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Book Reviews

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BOOK REVIEWS

LIFE INSURANCE AND ESTATE TAX PLANNING. By William J. Bowe. Nashville: Vanderbilt University Press, 1950. Pp. 92. \$2.00.

This little volume is particularly timely since it comes at a period when more and more practitioners are turning to the Practising Law Institute, and other educational institutions for specialized courses in taxation, trusts and estate planning. Life insurance has in recent years received approbation as the one vehicle upon which sound plans of income distributions should be built; hence Professor Bowe's emphasis upon this medium as an instrument of disposition. The present work ties in neatly with the author's previous effort of 1949, *Tax Planning For Estates*, which places particular emphasis on inter vivos gifts as a valuable method of distribution.

Tax pitfalls await the unwary. Policies, unlike other property cannot be easily made the subject of gift for the purpose of reducing the estate tax. Section 811 (G) (2) of the Internal Revenue Code covers both incidents of ownership retained by the transferor and/or his payment thereafter of premiums directly or indirectly. Either situation, when found to exist will result in the inclusion of the proceeds in the estate of the decedent-transferor in whole or in part. A gift of a life policy even when recognized, nevertheless, results in partial inclusion of the proceeds in the decedent's estate in proportion to the premiums paid by him. Illustrations are offered to indicate variations from the general rule. An outright sale to a third party while effective in reducing the taxable estate may prove of doubtful value to the purchaser who is faced with an income tax and not a long term capital gain on receipt of the proceeds at the insured's death.

How to qualify insurance proceeds for the marital deduction receives some attention. Space limitations evidently have prevented the author from expanding on this all important topic. The explanation of settlement options, too, might have received more liberal treatment. However Professor Bowe is at best in focusing attention on agreements dealing with the disposition of a participant's business interest effective at his death. He dwells upon the value of life insurance proceeds to guarantee that funds to effect purchase will in whole or in part be available to the survivors. A clear-cut agreement which embodies a price formula, restricts sale among the participants at least of a first offer basis, or better still, compels the survivors to buy may well withstand contest on valuation.

Many partnerships and close corporations involve family members and frequently the estate planner is asked by his client whether an interfamily purchase and sale agreement will fix the valuation as established in the agreement as controlling for estate tax purposes. In a father-son contract Professor Bowe points out that not only is there not an arm's length transaction but the consideration given by each of a promise to buy and sell is not substantially equal. The result, because the father receives less consideration than that which he has given, may be considered a gift from father to the son. In addition, because the father retains rights under the agreement until death, inclusion of the value of the stock in his estate under Section 811 (c) of the Internal Revenue Code will result.

It should be pointed out that the impact of local law should not be overlooked. Pertinent sections of the New York Decedent Estate Law and other statutes and related decisions might well be reviewed by the planner. Ill-considered distributions before or after death may result in problems under Section 18 of the New York Decedent Estate Law dealing with the surviving spouse's right of election and Section 26 of the New York Decedent Estate Law which is concerned

with the rights of afterborn children to take against the will. Totten trusts and joint bank accounts may likewise raise problems. It is the fashion these days to regard tax savings as the primary objective. In this reviewer's opinion it is secondary to the operation of a sound plan. They are not necessarily mutually exclusive.

On the whole this book is worth reading as a birdseye view of the area of larger problems which beset the lawyer who wishes to progress beyond the mere drafting of a will.

DAVID ADELMAN†

GOVERNMENT BY DECREE. By Marguerite A. Sieghart. New York: Frederick A. Praeger, Inc., 1950. Pp. xxix, 343. \$7.00.

Government By Decree, as indicated by its sub-title, is a comparative study of the history of the ordinance in English and in French law. It deals with a subject that may very well be considered as the most important development of modern government—the administrative process.

It was clear many years ago that the development and expansion of the administrative process was inevitable. It is now equally certain that the hands of the clock cannot be set back. It is, therefore, futile to continue to discuss and launch attacks upon the existence of the ever-increasing number of administrative agencies and tribunals. The method of approach, if it is to be profitable and constructive, cannot be one which denies the facts of life. The existence of the "wonderland of bureaucracy"¹ must be acknowledged. Indeed, efforts must be marshalled to ascertain methods of control for this vast ever-expanding process—methods calculated to assure that it remains within the constitutional framework that historically has proven its ability to guarantee to the individual *due process of law*. This is the gigantic problem that is examined by the author in *Government By Decree*.

It is stated in the Introduction that since delegated legislation has become a political commonplace, the problems that confront us today are essentially the same as those which the Bill of Rights and the Revised Charter attempted to remedy, *viz.*: ". . . where to draw the dividing line between law and ordinance, how to combine an efficient administration with the rule of law."² This is regarded by the author as the eternal problem of the right of distribution and balance of power—the strife between certainty and adaptability—between liberty and security.³

The purposes of the book are, first, to trace "the history of the ordinance in English law in an endeavour to show the main reasons for the vast increase in delegated legislation; second, to give an account of the history of the ordinance in French law . . . and third, to make an attempt to apply the results of these investigations to the problems of delegated legislation with a view to clarifying the issues and bringing them, if not nearer to a solution, then perhaps nearer to our comprehension."⁴

A reading of this scholarly, yet readable and practical, book will prove to be

† Mr. Adelman is a specialist in the field of Estate Planning.

1. See BECK, OUR WONDERLAND OF BUREAUCRACY (1932).
2. P. 1.
3. *Ibid.*
4. P. 2.

a very valuable experience to the legislator, judge, lawyer and administrator. It will make a definite contribution to the reader's understanding of the impact and effect of the administrative process upon the traditional concepts of law and government. In addition thereto, it will introduce the reader to French administrative law. In this regard the author submits that Great Britain, which in the past has greatly influenced French constitutional development, can in return make use of the experience of France in the field of administrative law.⁵

Recognizing that the problem is essentially one of giving the greatest possible protection to the individual, and hence revolves around the nature, method and scope of judicial review of administrative action,⁶ the following is stated to be the main difference between the English and French method of judicial control: ". . . in England the general jurisdiction over litigation to which the administration is a party belongs to the ordinary Law Courts, whereas in France it belongs to administrative Tribunals and foremost to the Council of State."⁷

The author asserts that "The English system, which in the past offered the highest guarantees against any abuse of administrative powers, has lost much of its value in modern times."⁸ This is attributed to two reasons: First, the scope of the general administrative jurisdiction of the Law Courts has been greatly reduced, *i.e.*, modern administrative legislation restricts the general jurisdiction of the Law Courts by the creation of administrative tribunals with specialized jurisdiction and by denying the right of appeal to the ordinary courts, even on a matter of law, and, second, the great increase in the exercise of discretionary powers. "And it cannot be very well denied that in modern times the English administration is given such a vast range of discretionary powers by Parliament as to make the question of legality or illegality appear to be of secondary importance only."⁹ In relation to the control of administrative discretion, which obviously is recognized as one of the main problems of administrative law, the interesting observation is made that "Though the English Law Courts exercise a certain amount of control in this direction, it is primarily on the Continent that safeguards have been developed against the abuse of discretionary powers beyond their legal limitations. It may therefore at least be open to doubt whether the protection of the individual against the State is better secured in England than it is in France or was in Imperial and Republican Germany."¹⁰

It is obvious that the book is not only timely but extremely thought-provoking. The reader will reexamine and reevaluate the administrative process in the light of the traditional standards embodied in the *rule of law*, and the understanding acquired about the French constitutions and the "contentieux administratif"¹¹ (administrative litigation).

5. P. 306.

6. See Re, Book Review, 22 ST. JOHN'S L. REV. 329, 330 (1948). "Conceding the positive need of administrative agencies, the concept of due process of law—the basic heritage of our jurisprudence—cannot vanish with the advent of the expanding administrative process."

7. P. 72.

8. *Ibid.*

9. P. 73.

10. *Ibid.* See the interesting introduction to the chapter entitled Executive Power and the Disappearance of Law, in SCHWARTZ, LAW AND THE EXECUTIVE IN BRITAIN 1 (1949). "The concept of law as a check upon arbitrary power is as old as political theory itself."

11. P. 205.

Interestingly enough, the reader is told that the attitude of the French people towards its administration has found expression in two slogans: "Qu'elle fasse, mais qu'elle obeisse a la loi," and "qu'elle fasse, mais qu'elle paie le préjudice." French administrative law has constantly striven to attain the aims expressed in those slogans—act, but act within the law, and award damages for wrongful administrative acts.¹²

Even though the author agrees with Dicey's words that "the administrative law of France originated in ideas which favour the prerogatives of the government as the proper defense for the interest of the nation," she concludes that it has transformed itself into a body of law *whose primary aim is the protection of the private citizen against administrative encroachments*.¹³ After the discussion of the French system, the author submits that it "has succeeded better than any other system in safeguarding the rights of the individual and that such an achievement is of the first importance at a time when all-too-powerful administrations tend more and more to trespass on the private sphere of life."¹⁴

The book is compact and well-organized into two divisions. Part I deals with the history of the ordinance in England; Part II with the history of the ordinance in France. The general conclusions, convincingly stated in one short chapter,¹⁵ are deemed to be logical and well-considered.

One conclusion in particular warrants serious consideration. The author states the "Modern government . . . claims in fact emergency powers for the solving of problems which form part of the ordinary duties of a modern administration. This tendency of equipping the Executive with *pleins pouvoir* over almost the whole field of its activities constitutes a serious threat to the continued existence of democratic government."¹⁶ The reader is told that in theory two methods could be applied to reduce "the grave dangers which are inherent in the present situation. . . ."¹⁷ The first consists of substantially decreasing the powers of the Executive, and the second of *increasing the means of control, and primarily of judicial control*. Since the first method is considered impracticable, only the second method remains, *viz., the increase of judicial control*. The author submits that "It is judicial control and judicial control only which can provide effective protection for the individual against the State by upholding his 'liberties' and thus enforcing the rule of law."¹⁸ The author assures the reader that *this judicial control* over administrative action does not imply a diminution of *efficiency* in the administration. "What is needed is not to sacrifice but to control administrative efficiency."¹⁹ In the words of Dr. C. K. Allen,²⁰

12. Pp. 248, 250

13. P. 250.

14. *Ibid.* See the interesting lecture given by Lord Nathan at the Association of the Bar of the City of New York. Discussing the British National Insurance and National Health Services Acts, Lord Nathan stated that "substantial progress was made in achieving that part of the programme which aimed at social justice. It laid firm the foundations of the Welfare State." 5 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 219 (May 1950).

15. Pp. 305-19.

16. P. 307.

17. P. 148.

18. P. 308.

19. P. 313.

20. Dr. Allen's contribution to the outstanding literature on administrative law includes BUREAUCRACY TRIUMPHANT (1931) and LAW AND ORDERS (1945).

who contributes a practical and enlightening Foreword to the book, "the state should behave not only efficiently but decently."²¹

Government By Decree is intended to give the English Reader a survey of the principles on which rested French administrative law. The author successfully shows that some of the principles evolved by French administrative law could be adopted in England. It is gratifying to know that the book is now available in the United States. Americans cannot afford to ignore the experience of both England and France in the field of delegated legislation. In the words of Dr. Allen, commenting on the method of "ordinary government by extraordinary means," "Here, surely, is a lesson which no country, however confident of its traditions of liberty, can afford to ignore. . . . No country is proof against crises or against Petains, and it is not in the nature of arbitrary power to remain forever latent."²²

EDWARD D. RE†

21. P. xii.

22. P. xv.

† Professor of Law, St. John's University School of Law.