

BOOK REVIEWS

HIDDEN TAXES IN CORPORATE REORGANIZATIONS. By Arnold R. Baar and George M. Morris. The Foundation Press, Inc., Chicago, 1935. Pp. xv, 547. Price: \$10.00.

Tremendous increases in governmental expenditures, a familiar spectacle in recent years, make necessary rapidly growing tax burdens. Rapidly growing tax burdens sharply accentuate tax consciousness on the part of the citizen, leading to business arrangements directed toward minimizing or avoiding taxes. Tax avoidance spurs government on to efforts to stop the gaps and to plug the loopholes through which citizens have found it both lawful and practicable to minimize or avoid the tax burden.

In order to make income taxes fair and non-discriminatory, those who draft and those who administer income tax laws must deal in detail with the vast array of complicated and constantly changing practices presented in modern business life. The taxpayer, when making out his income tax return, must face a vastly complicated system of taxation, the details of which are often difficult adequately to understand and follow. The increasing burdens of this tax system can, however, be mitigated to some extent through so arranging his transactions that the income tax provisions will not apply.

To assist government or citizen, or both, in this perennial practical process of tax collection or of avoiding or reducing the tax burden, many highly specialized and detailed technical books on taxation have appeared. The volume herein under review is one of these books, devoted to the narrow but far-reaching topic of income tax liability resulting from transactions in corporate reorganization.

The underlying practical problem giving rise to this book may be readily stated. Under the federal statute, income taxes become payable when income is realized. One way in which income is realized is by the sale of property at a profit over original cost. Corporate reorganizations, before the advent of the 77B Amendment to the Bankruptcy Act, were typically carried out through a procedure taking the form, briefly, of a sale of assets by the financially moribund corporation to a new, reorganized corporation in exchange for the securities, etc., of the reorganized corporation. Such a transaction obviously realizes no profit over original cost for anybody. It results, rather, in a readjustment of interests in the business organization, former creditors perforce becoming part owners or subordinate lienors in the reorganized corporation instead of getting their claims paid in full in cash as contracted for. Accordingly, the federal tax statute provides that such transfers in corporate reorganization shall involve no income tax. This so-called exemption from income tax on a transfer of assets in a corporate reorganization can also be resorted to, however, as a loophole through which to escape such taxes in the case of profitable sales of property. Astute lawyers can so arrange the details of a sale of property as to give the transaction the external form of a transfer in course of a reorganization. In the administration of the income tax law, therefore, two related problems must be faced: (1) just what reorganization properly can be considered exempt under the income tax statute, and (2) whether the transaction encountered in the instance, properly analyzed, falls within or outside of such statutory exemption. The text considered here is designed to assist practitioners in the solution of these two problems in connection with the application of the income tax law to current reorganization transactions.

The plan of the book presents first a series of statutory definitions of what is to be included in the term "reorganization" as used in the income tax statute.

It traces, historically, statutory expansion of the range of subject matter falling within this term, and discusses the problem of interpretation of the successively expanding statutory definitions and their accompanying administrative regulations which have up to now been disclosed in litigation. Next is presented a series of analyses of what transfers are to be included in the exemptions, in the light of the statutory provisions and administrative regulations, as continually varied by successive amendments and judicially construed in current litigation. Finally, a similar minute and exhaustive examination is made of the bases for determining gains or losses where the exemptions do not apply.

The present reviewer has studied this book carefully without being motivated by the exacting problem of just how to advise a client as to the application of the income tax law to a particular transaction. Thus read, the book readily conveys the impression of high specialization, minute technicality, and complete exhaustiveness. It appears repeatedly to put almost every word of the applicable sections of the income tax statute under the searching scrutiny of the legal microscope. For the legal adviser who, though relatively unfamiliar with the exact details, must nevertheless apply the constantly amended rules to the constantly varying practical transactions of actual clients, such a book, while up to date, can be of great assistance. By the same token, as successive amendments to the income tax rules, statutory or administrative, continue to be made, and as further variations are contrived in the practical transactions of clients in the ever-continuing contest between government and taxpayer over the processes of collecting or of avoiding taxes, such a book must tend toward relatively rapid obsolescence. It is no criticism of such a book, moreover, that it cannot make all questions clear and all paths straight. In this connection one is forcefully reminded of the highly significant remarks of a distinguished English jurist as delivered before the American Bar Association: "The complexity of modern trade transactions renders it impossible to legislate for every contingency, and any such attempt would probably end in such obscure and irritating provisions as one finds in an Income Tax Act, in which the anxiety of the revenue authorities to stop gaps, discovered by the ingenious potential taxpayer, is apt to overtax the ingenuity of the Parliamentary draughtsman, to completely confuse the mind of the honest taxpayer, and to start the Court on a Will o' the Wisp hunt for the intention of Parliament."¹

Lawrence Vold.†

INVENTION AND THE LAW. By Harry Aubrey Toulmin. Prentice-Hall, Inc., New York, 1936. Pp. xx, 399. Price: \$5.00.

The scope of this book is definitely limited, the discussion being confined to a single phase of the patent law. It is an important phase, to be sure, namely, that esoteric and difficult question as to whether or not a device which is new and useful demonstrates inventive genius in its conception. As Judge Arthur C. Denison says in his foreword, "Ever since the Supreme Court, exploring the statute, first discovered that a machine to be patentable, must be more than new and more than useful, the analytical chemists of this intellectual art have been trying to isolate that 'subtle something' which serves as the catalyst whereby skill becomes genius—with indifferent success." The book undertakes to present "the pronouncements of the Supreme Court of the United States and of

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1. The Rt. Honorable Lord Thankerton, Lord of Appeal in Ordinary, London, England, *Real Status and Function of the Lawyer in the Body Politic* (1936) 22 A. B. A. J. 713, 715.

the various United States Circuit Courts of Appeals", and those of occasional English courts, applicable to this specific problem. The legal meanings of novelty and usefulness requisite to patentability are adverted to incidentally, but only casually and in explanation of "invention". Hence the book, however well it be done within the author's self-imposed limits, cannot in any way serve as a text book of patent law; it will be an adjunct to the user's other books on the general subject. But as such an adjunct, it is a reference to abundant authority, citing some 700 cases.

In form also the book is somewhat unique. It is not a text of discussion by the author, like, say, *Walker on Patents*.¹ Neither is it a collocation of digested opinions, like *Macomber's Fixed Law of Patents*,² nor a text with illustrative cases, like *Rogers on Patents*.³ It strikes the reviewer as being, rather, a combination of the first two. The author formulates his own statement of the law, to the extent of a paragraph or a page or two, and follows it with several pages of excerpts from judicial opinions in cases presumably, but not always (many of the statements are but dicta), involving the point.

To this reviewer, an expression of law in an author's own words, as his synthesis of many decisions which he has studied and analyzed, is preferable to a mere compilation of repetitious statements "in the words of the courts". Indeed there is grave danger that the "words of the court" may be highly misleading when divorced from their context and their peculiar fact situations. Mr. Toulmin's selection, for example, makes no distinction between dicta and declarations essential to the decision. Moreover, some of the statements mean far less when considered in the light of the facts than when read by themselves. Thus in *Fond du Lac County v. May*,⁴ cited for the proposition that patentable invention must be an art, machine, manufacture, or composition of matter, the Court does indeed say (referring to *Jacobs v. Baker*)⁵ what Mr. Toulmin quotes, "This court held that an improvement in the construction of a jail did not come under the denomination of a machine, or a manufacture, or a composition of matter; and that it was doubtful whether it could be classed as an art."⁶ But the force of this statement, so explicit by itself (and so utterly absurd on its face), is practically destroyed when one looks at its context and the circumstances. So related, it becomes in both cases a mere casual "make weight" thrown carelessly into an opinion whose real basis is obviously that the device in question showed no patentable ingenuity. In various other instances the quoted excerpt, standing by itself, seems to mean something that, when read as a part of the whole opinion, it obviously was not intended to convey.

It is precisely this danger of misjudging the force of an opinion when reliance is upon excerpts only, that conduces to the reviewer's preference for the calculated conclusions of a reliable author who has himself studied and analyzed the decisions as a whole, and who gives the citations by which his accuracy of formulation can be checked. But for one who would use an orderly compilation of excerpts from judicial opinion, Mr. Toulmin presents a surprising number.

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1. WALKER, PATENTS (Lotsch's ed. 1929).

2. MACOMBER, THE LAW OF PATENTS (2d ed. 1913).

3. ROGERS, THE LAW OF PATENTS (1914).

4. 137 U. S. 395 (1890).

5. 7 Wall. 295 (U. S. 1869).

6. *Fond du Lac County v. May*, 137 U. S. 395, 408 (1890).

CASES AND AUTHORITIES ON PUBLIC UTILITIES (2d ed.). By G. H. Robinson. Callaghan & Co., Chicago, 1935. Pp. xxvii, 884. Price: \$6.00.

This work is much more than merely a second edition of a case book on public utilities which appeared in 1926 and which has been extremely useful to students of public utility regulation from the legal, economic and administrative standpoints. While in broad outline the present volume follows the arrangement of the earlier one, the treatment has been brought up to date. It covers developments which have taken place since 1926, and presents the cases from the standpoint of the present. It includes many new cases and analytical notes, and there have been extensive omissions of materials that are now of secondary importance.

The volume contains eleven chapters, besides an introduction in which the author discusses admirably the public utility concept in American law. The chapter headings are as follows: (1) The Historic "Public Callings" and Modern Extensions; (2) Legislative Authority to Declare "Publicness" as Affected by Common Law Principles Concerning the "Holding Out"; (3) The Public Interest in the Utility as a Going Concern: Labor "Devoted" to Public Utility Service; (4) Entry into Public Utility Status: Reciprocal Duties of Public and Utility; (5) The Obligation to Serve "All"; (6) The Obligation to Serve Without Discrimination; (7) Obligations of the Calling to Serve at Reasonable Rates; (8) The Obligation to Furnish Adequate Service; (9) The Obligation to Continue Service; (10) The Duties of Performance Owed to Those for Whom Service is Undertaken; (11) Federal and State Regulatory Authority and Their Interaction.

Each chapter presents pertinent excerpts from leading cases. In addition, leading authorities and other cases are cited in footnotes, and editorial analyses are added whenever they will contribute to the clarity of the topic. There is a table of cases cited, and an index of the various subjects covered. While there has been a reduction in the total number of pages found in the earlier volume (976 to 884), the author has included 83 new cases among the 199 covered in the volume.

Students of public utility regulation who are keenly concerned with public policy will be especially interested in the treatment of the public utility concept, and the consideration of what really makes a public utility and therefore subjects it to public control. This includes the legislative power to declare an industry a public utility. The newer cases relating to this topic are particularly emphasized.

The first nine chapters follow mostly the headings and sections of the earlier volume. Chapters 10 to 16 of the first edition are missing from the present work. In the new arrangement two chapters are added. Chapter 10 covers comprehensively the duties of performance to those for whom service is undertaken, and Chapter 11 surveys the federal and state regulatory authorities and their interaction.

The concluding chapter is of special significance in view of the interstate scope of present public utility organization and management, and because of the enlargement of federal regulation that has been instituted under New Deal legislation, through the Federal Power Commission, the Securities and Exchange Commission, and the Federal Communications Commission. The underlying constitutional and economic factors are presented in a clear and realistic manner.

John Bauer.†

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THE MAIN INSTITUTIONS OF JEWISH LAW. Volume One: The LAW OF PROPERTY. By Dr. Isaac Herzog. The Soncino Press, London, 1936: Pp. xxvii, 416. Price: 10 s. 6 d.

I think it was Schiller who said that really to know his own language a man must study a foreign tongue. That is probably true of religion as well, and certainly of jurisprudence. According to one religion, marriage disqualifies a man for the priesthood. In another faith, celibacy has the same result. The Jewish divorce law requires the express and well considered approval of both parties, whereas in most American jurisdictions such an agreement probably would be interpreted as fatally collusive. Thus one finds that reason and justice, like morality, vary with latitude, longitude, and the calendar.

Yet even those who have indulged in the fascinating study of comparative jurisprudence have rarely included Jewish law in their curricula, for want of textbooks on the subject. Until about a generation ago most Talmudic students were oblivious to the world outside the synagogue. It has only been within recent years that some Jewish scholars, more modern than their colleagues, have attempted to make their beloved study palatable, or at least intelligible, to the Occidental mind. But often even they lacked the rare skill needed to present Hebraic law in a systematized, modernized, and Westernized form. However, Dr. Herzog, who is Chief Rabbi of Ireland, though a Rabbinic scholar of the old school, is equipped with a broad modern education, plus a knowledge of Roman as well as English law. He is thus eminently qualified for the task he has undertaken: ". . . to give a systematic presentation of Jewish law under general jurisprudential concepts in a form readily intelligible to the average reader accustomed to Western standards."

Only one volume has appeared so far: *The Law of Property*. The first chapter, which is perhaps the most arresting, is entitled, "The Source of the Law." Jewish law, too, is divided into *lex scripta* (*Torah Shebiktab*) and *lex non scripta* (*Torah Sheba'al-peh*). The *lex scripta* of the Hebrews, however, is what Blackstone would define as "revealed or divine". Hence, Jewish "written law" is that revealed by God to Moses, as recorded in the Pentateuch. All other Jewish law is oral. A "broader and more far reaching differentiation" is the division into Pentateuchal (*Deorajtha*) and non-Pentateuchal (*Derabbanan*) law. Pentateuchal law includes not only the Mosaic Code, but also certain interpretations of it, traditionally believed to have been disclosed by Moses to Joshua, and thus orally transmitted by acknowledged leaders from generation to generation. This class also includes meanings of the Mosaic text arrived at by applying certain established deductive processes. The construction of the so-called *lex talionis*, "an eye for an eye", as calling for only a compensatory money verdict is thus regarded as Pentateuchal. Rights asserted under the Pentateuchal law prevail over conflicting rights claimed under non-Pentateuchal, or purely Rabbinic law.

Custom (*minhag*) is, of course, part of the unwritten law. It may be general or local (*hamakon*). Special recognition is given to the custom of merchants (*soharim*). To be valid it must be well-established, and not in conflict with written law. A custom which is unreasonable and unfair (*garua*) is not binding.

The author finds no evidence of any exact parallel in Jewish law to the development of equity as a separate legal system. There is, though, a strong tendency on the part of the rabbis (who served as judges) to temper the rigor of the law with mercy by insisting upon an equitable adjustment between the parties. In extreme cases they have even assumed the responsibility of temporizing the law.

The author discusses interestingly "The Law of the Non-Jewish State as a Source of Jewish Law". A briefer title would be, "Conflict of Laws". He

quotes with approval the maxim of the great Babylonian teacher, Mar Samuel (180-257 A. D.), that "the law of the government is *the* law", except, of course, in matters strictly theological. However, rather than make the embarrassing substitution, the Rabbis would now and then resort to strained and ingenious interpretations of their own code as being *en rapport* with the law of the State on the problems at issue.

Property is either movable (*metaltelin*) or immovable (*karka*). Various modes of transfer and acquisition of both real and personal property are discussed. Those who regard Rabbinic law as obsolete will be surprised to find reference to such modern subjects as bailment, liens, partnership disputes, mortgages, restraint of trade, and unfair competition.

Other volumes soon to appear are, Volume Two: *The Law of Obligation* (Contracts), Volume Three: *The Family Law* (Marriage, Divorce, Succession and Testation), Volume Four: *Administration of the Law*, and Volume Five: *The Criminal Law*. If the forthcoming volumes maintain the standard of the first, and there is every reason to believe that they will, Dr. Herzog will have produced a monumental work of great value.

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BOOK NOTES

THE JUDGE CHUCKLES. By A. L. Sainer. The Substantive & Adjective Law Publishers, New York, 1935. Pp. 233. Price: \$2.50.

The editor has collected twenty-eight judicial opinions ranging in time from 1588 to 1935, and graduated in humor from the farcical opinion rejecting the contention that the term "bootlegger" was an encomium¹ to the subtle wit of Justice Burch in holding that under certain circumstances a jury might be permitted to sniff at a liquid alleged to be liquor.²

Each opinion is prefaced by an appropriate quotation which, if read after a perusal of the opinion, adds to the chuckles that are produced. To one who is weary of laboriously wading through myriads of dry-as-dust cases, the temporary respite afforded by this volume comes as a welcome relief.

LIFE INSURANCE: A LEGALIZED RACKET. By Mort Gilbert and E. Albert Gilbert. Marlowe Pub. Co., Philadelphia, 1936. Pp. 205. Price: \$2.50.

Written in laymen's language, this little book packs within its short pages facts most disconcerting to those of us who have long regarded life insurance companies as protectors of those who live after we die. Suddenly to realize that the cheapest insurance (one-year renewable term) is by all odds the best, and the most expensive (the endowment) the worst, is a bit confusing, and certainly, not very comforting. It is always a rude awakening to learn that we are being mulcted by our alleged benefactors; but often it is profitable. Every attorney should become as familiar with the facts exposed by this book's authors as he is with his everyday legal problems.

1. *In re Kirk*, 101 N. J. L. 450, 130 Atl. 569 (1925). The court in dicta stated that the term "souphead" would not, on a basis of Roman history and other considerations, be regarded as opprobrious.

2. *State v. Jackson*, 121 Kan. 711, 249 Pac. 688 (1926).