ADMINISTRATIVE LAW-DEVELOPMENTS: 1940-1945 (A SERVICE FOR RETURNING VETERANS)

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Administrative Law—Developments: 1940-1945 (A Service for Returning Veterans)*—No period in American history has ushered in more sweeping changes in the legal structure than has the last decade and a half. No area of the law has witnessed more rapid development than has administrative law. A sketch of the progress of administrative law during the five-year period 1940 to 1945 reveals

* This comment is the third in a series of comments on recent developments in the various fields of the law published and to be published by the Review as a service for returning veterans. See announcement, 44 Mich. L. Rev. 149 (1945).


To be published: Shartel, Constitutional Law; James, Corporation Law; Bradway, Domestic Relations; Ohlinger, Federal Jurisdiction and Practice; Winters, State Adoption of the Federal Rules; Russell A. Smith, Labor Law; Arthur M. Smith, Patent Law; Thurston, Restitution; Kauper, Taxation; Leidy, Torts; Oppenheim, Trade Regulations.
an important refining of the "quasi judicial" procedures—procedures which, because of their swift and topsy-turvy growth, can well use a little refining.

The purpose of the following survey is two-fold; first, to outline the more significant developments of the last half decade, relating the new materials to the earlier doctrines and cases, thus furnishing a framework both for refreshing in the earlier law and familiarizing with the more recent; and, second, to furnish by suggestion and documentation sufficient bibliographical and other material to enable anyone who is seriously interested, to pursue on his own initiative a more intensive examination of the progress of administrative law during the war years. There is no pretense of exhaustive exposition; there is merely a suggestive survey. Moreover, the survey concerns only the procedural aspects of the law of administrative agencies. No attempt is made to invade the vast reaches of substantive law enforced by them.

Recent Statutory Developments in Administrative Law

Doubtless the most widely advertised statutory developments in administrative law of the war years have been the special war agencies, intended to guide the economy of the nation through the processes of war conversion and reconversion. The War Production Board, the Office of Price Administration, the National War Labor Board, and other war agencies have indeed fulfilled a most important function since Pearl Harbor. They have affected every man, woman, and child, and every business in the land. Without them it is scarcely conceivable that the war could have been prosecuted effectively or the national economy kept on an even keel. However, their temporary character, their "emergency" quality, and the fact that they are either liquidated or destined to be summarily brought to an end in the near future,

1 The War Production Board was first established by Executive Order 9024, dated January 16, 1942. It was set up within the Office for Emergency Management of the Executive Office of the President. The board was finally liquidated by Executive Order 9638, dated October 4, 1945, and its powers were transferred to the Civilian Production Administration in the Office of Emergency Management.


3 The National War Labor Board was established by Executive Order 9017, dated January 12, 1942. Additional authority was conferred by the so-called War Labor Disputes (Smith-Connally) Act of June 25, 1943.

4 A useful document for reference purposes, setting forth in brief compass the organization, powers, and personnel of all federal government agencies, is the United States Government Manual, published by the Division of Public Inquiries of the Office of War Information.

Detailed information concerning the war agency powers, rules, orders, decisions, etc., may best be obtained by reference to the standard loose-leaf services.
Much more significant from the long range point of view are certain powerful contemporary movements toward statutory reform of administrative procedure. Such reforms are definitely on the way. They spring from a profound apprehension over the rapid growth of more or less uncontrolled administrative powers. They are being brought to pass by the diligent efforts of many intelligent specialists, whose interests lie in aiding the wise assimilation of modern administrative methods into a constitutional system in which bureaucratic absolutism finds itself a most unwelcome guest.

Antecedent to the actual enactment of reform legislation on administrative procedure, recent years have brought forth a series of notable reports, all of which have recommended legislation to bring about organizational and procedural improvements in the administrative system. These reports have appeared from time to time during the past fifteen years, but the last five years have been especially fruitful. Because of their influence upon reform measures, as well as for the wealth of valuable information contained in them concerning administrative law and procedure, they have become milestones in the progress of administrative law. The principal documents in the series are as follows:

(1) *Report of the Committee on Ministers' Powers, 1932*, (A British document). This report deals with administrative law in England, but it served to stimulate constructive efforts on this side of the Atlantic and should therefore be regarded as a forerunner of the domestic efforts to improve administrative justice.

(2) *Report of the President's Committee on Administrative Management, 1937*. This report declares among other things that the federal "independent" regulatory commissions can more accurately be called "the 'irresponsible' regulatory commissions, for they are areas of unaccountability."

(3) *Reports of the Special Committee on Administrative Law of the American Bar Association, 1933–1943*. These reports contain a

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*Presented by the Lord High Chancellor to Parliament, by Command of His Majesty, April, 1932.

*Transmitted to the President January 8, 1937, and by him transmitted to Congress in accordance with Public Law No. 739, 74th Cong., 2d sess.

wealth of valuable material, and in the course of ten years they have offered three quite different types of statutory proposals for administrative reform. First came a proposal for a Federal Administrative Court. This died an early death. Then came the so-called Walter-Logan Bill, passed by Congress, but very wisely vetoed by the President. Finally the committee recommended the McCarran-Sumners Bill, now before Congress, known as S7 and HR 1290. This measure may become law before this survey is printed.

(4) Reports of the Committee on Administrative Agencies and Tribunals of the Section on Judicial Administration of the American Bar Association, 1938, 1939. These reports dealt primarily with state administrative procedure, and set forth a recommended bill for the improvement thereof.

(5) Final Report of the Attorney General's Committee on Administrative Procedure, 1941. This is the most elaborate, comprehensive, and objective survey to date of federal administrative agencies and procedures. It includes two bills recommended to Congress to correct deficiencies in the administrative process. One bill was proposed by the majority and another by a minority of the committee. The latter bill was subsequently approved in principle by the House of Delegates of the American Bar Association. It provided the framework from which the present McCarran-Sumners Bill has been developed. The Attorney General's Committee Report is accompanied by detailed monographic studies of twenty-nine of the more important federal agencies.

(6) Report on Administrative Adjudication in the State of New York, 1942. This is by all odds the best available study of state ad-

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8 1938 Report, 63 A.B.A. Rep. 623 (Ralph Hoyt, Chairman); 1939 Report, 64 A.B.A. Rep. 407 (Ralph Hoyt, Chairman).
10 Known as the "Benjamin Report" because it was prepared by Robert M. Benjamin of the New York Bar, who served as Commissioner under section 8 of the New York Executive Law, authorized and directed to study and report on state quasi-judicial procedures. This report, too, has been widely acclaimed and favorably reviewed. See, for example, Jaffe, "Administrative Procedure Re-Examined—The Benjamin Report," 56 Harv. L. Rev. 704 (1943); Hart, "The Benjamin Report on Administrative Adjudication," 21 Tex. L. Rev. 277 (1943).
ministrative law. Like the Attorney General’s Committee Report, it is a competent and objective discussion of both theory and practice.

(7) Report of the Judicial Council of California on Administrative Agencies Survey, 1944.\(^{11}\) This is a report which resulted in the adoption in 1945 by the California State Legislature of some important remedial legislation.

(8) Reports of the Committee of the National Conference of Commissioners on Uniform State Laws, 1940–1943.\(^{12}\) The National Conference has been working for several years on a draft of a Model State Administrative Procedure Act, a measure which will, no doubt, be given final approval in the near future. The content of the draft is described in the footnote.

The foregoing reports are symptomatic of the ferment going on everywhere in the land. They constitute a valuable contribution to current thinking on a vital subject, but even more importantly, they and other similar activities are bearing fruit in the form of remedial legislation. In several states the legislatures have already adopted statutes prescribing fair administrative procedures, either for all or for some of their administrative agencies. In other states bills of like purport have been introduced and have received consideration, although they have not yet been enacted into law. But they are on their way. There is a general realization abroad in the land of the need of assimilating administrative processes into our juristic system in a manner calculated to assure fair play as well as efficiency. The new legislation is responsive to that urge. It is undoubtedly the most significant development of the war years in administrative law. For ready reference a list of these remedial enactments is herewith set forth.

\(^{11}\) Tenth Biennial Report to the Governor and Legislature of California, December 31, 1944.

\(^{12}\) See National Conference of Commissioners Handbook for 1943, p. 226 et. seq., for the draft as revised to September, 1943. The 1943 draft has been again revised but the final revision is not available in printed form.

The draft model deals primarily with major principles, not with minor matters of procedural detail. There are certain basic principles of common sense, justice, and fair play that are deemed to be an irreducible minimum, and as such are embodied in the provisions of the measure. These are:

(1) Assurance of proper publicity for administrative rules that affect the public;

(2) Provisions for advance determinations, or “declaratory judgments,” on the validity of administrative rules, and provision for “declaratory rulings” affording advance understanding of the application of administrative rules to particular cases;

(3) Guaranties of fundamental fairness in administrative hearings, particularly in regard to rules of evidence and the taking of official notice in quasi-judicial proceedings;

(4) Provisions assuring personal familiarity on the part of the responsible agency heads with the evidence in the quasi-judicial cases decided by them;

(5) Assurance of proper scope of judicial review of administrative orders to guarantee correction of administrative errors.
(1) North Dakota—Uniform Practice Act.13 Adopted in 1941, this act was the first of the general remedial acts. It specifies basic procedures, both for rule making and for adjudication, somewhat along the lines of the National Conference of Commissioners Model Act hereinbefore mentioned.

(2) Wisconsin—Uniform Administrative Procedure Act.14 Adopted in 1943, this act was modeled closely on the National Conference of Commissioners Bill. In the Wisconsin legislature it was especially acclaimed as an important procedural reform.

(3) North Carolina—Revocation of License Act.15 Adopted in 1943, this act prohibits the cancellation of certain specified types of licenses without prior notice and hearing, and provides for appeal of cancellation orders to the Superior Courts, where the causes are tried to juries, using the same evidence as that introduced at the administrative hearings.

(4) Ohio—Uniform Administrative Procedure Act.16 Also adopted in 1943 on recommendation of a special administrative law commission created by the preceding legislature, this act prescribes procedure for licensing agencies—licensing being broadly defined to include all orders determining “the rights, duties, privileges, benefits, or legal relationships of a specified person or persons.”

(5) California—Three Acts: Administrative Procedure Act,17 Division of Administrative Procedure Act,18 Judicial Review Procedure.19 These acts, adopted in 1945, were the result of two years of careful and thorough study by the California Judicial Council. The council took advantage of previous studies and legislation, with the result that the provisions are exceedingly well-considered and effectively drafted.

The statutory measures just enumerated are much more than just five new statutes. They are the beginnings of a codification movement that in a decade will sweep throughout the country. Especially if the McCarran-Sumners Bill, sponsored by the American Bar Association,
becomes a law, and a code of fair administrative procedure is thereby imposed upon federal administrative agencies, we may confidently expect that every state in the Union will shortly re-examine its state administrative procedures and prescribe fair and reasonable standards with respect thereto. Indeed, if court practice is successfully and properly made subject to judicature acts and court rules, no good reason can be conceived why administrative practice should not be similarly subjected to the guiding influence of reasonable standards of action. Although there is resistance in some quarters to such codification, nevertheless it is responsive to an insistent need. The arguments for it, as applied to federal agencies, are briefly stated in the minority report of the Attorney General's Committee, as follows:

"In some quarters there is fear of unduly hampering the freedom of action of administrative agencies (by an administrative procedure act), and a conviction that it is either impossible or unwise to provide legislation for the great variety of administrative subjects and processes. The answer, we think, is to identify the few basic considerations and express them in legislative statements of policy, of principles, or of standards for the guidance of administration, subject always to reasonable variations to meet varying needs. Modern legislation, by which the most intimate and vital interests of society are governed, is cast for the better part in similar terms. To say that man can be so governed, but that agencies of the state cannot or should not be so governed, is a recognition of rejected forms of government. To govern the courts by weighty tradition, a bulky "Judicial Code," and uniform rules of practice, but to give administrators only slight statutory attention is at least questionable in a democracy.

"... Without impairing government, a legislative statement of principles will go far toward dispelling the cloud that hovers over the administrative process. It will guide administrators and protect the citizen far more than the judicial review of particular administrative cases, which is available only to those few who can afford it. What is needed is not a detailed code but a set of principles and a statement of legislative policy. The prescribed pattern need not be, and should not be, a rigid mold. There should be ample room for necessary changes and full allowance for differing needs of different agencies.

"Such a statement would be of invaluable assistance to the private persons on whom powers of government impinge, for they could learn more readily and clearly when, where, and how to proceed. Greater cooperation with Government officials would be assured. It would be of inestimable value to government itself by helping to alleviate the disrespect, distrust, and fear now felt by too large a percentage of citizens. Finally, there is reason to believe that administrative officials would welcome the assistance of general procedural instruction which, instead
of leaving them groping in the dark, would furnish a pattern of action." 20

The above mentioned reports urging statutory formulation of procedural standards for administrative agencies, and the beginnings of enactment of remedial legislation are undoubtedly the outstanding features in the path of progress of administrative law during the half decade 1940 to 1945.

Recent Court Decisions Concerning Administrative Procedure

The war years have seemingly ushered in a respite in new judicial pronouncements on administrative procedure. During the last five years there have been scarcely more than a score of decisions that have made a substantial contribution. And even such decisions as have been handed down have been of the clarifying and refining variety, rather than the sources of novel doctrines. In the following pages the principle cases are cited, their general purport stated, the law review comments footnoted; but no attempt is made to discuss the cases or to do more than suggest the trend of judicial thought.

Legislative Standards and Administrative Discretion. The Emergency Price Control Act of 1942 furnished a setting for a reconsideration of the constitutional prohibition on delegation of legislative power—a doctrine that played such a prominent part in the demise of the National Industrial Recovery Act, held invalid in ALA Schecter Poultry Corporation v. United States. The Price Control Act conferred authority on the administrator to fix such prices and rents as might be "general, fair and equitable" and as would "effectuate the purposes of the act," but in fixing them he was required to give "due consideration" to rents and prices in the "base period" fixed by Congress in the act. Without overruling the Schecter case, the court sustained both price control (Yakus v. United States) and rent control (Bowles v. Willingham). The court held that Congress had adopted sufficiently precise standards and had sufficiently circumscribed administrative discretion so that the doctrine of delegation of legislative power was properly satisfied. The decisions thus help to prick the line marking the boundary of permissible delegation, and serve to assure Congress of the propriety of the drafting technique now employed in delegating legislative authority to administrative agencies. 21


For law review discussions of the two cases, see 30 CORN. L. Q. 504 (1945); 30 IOWA L. REV. 288 (1945); 7 GA. B. J. 254 (1944).
Necessity of Affording Notice and Opportunity for Hearing. The basic right to notice and opportunity to be heard before one's rights are foreclosed by administrative action, is too well established to have received much further attention during recent years. Nevertheless, certain questions lying on the fringe of the basic principle arise from time to time. For example, the United States Supreme Court has been obliged in several instances to pass upon the hearing rights of collateral parties, i.e., persons not directly in the line of fire of an administrative order. To illustrate, in 1938, in the Pennsylvania Greyhound case, the court held that a "company dominated" union was not entitled to a notice and hearing in a National Labor Relations Board proceeding resulting in the disestablishment of the union. But in the same year in the Consolidated Edison case the court held that "independent" unions were entitled to notice and hearing before the entry of a Labor Board order invalidating contracts with such unions. In 1940, a somewhat similar question arose in the National Licorice Company case. It appeared that through the good offices of a company dominated union, the company had entered into individual employment contracts with its employees. Such action was held to be a violation of the Wagner Act in a Labor Board proceeding in which the contracting employees were not parties. A cease and desist order was issued. The Supreme Court on appeal held that the employees were not "necessary" parties, that the board could proceed to a final order without making the employees parties to the proceedings, but that employees' rights under the contracts could not be reduced by the board's order. Thus the court is gradually working out the boundary lines of indispensability of parties.

In still another important area of administrative action the rights of collateral parties have been recently extended and clarified. For years there has been uncertainty and doubt in the statutes, the regulations, and the judicial decisions, concerning the rights of a broadcasting licensee to intervene or appeal under the Federal Communications Act when a competing broadcasting license is granted or an existing license is modified to work economic injury or to interfere electrically with station operation. Under what circumstances can the owners of stations so injured intervene in proceedings before the commission, or appeal to the courts? Without elaborating the ramifications of a complex phase
of the law, suffice it to say that two recent Supreme Court decisions have materially broadened and clarified the rights of intervention and appeal, both when economic injury is alleged, 26 and when electrical interference is claimed. 27

Securing Information by Subpoena or Other Compulsory Process. Three important decisions of the last five years have virtually set to rest all constitutional doubts regarding the scope and power of the administrative subpoena. Not so many years ago there was good authority for the proposition that compulsory process could only be used against private business (as distinguished from public utilities) when there existed some reason to believe that a violation of the law had been or was being committed. No less a liberal than Justice Holmes once espoused the cause of limitation of the subpoena to “the cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.” 28 However, by virtue of the decisions in Fleming v. Montgomery Ward and Company, Endicott-Johnson Corporation v. Perkins, and, within recent weeks, Oklahoma Press Publishing Company v. Walling, all doubts are removed. If the administrative subpoena is not too broad or too indefinite, and if it calls for materials relevant to a legitimate administrative purpose, private business as well as public utilities must respond. Like the goldfish in a glass bowl, privacy is thus reduced to a minimum in the face of superior governmental needs. 29

The Hearing; Rules of Evidence; Official Notice. The hearing stage of “quasi-judicial” action has also been subjected to the refining process during the last half decade. The preceding decade brought the famous Morgan case in 1936. Morgan’s troubles not only ran into

26 Federal Communications Comm. v. Sanders Bros. Radio Co., 309 U.S. 470, 60 S. Ct. 692 (1940), holding that the one who suffers economic injury may appeal as an “aggrieved person,” provided he presents on the appeal a question of “public interest and convenience.”


For periodical discussion of the entire problem, see 1 Bill of Rights Rev. 137-140 (1940); 52 Yale L. J. 175-81 (1943); 40 Mich. L. Rev. 78-84 (1941).
several new editions in 1938 and 1939, but they persisted to figure in yet another decision in 1941. The Morgan series has really made a great contribution to formulation of proper standards for administrative hearings. Many procedural features have been discussed and subjected to the clarification that can only come from authoritative expression from the nation's highest tribunal. The requirement of clear statement of the claims of the opposing party, the right to submit argument, the intermediate report prepared by the trial examiner, the use of subordinates to sift and analyse the evidence, the probing of the mental processes of the agency heads, the question of "bias"—all these and other procedural phases have been discussed. The Morgan series has done its bit for administrative law. Another hearing case of considerable value was Inland Steel Company v. National Labor Relations Board, decided in 1940 by the Circuit Court of Appeals of the Seventh Circuit. The trial examiner in that proceeding was taught by the court of appeals that it was his duty to serve in a fair and impartial manner, and that the bias and partiality displayed by him could not be tolerated. Still another clarifying decision was rendered in Opp Cotton Mills, Incorporated v. Administrator of the Wage and Hour Division. One of the questions raised by the company had to do with the character of the evidence relied upon by the administrator in support of his findings. Much of it was clearly hearsay (reports, statistical data, etc.), utterly incompetent in a court of law. It was, nevertheless, regarded by the Supreme Court as adequate to sustain the administrator's wage order. Administrative proceedings, especially where they are "legislative" in character, are not to be deemed jury trials; and it is becoming increasingly apparent that the courts are going to apply standards of evidence quite different from those evolved to insulate juries from the contaminating influences of testimony of low probative value. Judge Learned Hand's famous statement concerning the use of hearsay seems to be accepted with increasing frequency. In the Remington-Rand case he said that no doubt "mere rumor" would not serve to support a finding, "but hearsay may do so, at least if more is


81 109 F. (2d) 9 (1940).

82 312 U. S. 126, 61 S. Ct. 524 (1941). For comment on this case, see Fuch, "Constitutional Implications of the Opp Cotton Mills Case," 27 WASH. UNIV. L. REV. 1 (1941); also 35 ILL. L. REV. 840-60 (1941); 29 GEO. L. J. 882-8 (1941).
not conveniently available, and if in the end the finding is supported
by the kind of evidence on which responsible persons are accustomed
to rely in serious affairs." 83

Judicial Review of Administrative Decisions. Judicial review, a
subject once deemed so important in administrative law, has gradually
moved into second place, giving way to greater emphasis upon the im­
provement of procedure before the agencies themselves. Neverthe­
less, the methods and scope of court redress of administrative error
continue to occupy a prominent place on the stage, although the last
five years have added but little that is really new. The evolution of
doctrines of judicial review of administrative decisions began in 1890
with the decision in Chicago, Milwaukee and St. Paul Railroad Com­
pany v. Minnesota. 84 The principal outlines of the scope of review have
been reiterated again and again, and the number of doubtful points are
now but few. Arbitrary administrative action will be set aside. Ad­
ministrative decisions on fact issues, if supported by "substantive evi­
dence," will be sustained. 85 Questions of "constitutional fact" were
once supposed to be reserved for independent reexamination and deter­
mination by the courts, 86 but the doctrine was limited in its scope, and
its foundations were shaken, if not shattered, in 1940, when the Su-

94 F. (2d) 862 at 873.
For periodical discussion of the entire problem of evidence in administrative pro­
cedings, see Davis, "An Approach to Problems of Evidence in the Administrative
Process," 55 HARV. L. REV. 365 (1942); Norwood, "Administrative Evidence in
Practice," 10 GEO. WASH. L. REV. 15 (1941); Hoyt, "Some Practical Problems Met
in the Trial of Cases before Administrative Tribunals," 25 MINN. L. REV. 545
(1941); Merrill, "Rules of Evidence in Administrative Proceedings," 14 OKLA.
B.A.J. 1934 (1943).
In regard to the taking of official notice by administrative agencies, mention
should be made of a valuable article by Gellhorn, "Official Notice in Administrative
84 134 U.S. 418, 10 S. Ct. 462 (1890).
85 For a complete review of the substantial evidence rule, both in statutes and in
case law, see Stason, "'Substantial Evidence' in Administrative Law," 89 UNIV. PA.
L. REV. 1026-51 (1941).
The present attitude of the Supreme Court on fact questions has been adequately
stated by Justice Stone in Medo Photo Supply Corp. v. National Labor Relations
Board, 321 U.S. 678, 64 S. Ct. 830 (1944), as follows: "It has now long been settled
that findings of the Board . . . are conclusive upon reviewing courts when supported
by substantial evidence, that the weighing of conflicting evidence is for the Board and
not the courts, that inferences from the evidence are to be drawn by the Board
and not by the courts, save only as questions of law are raised, and that upon such
questions of law, the experienced judgment of the Board is entitled to great weight."
86 Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S. Ct. 527
(1920); Crowell V. Benson, 285 U.S. 22, 52 S. Ct. 285 (1932); St. Joseph Stock
preme Court handed down its decision in an oil proration case, *Railroad Commission of Texas v. Rowan and Nichols Oil Company.* The case has certain features which may distinguish it from earlier decisions. The court does not expressly overrule the prior decisions, but at least it is made clear that in the oil proration field the courts will not re-examine the facts independently, even though unconstitutional confiscation is alleged. Just how generally the new doctrine will be applied to other constitutional fact questions remains in doubt. Finally, the last stronghold of the judicial branch, "the question of law," seems no longer to be a simon-pure judicial question, subject to independent court review. Even on such matters, the decision of the administrative tribunal is now deemed "entitled to great weight" when brought up for court review. In short, administrative decisions both on law and on fact, both constitutional and otherwise, have now attained measurable finality and maturity of stature. They have come of age.

By way of conclusion of this survey, it may be said that the five-year period, including the years of World War II, have witnessed two important progressive changes in administrative law, first, the embryonic beginnings of some notable statutory reforms of administrative procedure, and second, a further refining of the administrative process

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89 This survey would not be complete without the inclusion for reference purposes of several interesting treatises on administrative law, that have been published during the last five-year period. The following are suggested:
   5. Hart, An Introduction to Administrative Law—with selected cases (1940).

Finally, the following additional law review articles not hitherto cited should be included for reference purposes:
through the case by case impact of judicial decision. Notwithstanding
the conflicting interests of the war years, we have witnessed a gradual
assimilation of the administrative process into somewhat uncongenial
constitutional framework.

E. Blythe Stason†

11. Merrill, "Judicial Review of Administrative Proceedings, A Functional Pro-
12. Kripke, "A Case Study in the Relationship of Law and Accounting: Uniform
Accounts 100.5 and 107," 57 HARV. L. REV. 433 (1944).
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