidney pie without actually and unfortunately having so participated. It is interesting also to note that the index system of the claims bureau of the Association of Casualty & Surety Companies keeps a service for subscribers, including, as of October 1, 1950, about 202 insurance companies and 132 self-insurers, who report the names, addresses, doctors and lawyers of accident claimants. "From the information pooled, the Claims Bureau is frequently able to intercept the fraudulent claim repeater." (P. 263.)

Justice Traynor, of the California Supreme Court, writing a concurring opinion in *Escola v. Coca Cola Bottling Co.*,[6] recognized the availability of

5. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944).
6. 24 Cal.2d 453, 150 P.2d 436, 440 (1944).

insurance by the manufacturer and an imposition of absolute liability. Dickerson comments: "At the same time, there is the larger interest of the innocent consumer to be considered; and since it is his needs that give meaning in the first instance to the operation of the food business, he should not be compelled to accept without redress the individually devastating effects of risks that can be better borne or distributed by those who profit from the enterprises to which they attach." (P. 265.)

The chapter headings and sub-headings are excellent. It is the application of the "common sense" method of indexing that should be more prevalent in law books. For instance, under title "Fault of the Buyer," the subheads are "The Problem," "Negligence Cases," "Warranty Cases." Under "Some Considerations of Public Policy," are the subheads "Arguments for and against holding the retailer absolutely liable." Under the main head "Liability of the Manufacturer for Breach of Warranty," the various subheads of privity appear, and under the topic of "Liability of the Manufacturer for Negligence," the various problems of proof are broken down. Under "The Trichinosis Cases," there are at least 18 different headings, such as " 'Trichinous pork is unwholesome, but judgment for the defendant'—Contributory fault," "Pork to be eaten without cooking."

The writing is logical, salient, and terse. The book is extremely well footnoted, the table of cases is excellent, the appended "select list of authorities" relating to liability for defective products other than food is interesting. There are ample citations from the Year Books to *Yeo v. Pig 'N Whistle Sandwich Shops.*

In all, the book is recommended for any lawyer with a products liability case. First, for a general background, into all phases of the problem, historical, legal and economical. Interesting phrases for jury argument and possible "demonstrative evidence" are presented. The book is as readable as a novel. Secondly, the book is likewise available for specific authority in a particular case.

MELVIN M. BELLI*

TAX PLANNING FOR ESTATES. By William J. Bowe. Nashville: Vanderbilt University Press, 1952. Pp. 100. $2.10.

The first edition of this book appeared in 1949. The author points out that "since that time, the Revenue Act of 1950 and the Powers of Appointment Act of 1951 have introduced material changes of vital importance to

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estate planners. The new contemplation of death provision, the redemption of stock to pay death taxes amendment, the drastic modifications with respect to charitable trusts and other tax exempt entities, the complete overhauling of the powers of appointment sections of the gift and estate tax law, necessitated substantial changes in the text if it were to continue to be usable." (P. iii.) The present revision brings the text up to date. It provides much valuable material for the troubled layman and those seeking to be of help, the lawyer and the experienced estate planning counsel.

That nothing is more certain than death and taxes all agree, and as to the latter the author stresses the need for contemplation of the steady increase and converse decrease in amount of exemptions. The many suggested solutions, programs and plans of the writer, are all well reasoned and present a sound basis for the avoidance of taxes without attendant danger.

We are told that much can be accomplished under the present law. However, Mr. Bowe reminds us of existing pitfalls and the need for proper planning with emphasis on the plan being flexible. Here lies the secret of the author's continued success in this all important field. Quite often laymen and many so-called experts typify the old expression, "fools rush in where angels fear to tread," in dealing with tax problems. If the warnings of Mr. Bowe are taken to heart, much can be achieved by those desirous of tax advantages or savings. Should changes occur in the laws and regulations, as they undoubtedly will from time to time, all will not be lost as otherwise would be the case with an inflexible plan.

The clarity of this text and earlier work of Mr. Bowe on the same subject allows an easy recognition of the many problems mentioned in the discussion. However, the examples given and the solutions suggested warn against planning within the field without competent counsel. The considered necessity of an early revision of the original text should compel our attention to the requirement of continually reviewing pertinent law and changes therein.

Summarizing the conclusions to be reached from the concise presentation, young and old, those of moderate means and others with more at stake, should plan now for the future in view of the assured increase in the obligations of the governments, Federal and State. The savings alone that can be accomplished regarding income taxes, gift taxes and so-called death taxes, clearly illustrated in this revision, warrant the interested person in first reading this edition and then applying the appropriate suggestions to his particular case.

GEORGE HENRY TYNE*

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THE ESTATE TAX HANDBOOK. Edited by J. K. Lasser.[1] Albany: Matthew Bender & Co., 1951. Pp. 846. $15.00.

As the title suggests, the articles collected in this book are not confined to estate tax planning problems. The final article is entitled, for example, "How to Prepare an Estate Tax Return." However, the estate planning approach is evident on almost every page. Titles like "How to Coordinate Business Transactions with Estate Planning," "How Trusts Should Be Planned to Help Estate Planning," "How to Avoid Transfers Intended to Take Effect at Death," "How to Use Powers of Appointment in Estate Tax Planning," "How to Integrate Life Insurance into Estate Tax Planning," are indicative of the major emphasis to be found throughout the book. There are 23 articles in all. Five are devoted to marital deduction problems; two deal specifically with life insurance and many others touch this problem indirectly; stock purchase agreements and their effect on value for estate tax purposes are discussed in considerable detail in at least five articles in the book.[2] Indeed, one of the merits in a collection such as this is that because the basic problems in estate planning overlap the necessarily artificial separation of subjects,[3] the reader gets the different slants of many experts dealing with the same problem from varying approaches.

As perhaps one should expect, the quality and value of the articles differ tremendously—some are excellent, definitely superior. Mintz and Eifler, "How Trusts Should Be Planned to Help Estate Planning" and two articles by Foosaner on how to avoid transfers taking effect at or after death[4] are recommend for study to all lawyers working in this field and should be required reading for all law students. Other articles impress one as copies of talks hastily revised and sadly lacking the precise and painstaking writing that is so important in this field of the law if the novice is not to be misled. Some articles are excellently footnoted with all of the leading cases referred to and discussed. Others contain little or no reference material.

One fault—perhaps unavoidable in a collection of this number—is that the articles were obviously written at different dates and in a few instances

1. Adjunct Professor of Taxation, New York University; C.P.A. Other contributors include Martin Atlas, Frank B. Appleman, William J. Casey, Elmo H. Conley, Arnold L. Cutler, Robert H. Eifler, Malvern B. Fink, Samuel J. Foosaner, Wilbur H. Friedman, Alan L. Gornick, Sydney A. Gutkin, Benjamin Harrow, Raymond W. Hilgedag, George J. Laikin, George B. Lourie, Seymour S. Mintz, Charles A. Morehead, Roger K. Powell, I. A. Powers, Harry J. Rudick and R. L. Rockefeller.

2. Discussion commences at pp. 6, 41-46, 253, 359, 413.

3. Thus one cannot discuss buy and sell agreements without getting into problems of valuation, stock options, life insurance, etc. Similarly one cannot write about trusts in estate planning without considering transfers intended to take effect at death, powers of appointment, etc.

4. The first involves trust transfers and the second "other transfers."

there is a regrettable failure to adequately revise the text in the light of later developments. For example, "How Trusts Should Be Planned to Help Estate Planning" must have been completed before the Powers of Appointment Act of 1951 became law.[5] There is not even a footnote to suggest the very drastic changes which that act brought about. In the article entitled, "How to Use Powers of Appointment in Estate Planning" ten pages are devoted to Section 811 (f) as it read from 1942 to June 28, 1951, again with nothing to indicate that it is no longer law; then follow only 2¼ pages of not very informative material on the New Act.[6] The discussion on life insurance and stock redemption agreements at page 357 was written after the Tax Court decision in the *Emoloid* case, whereas in another article obviously written after reversal of that case by the court of appeals, the same topic is discussed at page 419 but in the very changed atmosphere which the later opinion has created.

The book is excellent. The above criticisms are merely to say that it could be better. It contains a very complete reference and discussion, with many helpful suggestions, of all the tax saving tools available to the estate planner. It is definitely recommended reading for all who draw wills, both the beginner and the seasoned practitioner.

WILLIAM J. BOWE*

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5. See pp. 145, 152.

6. Pp. 262-72, 272-74. See by way of comparison the excellent discussion in Turk, *The Powers of Appointment Act of 1951,* 90 TRUSTS & ESTATES 428 (1951).

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