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REVIEWS

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REVIEWS


It is gradually coming to be understood that the instrument of social teleology par excellence is the planning agency, and that to ignore planning is to overlook the purposive direction of social affairs. The time is long past for arguments that direction is necessary: the theory that the sum of private initiatives amounts to the general good has lain dead in intellectual gutters for fifty years. A holistic theory gradually replaces laissez-faire.

The law in the matter has never presented enormous difficulty. Economists used to be annoyed about judges: they knew no economics, it was said. It can now be seen that this, to the extent to which it was true, may not have been so unfortunate a circumstance as it might appear. Law could not shape itself about a theory no judge understood, or if he understood, accepted. So the law went on growing, gradually finding the meaning of "general interest" and slowly finding ways for the implementation of the general as against special interests. It was not always easy. Cases came to the courts, as they always had; and the private interests which were encroaching on the general interest had good counsel. Also the judges frequently had (or so it was said) sympathies and alliances which made social protection difficult. Yet when they fell back on what was in their well-instructed minds, they often found there a guidance toward the general as against special interest.

In the United States the judges have not had overmuch opportunity to interpret general interest statutes. The legislative process has been so furiously dominated, these many years, by lobbyists for private advantage, and by zeal to hamstring the executive, that institutions for the implementation of planning have had an extraordinarily difficult passage into life. It was easiest with city planning, partly at least, because there the state legislature was making law for another social organism than itself so planning agencies could get into city charters when they had no chance at all of getting established as instruments of the states themselves. But once they were established, the courts cannot be said to have been unsympathetic to them. There have often been misunderstandings but that is probably a result of the way these things happen. Property law is as old as society; planning is a sophisticated and recent process. Judges know, if they know anything, what the accepted rules about property are; and there is no doubt that the concept of planning seriously modifies them. What then could be more natural than a certain resistance?

To the planning theorist the approach to planning by way of property law
is to come in through a side door; and he has to look around for some time before he knows where he is. But to a lawyer, it is the most natural thing in the world to consider first of all the effect on property law of planning concepts. Let us explore this a little further. The planner thinks first of a gestalt, not of its parts, and certainly not of the individuals who are its members. Rights? Rights to him would be claims to fair sharing in the product thrown up by the organisms' various productive operations. Fairness is only achieved in a concept of generality. It does not consist in such a persistent protection of property that accumulations, which may not be touched, threaten the principle of fairness.

It would have to be admitted, I suppose, that property rights have come to enjoy a protection from the law which has often seriously limited what could be done toward social improvement. Even in the most advanced city charters, for instance, there is a requirement that changes in zoning regulations (or other improvements) may be blocked by the objection of twenty percent of the affected property owners; the gestalt of the city must conform to the ideas of very small and very self-interested minorities. This illustration is taken from what is probably the most advanced large-city charter in the United States. And it must be noted that this and similar property protections have held a general rezoning of New York City in abeyance for some ten years, while real estate operators cash in on the present over-zoning for commercial uses. But not much of this difficulty can be laid to the courts or even, perhaps, to the law. Much more responsibility lies in the simple failure of an integrated social organism to develop the directive organs it needs. When the New York charter was written, that twenty percent requirement was pretty much taken out of the air. It might have been lowered considerably if it had been realized how much of a handicap to the planning of the city it would prove to be.

It is often said that it is difficult to get into the law protections for the instruments of a positive policy. The law is for the protection of people from each other and from the state; it is not to secure the smooth operations of the social organism. Of course that is the way it has been. But that, again, is because that was the notion of the way it should be. What is there to prevent the growth of a different statutory attitude? And does anyone believe that constitutional prohibitions will do more than temporarily hinder the growth of a more positive policy? It is not any constitution or any body of law which prevents such progress; it is our reluctance to become an active and fairly-sharing partner in the general enterprise of society. Each of us as individual or corporation hopes to exploit others; and we object to rules which will prevent it. Those who cannot hope to gain from this kind of arrangement (say, for instance, organized workers) are not instructed in social theory. They do not know the betraying nature of common sense approaches to social management. And more often than not their leaders are rather politicians than intellectuals, so that they understand no better.
The main effort of organized labor in our society sometimes seems to be to get cut in on the loot rather than to create a situation in which productivity is increased in the interests of the general welfare.

The result of these uncomprehending or mistaken policies is that those who make the law—legislators, administrators and judges—are none of them encouraged to shape it in favor of the social organism. And those who carry out the law are often dedicated to the sabotage of the social organisms they operate. Any one who doubts that this is true is referred respectfully to the public papers of Mr. Herbert Hoover who was perhaps a great administrator but who certainly felt that the government existed to further the interests of Tom, Dick and Harry, confident that their prosperity added up to the welfare of the whole. The debacle of 1929 was the direct result of trying to operate a great society by not operating it as a whole. The amazement with which the big business men saw the floods rise about their well-protected thousand dollar desks showed how unconscious Americans were of the shortcomings of their social management.

They did not exactly learn from the crisis; but they began to give way at the most obvious cracks. When it is admitted that the ill, the aged, and the unemployed have right to at least a minimum protection, it is not a long jump to the conclusion that the fewer there are the smaller will be the bill for their support. And from that conclusion to the further one that only in a high-energy, reciprocal organism can the power and continuity be found for the maintenance of employment and welfare is not so far a jump either. They are getting used to the idea, at least, that such possibilities exist.

With these matters in mind we are to examine the compendium of Professors McDougal and Haber. It is intended, of course, not as a collection of materials having to do with planning but as an introduction to the study of property. But the consideration of what man can do with what he owns unmistakably runs over into a marked emphasis on the fitting of what he does with what he owns into the social *gestalt*. And so the casebook centers not on individual but on social rights. It goes even further: it persistently explores, in case after case, and in numerous descriptive and generalizing articles (some originally printed here and some not), the powers and abilities of organisms to shape their ends. Property rights are treated as limitations on these powers and abilities; how they stand today in theory and law is the center of this whole exploration.

In fact the preface says: "The clients we envision for the prospective property lawyer include not only the individual home-owner, business man, or farmer, but also all the great and small, public and private, associations of modern society, from, for example, local planning boards to the European Recovery Administration or the World Bank or the United Nations." This is a complete reversal of tradition. The lawyer is to be prepared, now, not so much to find ways in which individuals may do what they like with their own, as to find ways in which social organisms may proceed with their
development in spite of any property rights which may stand in the way. Such a reorientation would be expected to affect the structure of the compendium; and it does. It frankly intends to sort out social functions (allocation, planning and development), to classify social organisms (metropolitan, regional, national, world), and to use for its reference material those appellate court opinions and those lay discussions which fit into the contexts of "culture, social structure and social crisis."

That all this is slightly revolutionary no lawyer will need to be told. And those of us who function in related academic fields will not minimize the importance of recognizing the simple fact that the social organism, the "general interest," is, at least in this time and place, the center of legal orientation. Private interests and rights now group themselves humbly in the shadow of the society in which they function. They are no longer the arrogant determiners of what may and may not be done. It is a milestone, this book, a recognition of distance come, of change accomplished. This is literally meant; it is a recognition in the present, not an anticipation of the future, and so it marks off how far we have actually come. The book will have other editions as change goes on, presumably; and in some future one of them it may be expected, for instance, that the index references to national planning, which now number one, will gradually overtake and pass the number of references to city planning which are now 18. We actually have, and know that we have, at least some city planning in this nation; we still pretend that we have no national planning (although, of course, we bootleg a good deal when the Congress is not looking).\(^1\)

So the greater comes to comprehend the lesser: the community contains its individuals and gives them the life and meaning they can no longer have alone; it will gradually be recognized that the nation gives character to its communities, as the forest does to its trees, even though each tree remains an individual, and it will be recognized eventually that we are the nation we began to be in 1787. Presumably, that lag must be overcome before we can advance out of the nationalism which has already become technologically obsolete before it has been perfected, and into the worldism which science has prepared. World is a word which does not have an index heading now in this compendium (although internationalism does). Nevertheless, there is a kind of addendum, a chapter called, "Resource Planning and Development in the World Community," which is one of the book's best\(^2\); no one could read this chapter, really, without understanding that the tangle of difficulties incident to the practices of nationalism require wider jurisdictions

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1. Incidentally, the one reference to national planning has a sub-head; it reads, "existing chaos." It should be noted however that a good deal of national planning finds its way into this book, as it finds its way into our government, under such various guises as Taylor Grazing Act, Water Power, Housing, Forest Service, Farm Tenancy, Eminent Domain, etc., and that the same is true of International Planning.

2. The editors note an indebtedness to Miss Gertrude C. K. Leighton for assistance in its preparation.
for their solution. These may be regional before they become world institutions; but logical stopping places short of global finitude are hard to find these days and becoming harder all the time.

We have come to the point of suggesting, in this review at least, that what may be done on an Iowa farm, in a Birmingham steel mill, in a Northwest forest, or a New York office, is not only the separate action of a farmer, a businessman, a worker, an engineer, or of a corporation projecting the cooperating personalities of any group of them, but is part of a locked series of actions all of which interpenetrate each other, and that the extension of this solidarity, this unity, this interpenetration, until the world itself becomes logically one indivisible, almost organic, whole, is already prepared for in technology. Such a society, once it takes on organization, will not be too long delayed in beginning to develop the specialized organs it will need for direction. At that time the impersonal, imponderable motion of cultural evolution will come gradually under some kind of control. And men's properties will have something like the relation to it which cells have to individual bodies of which they are part: they will function within the union of a cooperating whole, with the good of the whole as their objective. They will not expect, each of them, to be permitted to exploit the others, or even to function with complete independence.

This is a long way forward from the fundamentals of capitalism. To what extent it will, when it arrives, modify the freedom of economic enterprise, cannot be told in advance. The rule will be that freedom must not be allowed to derange the whole. Desirable as freedom is for securing initiative—and initiative must always be an important consideration—it cannot be permitted to disrupt the pattern agreed on for the general economy. But capitalism has always been supposed to rest on a liberty which welcomed competition and conflict. The theory was that freely conflicting enterprisers (who are property users) would reach compromises approximating the public good. This made no allowance for the general definition of objectives or for shaping enterprise toward their attainment. That this was always—and latterly conspicuously so—more theory than reality everyone knows. What is not so often realized, however, is that the orthodoxy of the theory, the prevalent unwillingness to reject it, always made betraying appeal to it possible. And there has therefore been very uneven conformance to the rule. One of the marks of latter day capitalism has been the differentiation between those individuals and corporations whose behavior was required to conform to the rule (or who did so voluntarily) and those who were able to evade it. Evasion in the early "trust" days was easy. Fair trade practices were, however, gradually defined and regulations came gradually to have a semblance of enforcement. Evasion then passed into a more esoteric if not a more ethical phase. Competition need not be a reality if competitors do not compete; and there has never been any way discovered of enforcing competition. Those who tried to enforce it—and there were earnest trials—ought
to have seen that it was self defeating. Either competition is free or it is not competition. Compulsion is an injection of social rule whose logical end is the acceptance of responsibility for the function regulated. Between public ownership and regulation there is only a tenuous distinction to be made. It is a taking of property to limit what may be done with it. And if this limitation checks profit-making and power-gaining, where then is freedom?

And whence can come the right of the public to interfere? It must be done with some idea that the public (that is, the social organism within which the organs regulated function) has superior power—that sovereignty is not lodged in the automatism of freedom but rather in the directive organ of the public—somewhere within the government. If this is so, the extent of interference is theoretically immaterial. It is no more a denial of freedom to take away all right to function than it is to take away some of that right. It may be more “unreasonable”—a word well-liked by courts—but when so undefinable a test as reasonableness is allowed, the whole matter has become one of expediency rather than of fundamental attitude. There may be a contest—say between courts and legislatures—as to how actual limitation is to be applied, but there can no longer be an appeal to freedom and to inherent right.

It was always true that freedom could not be unlimited if only because of the inherent conflicts of freedom-using persons or corporate bodies. They might, of course, limit each other without interference by the public in the interest of a general good. But in practice that kind of freedom results in using the public as a football to be kicked about among contestants and leaves it in the end at the mercy of exploitative forces which become intolerable. Rather than modify the theory of laissez faire, which was neither derived from original facts nor supported by any subsequent ones, the line taken by theorists and jurists has usually been to maintain the theory as a fiction, with tacit agreement to modify it in such ways as would make the practical situation tolerable. The difficulty with this is the familiar one of rule by men rather than by law—or by agreed precept. And even if the man is a judge, his rule of reason may not be another's, even another judge's.

It is not as though there were not another approach, another conception. To regard the society, the economy, the community, the social organism, as a cohesive whole, does yield greater objectivity because functions, organs, cells can be brought into relation with each other and can be tested by the contribution they make to the whole. It is easier to say that the steel industry, with a theoretical capacity of, say, 100,000,000 tons of production ought to produce it when the nation needs it, than it is to say that it ought to be allowed to profit to the extent of eight percent on a putative valuation of a billion dollars. Differences about tons of steel are likely to be much fewer than they are about valuations for rate (or profit) making. In the one case there is a defensible, even an objective, criterion for performance; in the other there literally is none.
If Professors McDougal and Haber have not gone over to a holistic conception of the society within which properties are used, they have at least not based themselves on *laissez-faire*. They might not like to admit that they have made any commitment at all. But what, then, does it mean to ask, as they do:

"What are the resources, natural and technological, of the United States today and what are their potentialities for the production of values? What values do the people of the United States demand today from their resources and institutions and by what procedures can these values be translated into concrete programs of action and specific objectives toward which property doctrines and practices may be directed? What are the conditions and probable trends—in the demands, identifications, and expectations of the people; in resources and technology and the degree and efficiency of their use; in the structure of private claim and community control; in the balance of world power; etc.—which will largely determine the extent to which such values can be achieved? What, specifically, are the probable effects of the new uses of atomic energy? How, under such conditions, can the nation bring its best enlightenment and skills to the task of creating and operating the institutions appropriate for optimum achievement of all its values? How can it establish and perfect procedures in all its communities, efficiently and subject to democratic controls, to perform the necessary and continuous tasks of intelligence—the clarification and reclarification of goal, the appraisal and reappraisal of conditions, and the inventive consideration of alternative means? How can the people of the nation be brought to that consciousness of their interdependencies, that understanding of the necessity for the use of enlightenment and skill, and the vision of the rich promise of appropriate action which will cause them to assume the necessary initiative? How, in sum, can the large-scale property transformations which impend be managed not only with a minimum of destructiveness but even with a maximum production of values?" 3

The series of questions is sought to be answered in the 1200 pages which follow. At the risk of generalizing perhaps too freely, it can be said that the answers, with such relevance as they possess, present themselves in the comments of economists, political scientists, and legal theorists; they are not to be found in the cited opinions. This is not then so much a casebook as a book of commentary. It could not be a casebook because judges do not ordinarily commit themselves to holistic theory. They rest on specific acceptances or rejections of pleadings which come before them. They will discuss privilege, right, concern, benefit, burden, and even equity or justice. But these must usually be surrounded by multitudinous fact and supported by a firm foundation of precedent (which is often called principle). This is
quite a different procedure from that to be found in the essay on property by W. H. Hamilton and Irene Till for instance, or that on Public Ownership as an Instrument of Planning and Development Policies, both of which have implications which must be fairly hair-raising to lawyers who prefer to stay close to "practicality."

The book has four parts. The first (in some hundred pages) is titled Property and Wealth and is devoted to consideration of private volition and community control, federal and state, in the use and development of resources. The second is titled Land (Resource) Allocation by Private Volition; it contains four chapters of three hundred pages. It runs from the establishment of claims—volition, recording, adverse possession and basic reifications: title, fee simple, ownership, possession, land—through dead-hand volition—trusts, future interests and possessory estates, and landlord and tenant (caveat consumer) to concurrent interests (anachronism redivivus). Part three, to which the others are more or less introductory, concerns land planning and development and runs to seven chapters of some eight hundred pages. Here it is that Messrs. McDougal and Haber have gathered together what is known about what may be done by the community (city, state, nation) to shape its future—that is, to what extent private interests and rights limit what would otherwise seem desirable to do.

There is perhaps a small confusion about what constitutes planning as distinct from control in the interest of a plan or the execution of one. And the concentration on land excludes the temporal dimension of planning which is so important to the planner but does not directly involve property rights. But these exceptions aside, the gathering-together is satisfactorily comprehensive.

It is not a picture of adequate progress, whether what is paid attention to is the quotation from the National Resources Board Report (Our Cities: Their Role in the National Economy) which is headed "Patterns of Anarchy," or the note which the editors append after citing several "nuisance cases."

"It may bear emphasis that in these 'nuisance' cases the courts, however conscious or unconscious of their function, are in fact planning and determining the actual land use patterns of their communities and that in most of our communities this is the only kind of planning for which the community institutions make provision. The student will wish to observe not only the utter physical chaos of our contemporary communities, the interdependence in terms of effects on private and community values of all uses of land, and the doctrines which are supposed to guide the courts in their retrospective, retroactive planning but also the whole institutional context in which this planning takes place, and to question its adequacy to secure commonly accepted community objectives. It may be noted that the courts come in after the damage is done,

4. Pp. 4-11.
that they decide only as between the two parties and between them only so long as there is no substantial change in conditions, that they do not have the staffs or technical aids necessary to efficient and continuous performance of planning functions, and that the only technical standards at their command are the elusive tort doctrines.”

But how could it be otherwise? A community which establishes a planning agency must do so from practical compulsion, simply because there seems to be no other way to solve numerous problems and to achieve the coordination for lack of which nothing is done efficiently. There has been no previous preparation such as makes other institutions orthodox and ordinary. And it is often true, incredible as it seems, that judges who substitute themselves for planning agencies do so without any of the uneasiness or reticence which might be expected from the fact that they do not have “staffs or technical aids necessary to efficient and continuous performance of planning functions.” Hit-and-run settlement of issues with far and deep implications is often undertaken with incredible lightheartedness.

This book will without doubt contribute to a change in attitude. But it cannot be taken as a phenomenon by itself. It is one which belongs to the culture of a society which is in process of discovering that it has entity and continuity, and that it is not made up of discrete autonomous associations, but is a functioning, complex, interrelated whole. This book is itself an evidence that these processes of discovery are in operation.

One who examines the industrial institutions of our society must be struck at once by their organic self-consciousness and by the highly developed character of the organs for direction which hold the entire organism to a purposive and consistent course. In fact planners find their techniques developing most rapidly in industry. This movement was first made articulate by Frederick W. Taylor; but he was followed by numerous others; and there was even a Society in the early decades of this century for scientific management, whose work merged gradually into the every day practice of industrial engineers.

There has been a city planning movement too. But it has proceeded without this kind of encouragement and has by no means become diffused into the same general acceptance as has planning in industry. This is partly because planning interferes with legislative and executive functions when they are carried on by whim or caprice or even with a view to immediate “political” ends. The planning agency has a way of making much clear and objective which was before conveniently hazy and so could be manipulated on specious grounds; and planning is therefore inconvenient to whimsical mayors or log-rolling councilmen. As a result, even when it has had to be accepted at the insistence of groups of better citizens, it has usually been so mutilated in being born as to be a discredit to the whole planning species.

And as for national planning, the "politics" of the usual city hall is not much different from that of Capitol Hill. The Congress bitterly resists the intrusion of objectivity and of consistency when those virtues might interfere with the furthering of the local interests which are, after all, really represented by Congressmen. Even such leadership in the direction of consistency and general interest as comes from the other end of Pennsylvania Avenue is furiously resented. We are far from the acceptance by politicians of any institution for creating and furthering the social virtues to which there is so much objection even in the embryonic stages.

Yet here we have a book which looks to public rights and welfare, which anticipates that Lawyers' clients in the future will include social organisms, which expects planning institutions to have a formidable development within a foreseeable future. It must constitute recognition of a movement under way as well as a portent of new things to come. The politicians, if they cannot be convinced, will have to be coerced by constitution-making. That may be a longer process than even Messrs. McDougal and Haber would seem to anticipate.

Rexford G. Tugwell†


During the present hectic phase of mounting international tension, popular books about the atomic bomb are likely to have political repercussions that are by no means inconsequential. In assessing any such book, it is not sufficient merely to examine the intrinsic worth of the information it contains. Of far greater social importance is the way in which the A-bomb is presented, the predictions, prognostications, warnings, reassurances, and admonitions which, by being brought to the focus of attention, are potentially capable of molding public opinion.

Careful consideration of the attitudes and expectations conveyed to the audience is especially relevant in the case of a widely publicized essay like Bradley's No Place to Hide. As may be inferred from its repeated appearance on the New York Times best-seller list, this book has reached that relatively large and influential sector of the American public which comprises those who promptly peruse the latest non-fiction offerings on contemporary issues.

What sort of a contribution does Bradley make to public enlightenment on the critical problems raised by the destructive use of atomic energy? A purported answer to this question appears on the dust jacket, reiterating the extensive advertisements about the book: "What the atomic bomb can do to ships, or water, or land, and thereby to human beings, is told with

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clear implications for all of us by a brilliant young doctor whose job it was to watch for radioactive contamination during and after the Bikini tests."

Many readers may be somewhat disappointed to find that most of the contents consist of a detailed log of the author's day to day experiences during Operation Crossroads. As a plodding, prosaic record of the activities of a radiological monitor, it is perhaps successful in conveying the unglamorous monotony and routine which characterized the life of scientific observers who were present at the Bikini tests. Only infrequently is the account enlivened by a brief depiction of the personal reactions of the participants in those "hastily planned and hastily carried out" experiments. Here and there we catch a glimpse of the discomfort and consternation of research scientists who are forced to make practical decisions affecting the lives of large numbers of persons, before adequate data on the effectiveness of alternative precautionary measures are available. On a few pages we are treated to a vivid portrayal of the befuddlement of Navy regulars who find their habitual activities "fouled up" by "geigers," that new, unseen and hardly credible, menace: "decks you can't stay on for more than a few minutes but which seem like other decks; air you can't breathe without gas masks but which smells like all other air; water you can't swim in, and good tuna and jacks you can't eat."

Where in the book do we find the "clear implications for all of us" which we are promised by the blurb on the dust jacket? Presumably in the occasional comments, interspersed throughout the later sections of the log, on the destructive impact of the A-bomb. Dr. Bradley correctly calls attention to the fact that the nationwide publicity on the Bikini tests, with its emphasis on the unexpectedly small number of ships sunk, has had the effect of minimizing the threat of indiscriminate use of atomic energy for political coercion; it has contributed, therefore, to the widespread indifference about the A-bomb which characterizes American public opinion at the present time. This error in publicity he attempts to correct by emphasizing certain of the findings, which have been played down in official releases, on persistent radiological effects produced by the underwater A-bomb explosion.

The spray from the water-bursting bomb, we are told, left a radioactive coating on the surviving ships, a coating which transformed the decks into uninhabitable death traps. Short of sandblasting or dousing all exposed surfaces with acid, the lethal radioactivity persists for months and perhaps for years. The author does not neglect to point out that the surfaces of sidewalks, streets and buildings in our metropolitan seaports are no less vulnerable than the surfaces of the abandoned fleet: "I can think of no fact demonstrated by the Bikini tests which is more important in its widest implications than this difficulty of ridding the habitable surfaces of our world of contaminating fission products." Dr. Bradley completes his description of lingering radioactivity with a speculative account of the various ways that fatal doses
can be spread—via fish, floating slicks, and so on—to become a menace to inhabitants of coastal areas far removed from an underwater atomic explosion.

There need be no doubt about the fact that the limited portions of the book dealing with radiological contamination serve to correct some of the misinformation and false impressions left by the news releases and editorials on the results of the Bikini tests. But Dr. Bradley apparently assumes that by playing up the lethal dangers of A-bomb explosions, as he has done, it is possible to counteract public indifference about the vital political issues posed by those dangers. This assumption is seriously open to question on the basis of the findings of recent attitude and opinion research.

Although the results cannot be taken at face value, the available evidence from cross-section surveys of the U.S. population indicates that the majority of Americans are already keenly aware of the enormously destructive consequences of A-bomb warfare. The widespread public indifference revealed by the surveys evidently cannot be attributed to a lack of appreciation of the magnitude of the A-bomb threat. On the contrary, there are some good reasons for suspecting that the current attitudes of the American public are, to some extent, an unintended psychological effect of the early post-war publicity about the bomb, long before the Bikini tests, which aroused anxiety by repeatedly stressing the ominous dangers to be anticipated without offering any convincing information about ways and means of averting the threat. The tendency to ward off anxiety—by ignoring the A-bomb threat as much as possible, by relegating it to the dim, unforeseeable future, or by wishful thinking about national or personal invulnerability—is probably an important motivation underlying the public indifference about which Dr. Bradley is so concerned.

If this is so, a constructive awakening of public opinion can hardly be expected from a book which does nothing more than to call attention to certain of the dangers produced by atomic bomb explosions. If we avoid thinking about a potential source of danger it is usually because we know of no way of protecting ourselves, nothing we can actually do or think about doing that will serve to reduce the anxiety we experience whenever we permit ourselves to pay attention to the threat and to take it seriously. Our attitude of defensive indifference is more likely to be reinforced than counteracted by a communication which arouses our anticipatory anxieties once again, without pointing to concrete social actions that can be taken to circumvent the dangers.

It is true that Dr. Bradley has given an honest, objective description of the radiological dangers he has observed. Like the atomic scientists who have made so many public statements about the A-bomb threat, he can feel with some justification that his task is merely to point out the dangers and that it is up to others to work out constructive, reassuring solutions to channelize the anxieties that are aroused. But the actual effect on the public
may be far from what is intended so long as mass communications continue

IrvIng L. JanIs†

SELECT CASES IN THE Exchequer Chamber before all the justices of


By the fifteenth century the assembly of the justices in the Exchequer

Chamber had come to be recognized as the proper place for the resolution

of doubts and difficult questions of law. To it the common law judges as

well as the chancellor adjourned troublesome cases, and there, before the

justices of both benches, they were discussed and considered. Though the

Exchequer Chamber was without authority and its decisions purely advisory,

results reached in such an assembly of legal talent were not apt to be dis-

regarded when matters were returned to the courts from whence they had

come.

Since the cases referred to the Exchequer Chamber were important and

its prestige great, its deliberations and discussions were carefully reported.

From four manuscript volumes of fifteenth century reports Miss Hemmant

has transcribed fifty cases heard during the reigns of Edward IV, Richard

III, and Henry VII. Forty-three of these had already appeared, in one form

or another, in the folio Year Books, and Miss Hemmant has collated her

manuscript reports both with these and with the abstracts printed in Fitz-

herbert’s and Brooke’s Abridgements. The Selden Society’s plan undoubtedly

was to make available versions as complete as possible of an important group

of fifteenth century cases, among them some very useful to the legal and con-

stitutional historian, but it has not been particularly fortunate in its editor.

Miss Hemmant clearly is neither a lawyer nor at home among medieval law

reports. Consequently many of the nice points of law and procedure that

so interested counsel and judges, as well as some of the obvious ones, have

escaped her. When the reporter notes that the king was ‘displeased per le

long jour’ he means simply that the adjournment a week hence did not meet

with his approval. To infer from this (p. xlv) that the king perhaps sat on

the bench and was bored by a long and dreary day in court is, of course, an

inference no lawyer would make. That editors not sufficiently familiar with

their materials must needs be employed if the work is to be done at all is

only another indication of the deplorable lack of attention devoted to legal

historical studies in both England and the United States. Here as elsewhere

the profession gets no more than it deserves, nor must it be outraged to find

the correcting pencil necessary.

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A reviewer inevitably must be of two minds about a list of errors. Housman-like irascibility or self-aggrandizement too often is the real explanation behind it. Then, too, even a short catalogue tends to overshadow the large portions of text and translation that need no correction. With misgivings, therefore, I print the list below. It makes no claim to completeness nor will the learned reader find it useful, for Miss Hemmant's texts usually are good or easily emended. Where there are doubts the folio edition of the Year Books may be consulted. But to those now first coming to legal history, whose concern is with the right rather than the left side of the page, they may be of value, if only to indicate that fifteenth century lawyers did not lapse into nonsense nor reporters into incomprehensibility. P. 1: for the editor's addition 'mes' read 'ou'; p. 5: for 'derror' read 'dereigne' and omit the editorial addition 'bref'; p. 6: a negative apparently has been omitted in the sentence 'et ce fuit le plus fort consideracion que le priour [ne] serroit conclu', nor is the sentence adequately translated by 'and it was the opinion that the prior should be concluded'; (case 3): 'reservaunt rent et un entre pur defaute' in Littleton's speech is simply 'reserving rent and an entry for default', but the passages directly preceding and following it are corrupt and the translation largely meaningless; p. 7: read 'a wife by agreement of her husband can receive advantage, such as feoffment or lease for term of years, but never disadvantage'; p. 8: read 'and the rent was again in arrear, now he must have the action in both their names etc.'; p. 11: 'autrefoitz' is, of course, 'again'; p. 13: for 'tamen' read 'tantum': 'where one is expelled only it was said to be a change etc. although another was not put in his place'; p. 15: for 'no law etc.' read 'null tiel tenaunt'; p. 38: 'profitt que nest manuallle' is one that lies in grant rather than livery; p. 53: the word 'void' has been omitted in Fairfax's speech; p. 61: for 'destre' in the phrase 'mesme le chose que est destre principalement' read 'delyvere'; p. 62: the translation should read: 'and he cannot recover damages and also the goods for which he recovers damages'; omit the editor's inserted 'ne'; read 'seeing that the declaration was good and acceptable in law, counting generally of damages'; p. 83: 'breve de decepcione' is a writ of deceit; p. 102: the translation should read: 'And because the grant of the aforesaid tenth had been granted by the clergy of the province of Canterbury and the exemption is in these words, to excuse from the collection of tenths granted by the clergy of England, the question was whether the answer was sufficient or not.'; p. 103: 'clerus' has been made into 'clericus' with impossible results: the translation should read: 'But if it were possible or in some way had before been the custom that the clergy of England should grant or had granted any tenth to the king, then the exemption would be valueless [here], because the intention of the king is understood to be that the abbot should only be excused touching such grant etc., [but] seeing that no such grant can be made by the whole of the clergy of England, to wit, by those two provinces, but only by one in particular, and either of the same provinces is the clergy of England ...
so either clergy is the clergy of England.'; p. 104: 'The nomination might thus be special which the king cannot pardon etc.'; p. 116: 'for the words are that the inhabitants of that place shall not be vexed or sued . . . and not that one may be there against the dignity of the king'; pp. 118-19: 'waifs and strays . . . chattels of outlawed felons etc.'; p. 128: Miss Hemmant seems here to be unfamiliar with the tenancy by the law of England; p. 129: 'The question was whether this writ be sufficient warrant for the heirs of the mother [Margaret] wife of John Higford etc.': n. 2 therefore is wrong; the commission to which n. 1 refers should be sought on the Patent Roll; that granted to Lord Dacres is in Cal. Pat. Rolls, Henry VII, 1485-94, p. 165; pp. 129-30: the translation should read: 'by this writ of diem clausit extremum after the death of the tenant by the law of England, when it is found that the reversion of the manor after the death of the mother descended to the heir of the mother, that is sufficient for the heir to have livery, because there is seen ["visum" for 'inus'], in effect, tenure of the king, a tenant per legem Angle, and a reversion etc. And it is [not] always necessary to make mention of the estate of the wife when such an office is taken after the death of a tenant per legem Angle'; p. 131 (case 40): for 'accoorde' read 'accordaunt'; p. 132: for 'apres' read 'per'; the translation should read: 'and he prayed the lands to farm by the statute'; the statute is 36 Edw. III, st. 1, ca. 13; p. 133: to make sense of Keble's speech the translation must read: 'monstrans de droit is when the king is entitled by matter of fact which is true, but nevertheless the party has droit'; p. 135 (case 42): 'a autre entent' begins a new sentence; the word 'differently' is a mistranslation; p. 136: 'in iure ecclesie' clearly is not 'by ecclesiastical law'; p. 139: the word 'double' interlined was inserted by some one a good deal closer to and more familiar with the law of Henry VII's reign than Miss Hemmant can claim to be. It has been omitted in the translation with disastrous results. The last paragraph should read: 'And it was said that if the king be entitled by double matter of record to have the land etc., as by attainder [etc.], the party shall not have traverse but shall sue by petition, and the reason for this is because the king's first title is not disproved if the attainder [is annulled], and because it [the first title] remains in force the party shall not traverse it etc.'; p. 157: the word 'droit' is omitted in Jaye's speech: 'le baille est un que ad droit a medler'; p. 158: 'Quod nota. Iudicium.'; p. 166: the statute in Mor-daunt's speech is Quia emptores; p. 167: the statute in Boteler's speech is Westminster II, ca. 16: 'then that lord who first recovers shall have the wardship of the body, and this is in accordance with the statute'; the statute referred to in the next line, however, is 4 Hen. VII, ca. 17; p. 168: 'per certein temps' is 'for a certain time'; p. 169: the statutes are 36 Edw. III, st. 1, ca. 13; 8 Hen. VI, ca. 16; 18 Hen. VI, ca. 6; 'au maignez' is 'at least' not 'mediately'; p. 171: the translation of the first part of Rede's speech is nonsense; it should read: 'there are many statutes which give actions popular, such as decies tantum and other like actions'; p. 174: in the translation omit 'in this