BOOK REVIEWS

CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE. By Robert Wyness Millar. New York: Law Center of New York University, 1952. Pp. xvi, 534, $7.50.

Published under the auspices of the National Conference of Judicial Councils as the eighth study of the Judicial Administration Series,[1] this volume undertakes to survey in historical context "the major procedural rules employed [in civil proceedings] in the courts of first instance of this country and England." The selection of an author to undertake a work of such compass could not have been easy. The choice of Professor Millar was fortunate. With a background of many years of research in the field of procedural history against which to draw, Professor Millar has met the challenge of his assignment with distinction.

After a somewhat too brief opening comment on selected general aspects of procedural development, Professor Millar treats, in twenty chapters, as many specific phases of trial court procedure and practice. No attempt to summarize the material in this volume could do justice to its scope. An indication of the range of the study is sufficient for a review. Following a short account of the steps in the fusion of law-equity administration, the author discusses, in roughly the order in which they unfold in normal civil litigation, such topics as commencement of the action, service of process, joinder of parties and claims, pleading, discovery, pre-trial proceedings, jury and non-jury trial, judgment, trial court review of judgments, and execution. Each subject has its own story of development and change: a story which the author sets against the background of classic common-law and equity practice, with frequent sidelights from continental procedure; which he then traces through the mutations of successive reform; and which he rounds out with an account of the present practice in the Anglo-American courts. To this is added, where deemed appropriate, statements of the author's judgment as to the merits or demerits of the contemporaneous practice and the desirable course of future development of the particular technique under study.

Such a work has substantial value in its contribution to breaching the invisible barrier so often thrown up by lawyers against interstate commerce in procedural ideas. The inertia of most lawyers toward procedural reform has been notorious. No doubt this inertia has numerous sources, but none more influential than lack of knowledge.

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1. Prior volumes of the series are: POUND, ORGANIZATION OF COURTS; HAYNES, THE SELECTION AND TENURE OF JUDGES; POUND, APPELLATE PROCEDURE IN CIVIL CASES; ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL; ORFIELD, CRIMINAL APPEALS IN AMERICA; WARREN, TRAFFIC COURTS; VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION.

> "Most of the time we take ourselves for granted, as we have to, and live on a little knowledge about ourselves as we were." [2]

So most of us, as lawyers, manipulate our available procedural tools in our daily practice, ordinarily with little concern for the source or background of a particular instrument, and even less for the manner in which another jurisdiction may have reshaped or superseded it in the interest of a more efficient administration of justice. Professor Millar's study strikes at the foundation of unenlightenment that contributes so much to such professional insularity.

In supplying, in readable length, so broad a cross-section of our procedure, the author obviously could not explore the details of local practice. I suspect, therefore, that a reader expert in the practice of a particular state is apt to find occasions to quarrel with particulars in the text. To choose examples, I would go to the Texas practice, with which I happen to be especially familiar. Doing so, I note the omission of that state from the enumeration of those having summary judgment rules (p. 249), and those which have adopted rules incorporating Federal Rule 42(b) (p. 275). I observe the statement that in Texas the demand for jury must be made in open court (p. 249), a requirement eliminated in 1949. I question the implied attribution to Missouri of the development of an "expedient" of presumed findings in support of the judgment, after trial by the court, where findings were not made on particular fact issues (p. 352). The Missouri amendment of 1943 was antedated by a rule having similar effect in the Texas Rules of 1941. I am disturbed by the overly broad statement that the bill of review is "provided for in Texas" (p. 400), citing a rule, applicable to certain district courts, which states merely that bills of review are available in those courts. In Texas the bill of review practice is not "provided for" by a rule: it is established by long usage and merely recognized in the rule cited. Let it be emphasized, however, that these are minutiae. I cite them to illustrate that this text does not in every instance correctly state the details of local practice. But one does not read it to learn the practice of his own state. He reads it to witness the surge of procedural development, an historical study which in its overall picture is not marred by individual aberrations.

I did miss citations to the legal periodicals during the past dozen years. A review of 500 pages containing footnotes turned up references to only four articles published since 1940. While I have not combed the *Index of Legal Periodicals,* I find it rather hard to believe that in all the legal periodicals distributed in this period, there were pertinent to the subjects in this volume only four articles of sufficient value to merit citation. I value footnotes as a starting point for additional research on a point in which I develop a special interest. For the remoter past, I am prepared happily to accept a minimum citation of authority. But my interest, and I suspect that of most lawyers, in going beyond the text, is primarily to explore what

2. T. S. ELIOT, THE COCKTAIL PARTY, Act I, Scene 1.

has happened in recent years. In this respect, the text seems to me to fall short.

The author fortunately has stated freely his views concerning our present practice in its various aspects. This is wholly fitting. A historical survey has pragmatic value only as it affords the reader assistance in the formulation of judgments as to the failures of present techniques and as to changes which are most likely to minimize such failures. While the author's conclusions may not always win immediate acceptance, the reader is entitled to know and weigh the judgments of one whose vast historical knowledge is compiled in a study of this type. Here those views are repeatedly made known. I do not recommend their blanket acceptance, though I personally found few with which to quibble. What I do say is that such opinions cannot be lightly disregarded, and that the recommendations, if followed, could not fail to improve the administration of justice in many states.

The book is not perfect, but its faults are superficial. Moreover, they are probably inevitable in the treatment of so much in so little space, and hence are excusable. The book is one that should be read by every lawyer whose interest is in improving the workings of his courts; it is a "must" for those whose public service opens to them an opportunity directly to contribute to such improvement.

Roy W. McDonald †

FEDERAL ADMINISTRATIVE LAW. By Urban A. Lavery. St. Paul: West Publishing Co., 1952. Pp. xii, 518, $12.00.

Until relatively recently, the most salient thing about American administrative law was its lack of detailed doctrinal writings. In part, this was due to the newness of the field and the fact that it was in too great a state of flux to lend itself to systematic textual treatment. Yet, important though these factors doubtless are, of themselves, they do not account for the lack of treatises on administrative law in this country. More significant has been the attitude of the common lawyer toward the subject. Under the influence of what Mr. Justice Frankfurter has termed the "misconceptions and myopia" [1] of A. V. Dicey, Anglo-American legal thought reacted to the growth of modern administrative law in an ostrichlike manner. In Dicey's view, administrative law was opposed to the first principles of the English Constitution, and he accordingly denied its very existence in the common-law world. "In England, and in the countries which, like the United States, derive their civilization from English sources, the system of

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1. Foreword, 47 YALE L.J. 515, 517 (1938).

administrative law and the very principles upon which it rests are in truth unknown." [2]

The chief consequence of the Diceian view has been the absence in the past of any real attempt at systematization and synthesis of the field of administrative law by Anglo-American doctrinal writers. This is most striking, especially when one contrasts it with the situation that has existed with regard to other branches of our law. If one has sought to solve a problem—no matter how piddling—arising in a field of private law, he might turn to a plethora of texts to aid him. But let his case have referred to the relations of the administration and the citizen and there has been an almost complete dearth of doctrinal writing. As recently stated in a work seeking to explain the fundamentals of the American system to a civil-law audience, "an over-all account of administrative law does not yet exist in contemporary American literature." [3]

The situation just described has, however, in large part, become a thing of the past. The past three years have seen the publication of a number of treatises on American administrative law. The most significant of them has been the treatise of Professor Davis,[4] which represents the first attempt to treat in some detail all of the problems which are considered in this country to pertain to administrative law. The publication of these recent works has been made possible only by the rejection of American jurists of the Diceian denial of the existence of administrative law and by its recognition instead as an established rubric of our law. Their appearance indicates that administrative law in this country has attained a certain degree of growth and maturity. The period of synthesis and systematization is now at hand.

The book being reviewed—the most recent of American treatises on administrative law—is clearly intended to aid in the process of systematization of the subject. At its very beginning, the author informs us, using for the purpose a passage from John Stuart Mill, "This book makes no pretense of giving to the world a new theory of intellectual operations. Its claim to attention, if it possesses any, is grounded on the fact that it is an attempt . . . to embody and systematize the best ideas on its subject."

Certainly, Mr. Lavery's treatise is not, nor is it intended to be, as comprehensive in scope as, for example, Davis on *Administrative Law.* Nor is this due to the fact that its coverage is expressly limited to the federal field, for that is true of most other administrative law works as well. Even that by Davis, it should be noted, is, for all practical purposes, primarily a text on the federal law. Mr. Lavery's aim appears to be somewhat more limited than that of the other recent writers in the field. His goal is not to present a critical treatment of the major problems of federal administrative law. His work is intended essentially as a summary, more than as a critique, and

2. DICEY, LAW OF THE CONSTITUTION 180 (1885).

3. SCHWARTZ, LE DROIT ADMINISTRATIF AMÉRICAIN: NOTIONS GÉNÉRALES 231 (1952).

4. DAVIS, ADMINISTRATIVE LAW (1951).

of only certain aspects, rather than as an overall treatise on the subject. The author's statement in his Preface that the book attempts to "provide an overall treatise on the Practice and Application of Federal Administrative Law" is consequently somewhat misleading. Actually, the scope of the book is much less broad, since it contains essentially a discussion of the Federal Administrative Procedure Act and of federal administrative rule making.

The book is divided into three parts. The first part is devoted to a treatment of the Administrative Procedure Act of 1946. After discussing the background of the Act, the author seeks to analyze its provisions in numerical order. Much of this analysis is devoted to materials derived from the reports of the Senate and House Committees on the bills which evolved into the Procedure Act. However valuable these may be as starting points, it is to be feared that as the "be all and end all" of an explanation of the Act they leave much to be desired. This reviewer, at any rate, would have greatly preferred a critical account by the author himself of the Act's provisions, their advantages, and defects. It is true also of such a statute that mere exegesis of a fundamental text is not the way to obtain the most accurate picture of its actual meaning and effect. A discussion, for example, of the portions of the Act setting up a system of hearing examiners which refers mainly to the materials in the legislative history of the law, without any treatment of the way in which they have worked out in practice, is bound to suffer from incompleteness. The breakdown in operation thus far of the examiner system intended by the Procedure Act is of at least as great importance as the provisions of the Act themselves.

The second part of the Lavery book is devoted to what is essentially a listing of the 100 major federal agencies, with a brief mention of their historical origins and their statutory authority and purposes. Such a compendium is undoubtedly useful to those seeking a summary picture of the federal administration. One wonders, however, whether its place is in a present-day treatise of this type devoted to federal administrative law.

What appears to this reviewer to constitute the most valuable portion of Mr. Lavery's work is its third part, which is devoted to the subject of administrative rule making. This is a subject which is all too frequently overlooked by students of administrative law, despite its obvious importance to those affected by agency regulation. The author's viewpoint is well expressed in his characterization of the situation today as the "wilderness" of our federal regulations. This is primarily caused by the sheer bulk of agency rules—what Lavery terms the "uncontrolled flood of agency regulations," which will, according to his estimates, have reached some 480,000 pages by 1960. It is at the production end of the business of administrative rule making that the trouble really lies. And until some restraint in the matter of volume and loquacity is exercised by the agencies, little improvement can be hoped for. The Federal Register Act, the Code of Federal Regulations and the public information provisions in section 3 of the Administrative Procedure Act, valuable though they may be, are, in the

author's view, only first steps to bring the vast field of administrative law-making under control. What is needed now, he says, is for Congress to provide for a genuine codification of all agency rules and for such "Code" to be kept up to date. Congress must itself take over the legislative responsibility for such a "Code," as it did for the Statutes at large in the United States Code of 1926.

When a law professor fathers a book, to paraphrase a recent statement by Circuit Judge Dobie, lawyers are prone to criticize it as being interesting and stimulating yet utterly impractical. When the author is a practising lawyer, the professors turn the tables by insisting that the book possesses mechanical utility but altogether lacks logical symmetry, philosophical consistency, and any profound or penetrating scholarship.[5] It cannot be denied that there is much truth in Judge Dobie's remark. Thus, the present reviewer is bound to suffer from the bias of the academic jurist in his reactions to the work of a practising lawyer like Mr. Lavery. His aim, as he himself expresses it, is not to write a comprehensive critical treatise, but to furnish the practising lawyer with a useful and adequate desk-book covering those aspects of federal administrative law dealt with by him. At the same time, however, one may question whether the work would not have been more valuable had a broader approach been followed. In a field such as administrative law, critique is even more important than summary. The critical views of a practitioner of Mr. Lavery's stature would have proved more useful than his present exegetic reliance on authority.

Bernard Schwartz †

FEDERAL ADMINISTRATIVE LAW. By Rinehart J. Swenson. New York: The Ronald Press Company, 1952. Pp. iv, 376, $6.00.

In spite of the appearance of several more or less comprehensive texts on administrative law in the last few years, workers and students in the field had long endured, theretofore, a dearth of useful texts. As a result they are disposed to welcome joyously a new book such as Swenson's, even though it purports to deal only with federal administrative law, and to ask questions about it only afterward. That afterward has now come, for obviously reviewing time is not only questioning time, but also question-answering time. The first answer is that we should still welcome the book, although it may make some of us furious.

At the outset, readers of a book on federal administrative law might look for a unified and detailed treatment of the Administrative Procedure Act of 1946. It will not be found. Pertinent provisions of that Act are cited in connection with discussions of various subject matters dealt with

5. Dobie, Book Review, 39 VA. L. REV. 135, 137 (1953).

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by it, but the book will hardly serve as a convenient instrument for study of the Act as a matter of special interest. But the book has other values, as will appear.

Meanwhile, an observation of the author about the general character of the Act requires mention and some comment. For some of us the observation is irritating. On pages 121-122 the author states: "This is a lawyer's law, conceived by lawyers and dedicated to the proposition that justice is the exclusive business of lawyers. . . . The provision for citizen participation in rule making gives almost unlimited opportunity for sabotage, and the extension of judicial review may give so many citizens so many days in court that the government will have very few days out of court." [1] It appears to be something less than objective to account for this important and vastly beneficent, though far from perfect, legislation as merely the product of a selfish service of self by the legal profession. It should be added that it is not apparent, in connection with public participation in rule making,[2] how the requirement that the "bureaucrats" come out of their "ivory towers" to the extent of considering the written views of those interested in and affected by proposed rules can sabotage anything. That practice was advocated as long ago (1932) as the report of the English Committee on Ministers Powers, and it was a practice extensively followed in the federal field on a voluntary basis prior to the adoption of the Act. Certainly the practice has much to commend it; this is true especially when its use cannot effectively obstruct the making of rules which are appropriate or necessary. The author's implied criticism of judicial review is unfair. At least he should have indicated that much that is favorable can be and has been said about judicial review generally and about the judicial review provisions of the Act.

But the book in numerous respects is too good to justify detailed examination here of the enthusiasms, overenthusiasms, and biases of the author. The foregoing should be warning enough that at times the author is willing to invite the reader to follow him far out on a limb, instead of cautioning the reader that in many controverted matters there may be or is a different view which is reasonable.

As to scope, the book deals with the growth, nature and control of administrative action. The first chapter deals largely, and adequately enough, with the actual fact of "big government." Chapter 2 deals with fitting this factual situation into the legal one, particularly the constitutional one relating to separation of powers. By ranging through political writings and views from the "one power" to the "five power" theories, the author does a fine job of opening the minds of those who have assumed that the Montesquieu "three power" type of government is the only possible kind. He also develops the idea that the three power system is both delusive and unworkable and in fact under the pressures of the necessities of modern

1. See also page 307 where the author quotes with evident high approval a charge, somewhat similar, except that it out-Swensons Swenson.

2. See Section 4 of the Act.

government, has not prevented the union of all of the kinds of governmental power in many administrative bodies. The treatment of the matter of standards is also sophisticated. The problem of uncertainty in standards is well illustrated, not only by the "war emergency" cases but also in non-emergency situations such as that in *American Power & Light Company v. Securities and Exchange Commission.*[3]

Chapter 3 purports to deal with The Administrative Process. But while constitutional and statutory requirements in regard to rule making and adjudication are considered, the chapter has several defects. The difficulties of distinguishing in many situations between rule making and adjudication seem to be dealt with inadequately. The ancillary investigative and prosecutive powers, as well as the public information and reporting functions, are largely ignored. As to rule making and adjudication, requirements of notice and hearing are developed, although somewhat scantily. Quite usefully, the need for clarifying the law in regard to res judicata is demonstrated. Notably lacking is any adequate treatment of post-hearing (including decisional) matters at the agency level.

Chapter 4 deals with the Enforcement of Administrative Action. It contains a good analysis of the illogic, however politic, of denying the contempt power to administrators. There is an adequate summary of the consequent necessity for court enforcement. Investigation and enforcement of subpenas are dealt with here, although it seems they should have been considered along with other "processes" in chapter 3.

The Doctrine of State Immunity from liability for the acts of its officers is the subject of chapter 5. In connection with consent to liability, some consideration is given to the work of the Court of Claims and to the Tort Claims Act. Several excursions into the state field are made to round out the treatment. A strong plea is made for more extensive curtailing of the doctrine of "state irresponsibility."

The Liability of Public Officers is considered in chapter 6. This chapter, includes a good analysis of the problems arising when the offensive official action is discretionary or "judicial," and the analogy to the immunity of judges is developed. The acute problem of official action under an unconstitutional statute is extensively considered. Mention is made of the opportunity for avoiding risk in doubtful cases by the official's obtaining a declaratory judgment.

Judicial review and its limitations are dealt with in chapters 7 and 8. In considering the theory of judicial review, Parliamentary supremacy in Britain is contrasted briefly with our system of judicial supremacy, and the anomaly is noted that under our system the courts are required to "assimilate to the judicial function the power to govern" (page 214). Reference to the French system of administrative independence might have served to round out the treatment of this aspect of separation of powers. As to scope of review, there is a good treatment of the problem of administrative finality in cases presenting "mixed" questions of law and fact and in cases

3. 329 U.S. 90 (1946).

involving "constitutional" and "jurisdictional" facts. The treatment of the substantial evidence rule is comparatively extensive, clear and good. The criticism of judicial review of rule making is worthy of thoughtful consideration.

Chapter 9, entitled Government by Agency or Government by Lawsuit, is devoted to an examination, with administrative reform possibilities in mind, of both the benefits and the dangers of government by administration which is often of a discretionary character, as compared to government by rule. The point is made and stressed that government by agency is better adapted to the protection of "public rights," in connection with which large policy areas are encountered, whereas courts are generally ill equipped to determine policy. The objective-minded student of this subject will find much to interest him in this chapter. At any rate, we have come to use both discretion and the rule of law as instruments for coordinated governmental action. Lawyers who have resisted the increased use of the administrative technique (and the author seems to assume that nearly all of them do) and favor subjecting the "far-reaching policies of government" to the "narrow, individual, and legalistic procedure" of the "lawsuit method of evaluation" are severely castigated, and not without a number of gratuitous side-swipes at the legal profession as a whole.

Chapter 10, the final chapter, considers Congressional Supervision of the Federal Administrative Process, and covers matters usual to such a heading. In addition it stresses the useful and perhaps often-neglected idea that the congressional investigation is itself a powerful instrument of control.

What now about the book as a whole? In spite of unevenness, some omissions, and various biases (which may, perhaps, be largely forgiven in so controversial a field) it is believed that the book will have a large value to those who wish to explore the pros and cons of one of the most important legal and governmental developments of our time. However, neither student nor practitioner should rely on it exclusively. Others, who have already explored, even if they disagree with the author on many points (and many doubtless will) should nevertheless be thankful for this book.

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