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itself represents previous evaluations of conduct and in turn influences subsequent evaluations, provide a guide, for an ultimate criterion is still lacking. But Professor Hall seems to have faith in method, though the purpose of the method be left unexplained. Arguing that the current political ideal has formed, again at least since the time of the Stoics, a part of the essence of positive law (in the sense that such ideal should conform to "justice," "virtue" or "natural law"), and expressing the belief that the democratic ideal, self-rule, is the highest political form achievable by man, he concludes that self-rule must form a part of the essence of law. Certainly the democratic form of government would seem to be that most consistent with man's nature. It also may be that self-rule is less likely to lead to excesses like Nazism or Communism, which Professor Hall dreads as much as any person. To that extent a plea for self-rule is more than understandable. But if I understand Professor Hall correctly, he does not actually separate the ethical quality of law from its democratic or non-democratic formulation. In his analysis, democratically formulated law has intrinsic value because it is the product of the form of government best suited to ascertain the "best answers" to human problems; that is, because there is no better way of ascertaining the ethically valid, law established by truly democratic processes must be "rationally the most defensible," and therefore "objectively valid."

In the last analysis, Professor Hall's third component must be regarded as another of those attempts, always necessarily futile, to construct an ethical science without first principles. It would be better if it were not necessary to be adversely critical of the effort of so serious a scholar as Professor Hall. But there is no way of judging the value of any activity as *human activity* (that it, not merely in terms of immediate purpose), which is necessarily the essence of ethics, unless the purpose of man can be ascertained. This is the province of metaphysics and faith. Those who can accept neither must be content to remain aimless impulses to action without right to speak of values.

ROBERT A. PASCAL*

TAX PLANNING FOR ESTATES, by William J. Bowie. Nashville: The Vanderbilt University Press, 1949. Pp. 93, \$2.00.

My own liking for this little book is shown by the fact that I placed it on the list of books for the students in the Estate

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and Gift Tax course here to buy under the GI bill. One of them remarked that it was the sort of book that you could show to an intelligent client to explain what you were trying to do for him. It is a remarkably good job of explaining the essentials of a complex subject in less than 100 pages.

There remains the question of the value of the book to the practicing attorney in Louisiana. Because of the basic differences between the succession laws of this state and those of the common law jurisdictions, there is a natural tendency to dismiss any national book on estate planning as inapplicable to the problems which will arise here. While adjustments must of course be made, dismissal of this volume would be a mistake.

Fundamentally, all estate tax avoidance devices are based upon property theories of title which ignore economic realities. If the property is not owned by the decedent at the time of death, it is not part of the estate, and obviously not taxable. However, there is a wide field in which property is not "owned" by the decedent in any technical sense, but it is effectively controlled (or was gotten rid of by a device which was a substitute for a will)—and it is here that the battle between the taxpayer and the tax collector has been waged. It has been a losing battle, on the whole, for the taxpayers.¹ Professor Bowe's book summarizes the devices which still survive.

For Louisiana, the best of avoidance devices was already available in the community property system, with its view that one-half of the community property always had belonged to the surviving spouse. This rule was applied to the tax cases by the courts,² but it was reversed by Congress in 1942, so far as the estate tax was concerned.³ The Supreme Court upheld Congress. But the battle lost in *Fernandez v. Weiner*⁴ was won again in Congress in 1948 so emphatically that not only was the recognition of community property restored, but its benefits were

1. A losing battle, that is, in the courts. Taxpayers have fared better before Congress. See Paul, *Studies in Federal Taxation* (1937) 27-66; Paul, *Taxation for Prosperity* (1947) 281. The most recent example is the congressional reaction to the government victories in *Commissioner v. Church's Estate*, 335 U.S. 632, 69 S.Ct. 322, 93 L.Ed. 310 (1949) and *Spiegel's Estate v. Commissioner*, 335 U.S. 701, 69 S.Ct. 301, 93 L.Ed. 327 (1949), as expressed in the Technical Changes Act, Pub. L. No. 378, 81st Cong., 1st Sess. (Oct. 25, 1949), discussed in Bittker, *Church and Spiegel: The Legislative Sequel* (1950) 59 *Yale L.J.* 395. Most of the estate tax avoidance devices which are effective today have specific congressional sanction.

2. *Hernandez v. Becker*, 54 F.(2d) 542 (C.C.A. 10th, 1931).

3. Int. Rev. Code § 811(e)(2), repealed by Revenue Act of 1948, § 351(a), 62 Stat. 116.

4. 326 U.S. 340, 66 S.Ct. 178, 90 L.Ed. 116 (1945).

extended to all states through the marital deduction provisions.⁵ Thus the victory of community property, the civil law's contribution to the field of tax avoidance, seems secure. The discrimination in the present law is not against a majority of states, but against the unmarried, a minority that may safely be ignored.

The two principal common law devices for the avoidance of estate taxes are the irrevocable gift and the trust. The gift, of course, has always been recognized by Louisiana law, but with significant limitations not known to the common law.⁶ The trust, in Louisiana, is a recent statutory innovation,⁷ and is subject to limitations unknown in common law trusts.

In the use of the gift to avoid estate taxes, Louisiana lost the first major battle in the courts because of a provision in the Civil Code that gifts between spouses were always revocable.⁸ The legislature amended the code,⁹ and today gifts between spouses are as effective a device for the avoidance of an estate tax in Louisiana as they are in any other state. Their practical importance, however, is diminished by the present recognition of community property and the marital deduction.

Making a valid gift, of course, does not lead to complete tax exemption. There is then the gift tax to pay. As Professor Bowe points out, however, because of the gift tax exemptions and exclusions, and the appreciably lower gift tax rates, important savings are possible through the making of inter vivos gifts, despite the gift tax. There are, indeed, some savings even though the gift is held to be in contemplation of death and the estate tax is levied in the end.

Under the Civil Code¹⁰ it is true that donations of more than the disposable portion of the estate are not irrevocable, but subject to reduction. Further, it cannot be conclusively determined whether a gift falls within these provisions until the donor's death.¹¹ However, it is probable that these gifts are not "revocable," and hence not taxable under the estate tax, under the provisions of the Internal Revenue Code. The Federal statute

5. Int. Rev. Code § 812(e). The effect of the present law is explained in Rubin and Champagne, *Community Property Aspects of the 1948 Revenue Act (1949)* 9 LOUISIANA LAW REVIEW 1.

6. Arts. 1467-1755, La. Civil Code of 1870.

7. La. Act 81 of 1938 [La. R.S. (1950) §§ 9:1791-9:2212].

8. Art. 1749, La. Civil Code of 1870. *Howard v. United States*, 125 F.(2d) 986 (C.C.A. 5th, 1942), noted in (1942) 55 Harv. L. Rev. 684; *Vaccaro v. United States*, 149 F.(2d) 1014 (C.C.A. 5th, 1945).

9. La. Act 187 of 1942 [La. R.S. (1950) §§ 9:2351-9:2353].

10. Art. 1504, La. Civil Code of 1870.

11. *Guidry v. Caire*, 181 La. 895, 160 So. 622 (1935).

refers to a power of revocation in the decedent either acting alone or with others.¹² The Louisiana Civil Code provisions indicate that the power of reduction is not in the donor at all, since the donation is made effective for his life, and the right to sue at his death is given only to his forced heirs.¹³ The adaptability of the suggestions with regard to gifts in Louisiana, consequently, is limited to gifts of the disposable portion of the estate, or to gifts in the proper proportion to the forced heirs. Otherwise the gifts may be swept back into the estate in an action brought by the forced heirs, thus raising the possibility of an estate tax claim by the federal government.¹⁴

The trust, however, is the greatest of the tax avoidance devices. Most estate tax battles have been fought over it. Even with the set-backs that taxpayers have suffered, the basic pattern of a trust or bequest to the son for life, with remainder to such of the grandchildren as the son shall designate, is effective today to make the estate tax payable only every other generation instead of every generation.¹⁵ Such a trust or bequest, however, is impossible in Louisiana. The duration of a Louisiana trust is limited to ten years after the settlor's death, or to ten

12. Int. Rev. Code § 811(d) (1939).

13. Arts. 1503, 1504, La. Civil Code of 1870. Adopted as well as natural children may be forced heirs. If, however, the donation is within the terms of Art. 1497, La. Civil Code of 1870, making donations of all of the donor's property void, the transaction is clearly taxable, since the power of revocation there is in the donor and within the words of the federal statute.

The right of revocation for ingratitude, given to the donor by Art. 1560, La. Civil Code of 1870, is so limited in the situations where it can be invoked, and in its effect under Art. 1562, La. Civil Code of 1870, that it is suggested that it is not a "power of revocation" within the meaning of the Federal Estate Tax. In the case of a collation, under Arts. 1227-1241, La. Civil Code of 1870, since the moving party must be an heir rather than the donor, it is suggested that the arguments in the text against taxability of a reduction are applicable.

14. *Guidry v. Caire*, 181 La. 895, 160 So. 622 (1935) is an example of an action of this type. Whether such an estate tax claim would be valid is a complex problem beyond the scope of this review. The additional danger of tax claims as the result of the tacit revocation of donations inter vivos, under the rule of *Atkins v. Johnston*, 213 La. 458, 35 So.(2d) (1948), is pointed out in Note (1949) 9 LOUISIANA LAW REVIEW 294.

15. This type of trust with a special power of appointment is specifically exempted from taxation by Int. Rev. Code § 811(f)(2)(A). The power of appointment is prohibited in Louisiana. Art. 1573, La. Civil Code of 1870. If the grandchildren are alive at the time of the testator's death, much the same result might be achieved by a bequest of the naked title to the grandchildren, and the usufruct to the son, as permitted by Art. 1522, La. Civil Code of 1870. *Succession of Fertel*, 208 La. 614, 23 So.(2d) 234 (1945). The tax result would be the same as in the common law trust, and the theory upon which it is based is also the same—that title vests directly in the grandchildren from the decedent. The bequest should be made to the grandchildren by name, and the device is useful only where there is no danger of disinheriting after-born grandchildren.

years after child beneficiaries attain their majority.¹⁶ Further, the beneficiaries of a Louisiana trust must be in being at the time it is established.¹⁷ The trust for grandchildren not in esse is an impossibility. Any tax avoidance device which depends upon a trust for a lifetime's duration, or a trust for children not in esse cannot be used in Louisiana.

Charitable trusts with indefinite duration are specifically permitted in Louisiana by statute.¹⁸ Taxes may be saved by using part of the disposable portion of the estate to establish a charitable trust with future expenditures for charitable objects under control of a trustee who may be a member of the family.¹⁹ The more important device of retaining control of a family business, by leaving the bulk of the estate to a charitable foundation controlled by the family, and, through claiming the charitable deduction avoiding the sale of the business, perhaps at a sacrifice, to meet the demand of the tax collector for cash, runs counter to the doctrine of forced heirship. It could only be done here with the acquiescence of all of the forced heirs.

The charitable foundation as a method of preventing the forced sale of a family business to satisfy the tax collector's demand for cash has been the favorite method for preserving the country's largest fortunes.²⁰ As Professor Bowe points out, however, it may also be useful in preserving a relatively small business, and, while it sacrifices capital which would go to the tax collector anyway, it preserves control.

16. La. R.S. (1950) § 9:1794.

17. La. R.S. (1950) § 9:1902. The same would be true of a direct gift, under Art. 1482, La. Civil Code of 1870. Another important limitation on Louisiana trusts, though not particularly significant for estate tax purposes, is that while the legitime may be placed in trust (La. R.S. [1950] § 9:1793), the income of the legitime must be paid to the beneficiary at least once a year. The act is silent as to accumulations where the legitime is not involved, and presumably they would be permitted.

18. La. R.S. (1950) §§ 9:2271-9:2295. In Louisiana, the trust for life with remainder to charity, of the type involved in *Henslee v. Union Planters Nat. Bank*, 335 U.S. 595, 69 S.Ct. 290, 93 L.Ed. 239 (1949), and similar cases, would probably be held to be invalid, as violating the ten year limitation, rather than valid, as an exempt charitable trust. This is the view taken in Wheeler, *The Louisiana Law of Charities* (1941) 15 *Tulane L. Rev.* 177, 194. The same result could be achieved by an outright bequest to the charity, coupled with a contract by it to pay an annuity to the widow. The value of the annuity, like the value of the life estate in the common law trust, would be subject to estate tax, but the corpus would escape.

19. *Pires v. Youree*, 170 La. 986, 129 So. 552 (1930). But see *Succession of Purkert*, 184 La. 792, 167 So. 444 (1936). In drafting such a trust, the trustee should be named as such and it would be well to recite that the powers are to be exercised under the Charitable Trusts Act.

20. Comment, (1950) 59 *Yale L.J.* 477. The exemption of charitable bequests is provided in Int. Rev. Code § 812(d) and of gifts in Int. Rev. Code § 1004(a)(2)(B).

Most of the tax saving devices in Professor's Bowe's book are not dependent upon the types of trust which are impossible in Louisiana for their success. There is more than enough that is of practical importance here to make the book well worth reading. Where a gift in trust is recommended, in jurisdictions where such a gift is possible, the same tax results can often be achieved in Louisiana by an outright gift. Where a trust, impossible in this state, is really needed, Louisiana lawyers should not overlook the possibilities of setting up a trust in another state. Assuming that movable property is involved, and that it is moved to the state of the trustee's domicile before the trust is set up by contract in that state, the law of that state will govern the validity of the trust.²¹ It should be noted, however, that there is no constitutional obstacle to the taxation of the trust by the state of the trustee's domicile, either in inheritance of property taxation,²² though most states where important trust business is transacted do not levy such taxes.

No one ought ever to write on this subject without making this warning: There are many situations in which the best estate plan, for the particular family, is not the one which saves the most taxes. The estate tax avoidance devices which remain effective generally require almost completely giving up control over the property. There are many circumstances where it may be worth the estate tax to retain complete control. Professor Bowe begins his book with this warning, and it is appropriate that this review should end by repeating it.

ALBERT H. COTTON*

21. Restatement, Conflict of Laws (1934) § 294, and Louisiana Annotations; Land, Trusts in the Conflict of Laws (1940) § 23; *Hulin v. Faure*, 15 La. Ann. 622 (1860).

22. *Greenough v. Tax Assessors of City of Newport*, 331 U.S. 486, 67 S.Ct. 1400, 91 L.Ed. 1621 (1947).

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