

THE FLAW IN

THE OBSERVER, SEPTEMBER 25, 1966

THE WARREN

REPORT

LORD DEVLIN, a former judge, reviews two new books on the Warren Commission and finds its main conclusion—that Oswald killed President Kennedy—still unshaken. But he also says that 'it was not as potent an instrument for discovering the truth as externally it appeared to be.'

MURDER problems have an irresistible fascination and when the murdered man is the President of the United States sooner or later there will be those who find the official solution too tame and will want to offer something more stimulating.

In preparing for it they will be led to discover grievous shortcomings in the accepted version. What is unusual about the books and articles already written on the death of President Kennedy and the Warren Commission's Report on it is that they are all about the shortcomings. They have no new and exciting theories to propound and rely for excitement on charges of gross negligence or worse against the commission.

Two books* of this sort have just come out here. One is by an old hand, Mark Lane, the spearhead of a body of critics which has had it in for the commission from the beginning. The other is by a new hand, Mr Edward Jay Epstein, a young scholar at Harvard.

Shots from a knoll?

Mr Lane's "Rush to Judgment" is a series of disjointed chapters under such headings as "The Paraffin Test and the Latent Palmprint" on different aspects of the investigation. Professor Trevor-Roper's excellent and moderate introduction gives the book some unity of theme. Still, it is definitely not a book for beginners. Anyone who has at hand the 26 volumes of evidence published by the commission and can look up the full and detailed references which Mr Lane gives and evaluate the criticisms for himself will probably end up with some good points to argue, for Mr Lane's erudition on this subject is enormous.

But for the general reader who prefers to approach the commission's conclusions by a reasonably impartial route, Mr Lane is not a safe guide. There is, for example, some evidence that shots came from a grassy knoll in front of the motorcade. No gunman was seen there and no signs of murderous activity afterwards discovered. The commission dismisses rather cursorily the evidence of the many people who say they

heard the sound of shots from there, taking the view that all the shots came from the book depository behind the President's car. Mr Lane's chapter, "Where the shots came from," devotes all but one sentence to the grassy knoll; the official view is covered by the statement that "there is some evidence to suggest that one or more shots may have been fired from the book depository." The "some evidence" consists of a tripod,

*"Rush to Judgment," by Mark Lane. Introduction by Hugh Trevor-Roper (Bodley Head 42s.). "Inquest," by Edward Jay Epstein. Introduction by Richard H. Rovere (Hutchinson 30s.).

a rifle, three empty cartridge cases, two bullets which came from the rifle and three witnesses who saw a man with a rifle at a window.

Mr Epstein's "Inquest" has almost all the qualities Mr Lane's book lacks. It is balanced, clearly and carefully composed, short and directed to a point. It was projected as a study of how the commission did its work. It emerges as an argument designed to expose a major flaw in the structure of the report; and the study of the commission's workings takes a subordinate place as an explanation of how the flawing could have occurred. The argument does not challenge the guilt of Oswald. It is directed to the question whether Oswald was acting singly or with others.

President Kennedy was hit twice and Governor Connally once. Since three shots were fired from the depository, it is natural to think that they scored three hits. But a careful analysis of the evidence (Mr Lane hovers over the point in a chapter entitled "The Magic Bullet," but never quite descends on it) shows that Oswald's rifle could not have achieved three hits within the permissible time span. Either both men were hit by a single bullet or there were two assassins with two rifles. The commission concluded that the first bullet to hit the President passed through his neck and then "most probably" hit the Governor. It said that the evidence for this was "very persuasive," but that the determination was not necessary to any essential finding.

Evidence ignored

This is the flaw. The determination was necessary to the finding that there was no evidence of any assassin but Oswald. Any reasonable doubt on this point demands quite different handling of the evidence which suggests a second assassin or a second source of the rifle fire. Mr Lane's indignation at the summary disposal of the "grassy knoll" evidence becomes more understandable. There was evidence, not very strong but ignored in the report, of another man being seen at the depository window. Oswald's movements during the days when, if there was an accomplice, the assassination must have been planned do not seem to have been investigated. All these fields, which could be shut off by a positive finding, are left open by a persuasive one.

In Mr Epstein's opinion, so far from there being "very persuasive" evidence, the medical evidence, which he examines in greater detail than is done in the report, points to the opposite conclusion. Again this ground has been traversed by others. The interest of his approach is that he shows how an inadmissible ambiguity in an essential finding could have been overlooked by the high-powered

team that prepared the report.

Commissions of inquiry of this sort, often headed by a judge, are common enough in Britain but very rare in the US. Their methods are likely to be different from ours, because in America professional men do more of their work by directing assistants and subordinates to do it for them than they do over here. The seven members of the commission were by our standards very detached from its day-to-day work. This was in the charge of Mr Lee Rankin, a former Solicitor-General and a very distinguished member of the American Bar, who led a team of lawyers. One of Mr Epstein's informants compared the commission to a corporation's board of directors.

Single-bullet theory

The field of investigation was parcelled out into areas and a senior and junior counsel allotted to each. Area I covered "The Basic Facts of the Assassination." The senior lawyer assigned to this area had very little time to give to it and the burden fell almost entirely on Arlen Specter, his junior. When in the course of the inquiry it emerged that the President and the Governor could not both have been hit by separate shots from Oswald's rifle, Mr Specter adopted the "single-bullet" hypothesis. He proclaimed it before he had really checked the evidence. It can certainly happen that a man with a hypothesis tends to look at facts from an angle that makes them fit in rather than stand out. Mr Epstein has built up a formidable case for the suggestion that Mr Specter got the evidence to fit the theory rather than the other way round.

No decision in principle for or against the single-bullet theory seems to have been taken by the commission until after Mr Specter had finished his draft which was not discussed by the commission until a comparatively late stage. The single-bullet theory was then challenged, the commission was split more or less evenly and the compromise version that appears in the report was adopted. It was thus that the theory was reduced from the status of a finding which, whether right or wrong, makes sense with the rest of the report to a statement of persuasiveness which does not.

Who were Mr Epstein's informants? They were five out of the seven members of the commission and 10 members of the staff. One member of the staff actually supplied "the working papers" of the commission. Some members of the staff were highly critical of their colleagues' activities. The difference of opinion on the single-bullet theory and the position taken by each member of the commission was disclosed by the commissioners themselves in the interviews which Mr

Epstein had with them. This is another respect in which the British practice differs very sharply from the American. The Chief Justice's suggestion to the staff, made at the farewell dinner after the presentation of the report, that its relationship to the Government was analogous to a lawyer-client relationship, does not seem to have been found acceptable to judge from their subsequent conduct.

Errors due to time-pressure or to faults in the organisation of the inquiry are not, however, in Mr Epstein's opinion enough to account for the commission's mistaken conclusion. In what strikes me as the least convincing part of a good book, Mr Epstein proposes a further explanation based on the concept of "political truth." He believes, on what seems to me to be too slender evidence, that there is, or was, in existence an original autopsy report whose findings are inconsistent with the single-bullet hypothesis. He as good (but not quite as good) as says that the autopsy report published by the commission as purportedly the original report is not the original one at all. He treats this as indicating, not anything so crude as suppression, but that the conclusions of the Warren Report must be viewed as

expressions of political truth."

If this is intended as a vague innuendo, it is unworthy of inclusion in a thesis that is usually sharp and precise. If it has a definite meaning, this can only be that the commission lied for political reasons. The commission was not an abstract entity, but as Mr Epstein's researches show so clearly a collection of individuals; and he shows also how it could have erred collectively. If he wants to go further than that and assert that one or more of the commission or its counsel or its staff were responsible for representing an autopsy report as original when they knew or suspected that it was not, he surely owes it to those who were so candid with him to be less subtle in his phraseology.

Dispelling rumours

He makes another charge against the commission and this also is suitably wrapped up. There was, he says, a dualism in the commission's purpose. Its explicit purpose was to ascertain and expose the facts; its implicit purpose was to protect the national interest by dispelling rumours. This seems to me an unnecessary refinement. Its purpose, ex-

PLICIT or implicit, was to ascertain the facts and if it did that properly it would dispel false rumours. If "dualism" means that the commission had also as a purpose the dispelling of true rumours, no honourable man could serve on it or under it.

But this apparently is what it does mean. There was a rumour that Oswald was an FBI agent. The source was Alonzo Hudkins, a Texas newspaper reporter. Oswald, because of his Communist connections, had been under observation by the FBI and the 10 agents who had had contact with his case each made an affidavit denying that he was ever used as an informant. There was a further affidavit saying that a search of FBI records showed no trace of him as an informant. The commission asked a lawyer in Texas, Special Counsel for the State, to interview Hudkins and the result was a report that the story was "based on nothing but Hudkins's imagination."

Mr Epstein does not suggest that there was ever any substance in this rumour, but he considers that it should have been more thoroughly investigated. Perhaps so. But he takes this single example as the whole foundation on which to base a general conclusion that throughout the investigation the

dominant purpose of the commission was to dispel rumours rather than to ascertain the truth. He suggests also that the commission took steps to conceal even the existence of the rumour: and supports this by the inaccurate statement that it is nowhere mentioned in the report.

Possibility remains

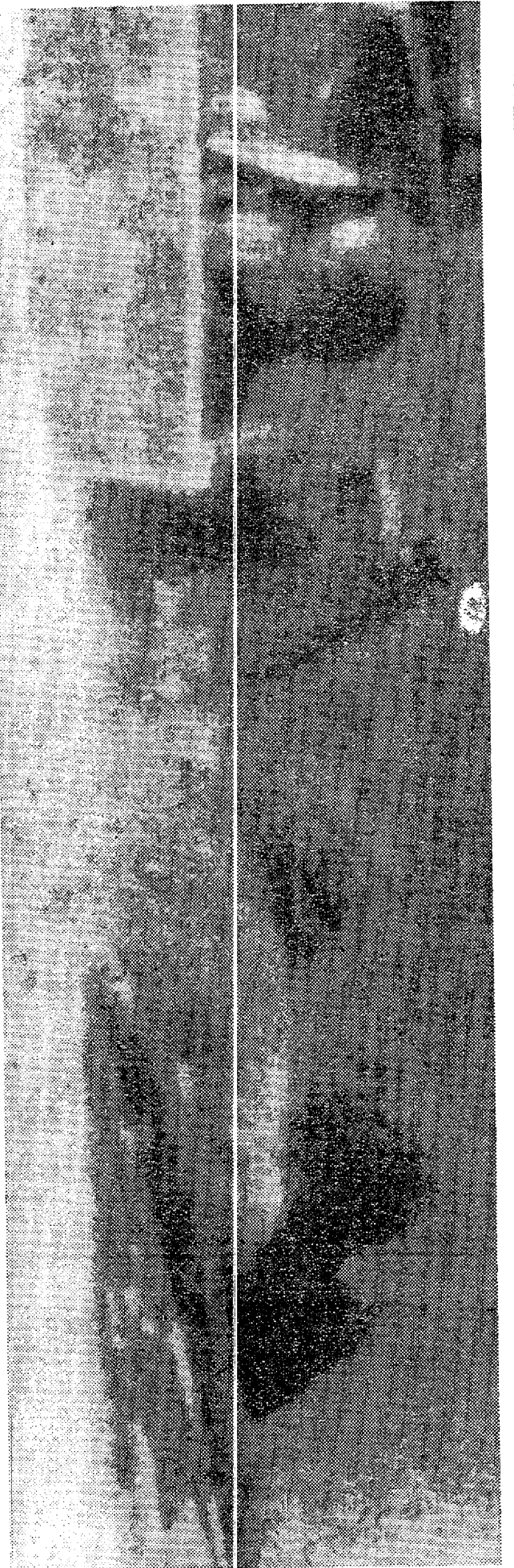
How does the Warren Report stand at the end of it all? Mr Epstein's exposé of the workings of the commission should put an end to the notion that it was set up as an apparatus for concealing the truth. His conclusion that it brought itself to shirk the truth because of its own fear of the political consequences is not to my mind sustained. But the revelations he has obtained of its internal workings show that it was not as potent an instrument for discovering the truth as externally it appeared to be.

So much for the commission. As for the report, its main conclusion that Oswald was guilty is still unshaken and is perhaps fortified by its acceptance by so acute a critic as Mr Epstein. But unless Mr Epstein can be answered effectively, the possibility that Oswald had an accomplice cannot be disposed of as

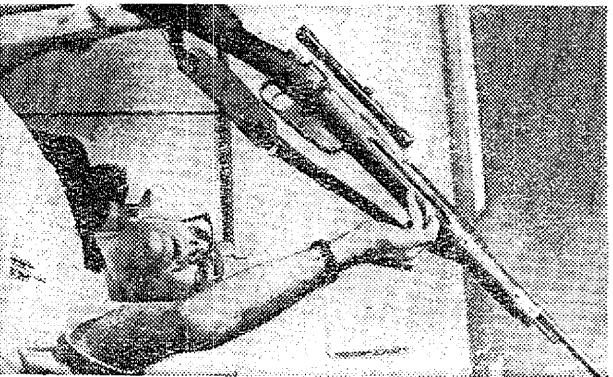
neatly and conclusively as the report does.

Yet to my mind it still remains only a possibility. It is one thing to produce, as Mr Epstein has done, an emanation of an accomplice whose presence is inferred as necessary to explain circumstantial evidence, and another to postulate a man of flesh and blood who had a gun which he actually fired and who has vanished with his gun into thin air, leaving no trace, not even a bullet, of who he was and of what he did. The difficulty involved in this postulate evidently drove half the commission to accept the single-bullet hypothesis. To demonstrate that there are also great difficulties about the hypothesis does not solve the problem. But it leaves plenty of room for argument for those who want to go on arguing. Maybe, as is the fate of so many arguments, the ending will be inconclusive.

Maybe also the importance of this book and others like it is slightly exaggerated. Why should the possibility or the probability or even the certainty that there was a second unidentified man working with Oswald be supposed to shake Washington to its foundations or to require for its concealment the invention of a political truth?



Assassination in Dallas : President Kennedy (right) slumps into the arms of his wife Jacqueline.



Above : Oswald's rifle.