

## BOOK REVIEWS

"THE LAW OF INSURANCE IN PENNSYLVANIA." By Abe. J. Goldin (Member Philadelphia Bar). Second Edition. George T. Bisel Company, Philadelphia, 1946. (2 Vols., pp. xxxiii, 1-590, xiv, 591-1281.)

Just as the factual histories of local communities—counties, townships, villages—have a different flavor in the stream of the record of the past from the over-all national historical works, so the handbook covering a branch of law in a single state makes a contribution to law writing distinct from the encyclopaedia or text for the country as a whole.

The Second Edition of Abe. Goldin's valuable work on Insurance Law in Pennsylvania (first published in 1934) is perhaps typical of the strong points—and of some of the weak points—inherent in the local law book intended primarily for active practitioners. It is a work-a-day book, designed for desk use by lawyers faced frequently with need of quick references to answer the question—"How does Pennsylvania deal with this point?" For such purposes it is excellently organized, provided with a full analytical index, and equipped with a pocket for future paperbacked supplements. Statutory provisions in Pennsylvania, especially the important Standard Policy Provisions in the different branches of insurance law, are clearly stated under the various headings (although generally entirely without editorial comment indicating how these provisions may in any way set Pennsylvania off from other states in its insurance law).

The author devotes 15 pages (463-477) to the 1945 statute (cited in the book only as "Senate Bill No. 385")<sup>1</sup> which was designed to enable Pennsylvania fire and casualty companies in part to meet world competition in a post-war society in which the United States finds itself perforce taking over international trade leadership, heretofore the pride of Great Britain. The new grant of power to these two types of companies to write "Personal Property Floaters" (fire companies thereby including coverage of casualty risks to such property and vice versa, instead of continuing the ancient habit of two separate policies) is indeed, so far as Pennsylvania is concerned, "the first break in the armor of State laws requiring corporations doing an insurance business" to limit their policies to specified branches of insurance, instead of being able in one policy to cover all risks to a single item of property.

Mr. Goldin at this point (p. 463) adds one of his relatively few editorial comments: "In time we will reach the English insurance system, where companies may issue comprehensive coverage policies, instead of the insured requiring many policies to protect him from the various risks." *"In time"* forsooth! If we in America do not move rapidly to shake off outworn shackles of the restrictive sort, we may fritter away the world leadership now tendered to us. Where are to come the voices to speak authoritatively on such subjects? In New York the annual report of the Superintendent of Insurance is an authoritative survey, forwards and backwards.<sup>2</sup> Pennsylvania Insurance Commissioners have an equal opportunity to give leadership in thought to a business which today suffers from

1. Act of May 22, 1945, P. L. 825, amending Section 202(b) (2) and adding Section 202(c) (13) to the Insurance Company Law (Act of May 17, 1921, P. L. 682).

2. Thus Superintendent Robert E. Dineen in the New York 87th Preliminary Report to the 1946 Legislature (page 40) says: "One of the factors which has given impetus to this trend is the fact that many of America's most successful insurance

the difficulty in finding industry-wide vision among all competing branches which sometimes have vested interests in maintaining the *status quo*, however restrictive.

The flaw in the local historical chronicle is its attention to the creek, while the river flows on somewhere else. From the floods and droughts of the creek much can be learned, but from them alone one's view is necessarily limited. So Mr. Goldin in his attention to Pennsylvania details tends to overlook even a warning that all may not be well hereafter with the Pennsylvania cases or statutory provisions which he summarizes seriatim to constitute the bulk of his text.

In the very period in which this Edition was being prepared and printed, the business of insurance in America had been torn up from its legal roots. As the author points out on page 10 in a single half-page of the book (out of 1281 pages of text), the 1944 decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case,<sup>3</sup> holding that insurance conducted across state lines is interstate commerce and therefore subject to federal regulation, "upset the entire system of insurance regulations, considering the fact that every state has departments covering the regulation and control of the insurance business in that state". Attention is then called to the passage of the McCarran Act (sometimes known as "Public Law 15")<sup>4</sup> giving, until the end of a moratorium period on January 1, 1948, "the government, the states and insurers an opportunity to work out their own destinies in view of the present muddled situation" (page 10).

After this brief preliminary warning, this Edition proceeds almost without any reference to the state of flux in which the law relating to supervision of insurance by the several states finds itself. For instance, retaliatory laws were, at the time the Edition went to press, still under attack in the Supreme Court of the United States because of the new status of insurance as interstate commerce, but the reference to such laws on page 15 gives no indication of any such question. As a matter of fact, the retaliatory problem has been at least temporarily solved, along with problems of Tax discrimination in insurance, by the decisions of the United States Supreme Court on June 3, 1946 (two days after the date of Mr. Goldin's Preface) in the *Robertson* and *Prudential* cases<sup>5</sup> and by the Per Curiam decisions on June 10, 1946, upon the appeal of the four cases known collectively as "*In Re Insurance Tax Cases*, 160 Kan. 300, 161 P. 2d 726."<sup>6</sup> However, in spite of those decisions, there are some questions relating to the validity of extreme retaliatory laws which may fall outside the ground of justifiable state regulation.<sup>7</sup>

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groups have been engaged in multiple line underwriting for years. True it is that, in conforming to the letter of the law, separate corporations have been maintained. . . . It is rather anomalous to assert that it is not prudent to permit companies to write fire and casualty lines at the same time, when we permit, under existing law, companies to write surety and workmen's compensation at the same time."

3. *United States v. South-Eastern Underwriters Association, et al.*, 322 U. S. 533 (1944).

4. The Act of March 9, 1945 (Public Law No. 15 of the 79th Congress), Chapter 20—1st Session (S. 240): "An Act to express the intent of the Congress with reference to regulation of the business of insurance."

5. *F. O. Robertson v. The People of California*, 66 Sup. Ct. 49, 1160 (1946). The *Prudential Insurance Company of America v. L. George Benjamin as Insurance Commissioner of the State of South Carolina*, 35 S. E. 2d 586, 66 Sup. Ct. 491 (1946).

6. *American Indemnity Co. v. Hobbs*, *Pacific Mutual Life v. Hobbs*, *Prudential v. Hobbs*, *Aetna v. Hobbs*, 66 Sup. Ct. 1360, 1361 (1946).

7. Compare for instance the extreme amendment to the 1921 Retaliatory Insurance Law of Pennsylvania made by the Act of May 5, 1945, P. L. 430 (40 P. S. Sec. 50), following a decision of the Dauphin County Court on June 26, 1944, holding that the

In spite of the fact that the deadline date of January 1, 1948, is fast approaching and that the legislatures of several states, have already adjourned without passing the statutory regulation in the field of cooperative rate-making in fire and casualty insurance which is vitally necessary to eliminate the effect of the Federal anti-trust acts, great uncertainty still exists nationally as to the further developments in the field of insurance supervision flowing from the 1944 decision in the South-Eastern Underwriters Association case.<sup>8</sup> Mr. Goldin can hardly be criticized for not attempting in this Pennsylvania handbook to act as a soothsayer as to the future of this all-important question, but a mild doubt may be expressed as to whether the general practitioner, picking up his book, is sufficiently put on notice of the risks of sudden change in some of the matters with which he deals.

ROBERT DECHERT †

EVIDENCE: COMMON SENSE AND COMMON LAW. By John MacArthur Maguire. The Foundation Press, Inc., Chicago, 1947. Pp. xi, 251. \$3.00.

It is a source of righteous dismay to the law student that in the vast stacks of the great law libraries there are so very few books designed to fill his needs. The reports and the statutes and the reference books are simply *there*: they are not and should not be tailored to the requirements of any group. The legal periodicals contain much that is golden but more that is precious or esoteric or too highly specialized. The textbooks run the gamut from a Collier on *Bankruptcy* to Williston's slender little book on *Negotiable Instruments*. But most of them are slightly dangerous and some downright treacherous. In all of them he is bludgeoned into insensibility with footnotes.

The student with a modicum of sophistication approaches them all with caution. Many students, moreover, leave the library with their copy of Vold or Moynahan surreptitiously tucked away, with a certain furtiveness,—like a spinster leaving Brentano's with *Lady Chatterly's Lover*. Indeed, a brochure recently received from a New York canned digest fac-

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1921 Act, as amended in 1931 and 1933, did not apply to non-discriminatory prohibitions in another state. Incidentally, neither that decision nor the 1945 amendment is mentioned in this 1946 book.

8. The National All-Industry Committee (representing all branches of insurance) was meeting regularly during and after the period this book was in production. Jointly with the National Association of (State) Insurance Commissioners, two model rating bills have been presented to the country, as a result of action at the June 1946 meeting in Portland, Oregon, of the State Insurance Commissioners. One of these bills related to fire and marine insurance, the second to casualty and surety coverage. Forty-four state legislatures are meeting (or have met) in 1947, in many of which action by the Legislature is necessary before 1948 to meet the requirements of the McCarran Act for removing threat of Federal Anti-Trust prosecution from those who use rates made cooperatively. In Pennsylvania a state All-Industry Committee proposed somewhat altered forms of the national model bills, providing for less state participation in certain respects (House Bills 887 and 888). As this review is written, the issues are being actively debated in the Legislature—shall Pennsylvania have the proposed modified rating statutes, or the type proposed by the National Committee, or some intermediate variety, or none at all for the present? If a stalemate develops (as it has in some states), with no legislation on the subject, where will fire and casualty insurance stand on January 1, 1948?

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tory carried this legend: "This book will be sent to you in a plain wrapper."

Some will say (as many have) that all of this is due to a long propaganda campaign on the part of law professors contrived to perpetuate themselves. Others may sense that the dearth of really *useful* student texts lies in the difficulty of avoiding infinite documentation and dissection on the one hand and over-simplification on the other and the near-paradox of being brief and clear and yet not superficial or misleading.

Professor Maguire of the Harvard Law School faculty studied his Evidence under John Chipman Gray and has taught its myth and matter for twenty-five years. A product of this experience is this book designed for students who are studying or are about to study Evidence. It is believed that this book undertakes an almost unique task: to make intelligible to the student, in brief form, the principles of the law of evidence and, above all, to convey its "feel" and instil a tolerance for its vagaries. Thus it is to be sharply distinguished from the Hornbook type of student text. The latter, their Prefaces notwithstanding, are in the nature of expanded digests; they are the volumes thumbed most ardently immediately prior to examinations.

This work is of no such ilk. There are no black-letter section headings, no itemized exceptions to general rules, no cataloging of "splits." Where courts disagree, we are so informed, but such is the style that the common ground of agreement is felt as well as the elements of disagreement. And the style is indeed refreshing. Not an aroma of pedantry is present, case citation is deliberately sparse, footnotes non-existent. The tone is casual but not cavalier, though sometimes the jocular manner is invoked to jolly the reader over rough spots in the road. Perhaps there are quagmires which Professor Maguire too discreetly leads us past. Is not the business entry exception a deeper slough than his discussion indicates?

It is in its treatment of the Hearsay Exceptions that the book is most cursory. Less than fifty of the 231 pages are devoted directly to the Hearsay Rule and its exceptions. The observations are enlightening but it cannot be said that any attempt is made to cover this ground. In this outline many of the prominent exceptions are not mentioned. Maguire's faculty of shedding light is thus unfortunately never brought to bear upon the provocative problems arising in connection with spontaneous statements, vicarious admissions, the rebutting of admissions by extrinsic evidence, and the peculiarly-within-his-own-knowledge limitation, the diverse rationales of a declaration serving one interest and diserving another, the often absurd application of the opinion rule to dying declarations,—these are random examples of points of more than occult interest which are not discussed.

In this vein it must be said that although there is no glossing over of the genuine difficulties presented by this branch of the law, the novice reader would not always be made to appreciate the potential dangers inherent in many of its doctrines. Brevity has been accomplished; perhaps it was inevitable that those points-within-points and exceptions-to-exceptions which too often form the kernel of the actual problems had to be omitted. The student, at any rate, will not be directly helped to prevail over the problems typical of examinations, albeit it is admitted that such monsters are sports produced by years of inbreeding.

All this is not so much by way of criticism as by way of showing what *Evidence: Common Sense and Common Law* does not purport to attempt. Brahms complained that as he composed he was always aware of the vast

shadow of Beethoven falling across his manuscript. Thus for years to come no writer in the field of Evidence will escape comparison with Wigmore, comparison, in this case, with the *Student Text*. We raise the point for the purpose of rejecting it. Maguire has not attempted to encroach on this domain. The relationship between this book and Wigmore's *Student Text* is roughly equivalent to the relationship between Llewellyn's *Meet Negotiable Instruments*<sup>1</sup> and Britton's *Bills and Notes*.

Its success in conveying the spirit of the law of evidence and usefulness as preliminary orientation make this book valuable. Its brevity and conversational tone will make it read. The pre-evidence student will see the great names in the field move across its pages unheralded by trumpets: Thayer, Wigmore and Morgan are called upon now and then for friendly counsel rather than relegated to glowering pompously from footnotes. Still, there are times when the student will conclude that evidence is all common law and no common sense; it is then that Professor Maguire brings on the Model Code of the American Law Institute. This is not cramming fodder. It is a book to be read more than to be studied. How welcome books of similar scope and temper would be in other fields!

HENRY W. SAWYER, III †

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*The following letter was received from Milton R. Kowitz, author of "The Alien and the Asiatic in American Law," which was reviewed in the March issue by Charles Gordon, attorney in office of General Counsel of Immigration and Naturalization Service.*

Sir:

In the March issue of the *University of Pennsylvania Law Review* there is a review of my book *The Alien and the Asiatic in American Law* by Charles Gordon. While Mr. Gordon says some gratifying things about my book, he at the same time makes charges against it which I cannot disregard. He states that the book contains exaggerations and misstatements. I should like to consider some of the items he cites as evidence of this charge:

(1) Mr. Gordon states that on pages 58-59 I list 17 indictments against the deportation process: "Several of these relate only to proceedings under the Chinese Exclusion Laws," he says, "which were repealed in 1943; others are clearly inaccurate: for example, the statements that the alien is not entitled to counsel or to the confrontation and cross-examination of witnesses who testify against him; still others are only partly true."

One gets the impression from this statement that the author of the book failed to point out that several of the indictments relate only to proceedings under the Chinese Exclusion Laws; yet items 1, 7 and 16 *expressly* mention the Chinese. For example, item 7 on page 58 states: "A Chinese person claiming American citizenship has the burden of proof."

As to the statement that the alien is not entitled to counsel or to confrontation or cross-examination of witnesses in deportation proceedings, it

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1. 44 COL. L. REV. 209 (1944).

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clearly appears from what I say on page 58 that I was discussing only the alien's *constitutional* rights, and was not discussing his rights under acts of Congress or administrative regulations. Thus item 3 on page 58 says: "Since deportation is not punishment, the alien is not entitled to constitutional protection accorded to persons accused of crime. . . ."

It is to be noted, too, that the list on pages 58 and 59 is intended chiefly as a summary of the discussion up to that point, and the discussion up to that point was chiefly of the constitutional questions as formulated by the United States Supreme Court. It was not intended that the summary be read in place of the discussion that precedes it.

(2) The reviewer states that on page 47 I make the "very extreme assertion that the three and one half million alien residents in the United States all are subject to deportation. One might just as easily contend that every resident of the United States is subject to imprisonment."

But the Supreme Court has never said that every resident of the United States is subject to imprisonment. It has, however, said that aliens are subject to deportation in the discretion of Congress, and that Congress may act on the basis of a reason or without any reason in ordering the deportation of aliens. I quote on page 48 from the opinion of the Supreme Court in *Fong Yue Ting v. United States*, 149 U. S. 698 (1893), in which Mr. Justice Gray for the majority of the court said: "The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." The court said that Congress has the inalienable and inherent right to expel all or any class of aliens, "absolutely or upon certain conditions, in war or in peace." I was writing only of the *constitutional* power of Congress as formulated by the Supreme Court, and it is nowhere in the book stated that Congress *has* ordered the deportation of all aliens.

(3) The reviewer castigates the author for failing to commend Congress for its "splendid achievements" in rescinding the racial restriction against the Chinese, Filipinos, and East Indians, and making them eligible for naturalization.

The Massachusetts courts have been condemned for the Sacco and Vanzetti case. No one has organized committees to write in praise of the Massachusetts courts for their *just* decisions in many cases. Mr. Gordon is at liberty to sing the praises of Congress for mitigating the racist immigration and naturalization laws which should never have been enacted in a democratic country; but I beg to be excused.

(4) The reviewer says that the author was guilty of being "one sided" in denouncing Justice Cardozo's dictum in *Morrison v. California*, 291 U. S. 82 (1934), that persons of mixed race may be disqualified from naturalization, even if the ineligible strain is not preponderant. Mr. Gordon points out that this dictum has never been followed and that it does not state the law.

On page 95 I expressly describe the statement by Mr. Justice Cardozo as an *obiter dictum*. Mr. Gordon blames me for not referring to two lower federal cases, decided before *Morrison v. California*, in which he says it was held that a person of mixed blood is eligible to naturalization if the eligible strains of blood in his veins are predominant. But there are many lower court cases that I have not cited. In the preface I state clearly enough that the book is concerned primarily with the role of the Supreme Court.

(5) Mr. Gordon says that while I give credit to the Supreme Court for its decision in *Schneiderman v. United States*, 320 U. S. 118 (1943), in which the Court protected the rights of aliens, I fail to mention many other cases in which the Court protected such rights. But Mr. Gordon mentions only two cases, and one gets the impression that these cases are being called to my attention for the first time through the review. The fact is that the cases are cited, discussed and evaluated in the book. Furthermore, the book is not an attempt to discuss *all* of the cases decided by the Supreme Court which involve aliens. I was interested only in the *constitutional* questions, and cases which were not concerned with such questions did not fall within the ken of my interest. I cannot be blamed for not doing what I did not undertake to do.

(6) The reviewer states that many of the faults of the author's presentation "stem from his apparent assumption that it is the function of the courts to pass upon the social desirability of all legislation." This is not documented. No chapter or verse is cited to substantiate that assertion. The author of the book has not invented judicial review of legislation, nor is he under the impression that the court is getting ready to abandon this function. The only point the author makes is that as long as the court will engage in judicial review, it should exercise this function to broaden and strengthen civil liberties rather than to restrict them. "The sound, democratic way to remove legislative errors, other than those which infringe constitutional guarantees," says Mr. Gordon, "is to educate public opinion and thus induce corrective action by the legislature." I do not believe there is anything in the book which is inconsistent with this position.

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## BOOKS RECEIVED

- CASES ON TAXATION. By John M. Maguire and Roswell Magill. Foundation Press Inc., Chicago, 1947. Pp. xxii, 1099. \$8.50.
- CONFLICT OF LAWS. By John Delatre Falconbridge. Canadian Law Book Co., Ltd., Toronto, 1947. Pp. xxxi, 730. \$8.00.
- CORPORATIONS. (Revised Edition.) By Henry S. Ballantine. Callaghan & COMPANY, Chicago, 1946. Pp. xx, 992.
- ECONOMICS OF PUBLIC UTILITIES. By Emery Troxel. Rinehart & Company, Inc., New York, 1947. Pp. xiv, 892. \$5.75.
- EIGHTH CONFERENCE OF TEACHERS OF INTERNATIONAL LAW. Carnegie Endowment for International Peace, Washington, D. C., 1946. Pp. xvi, 166. \$1.00.
- ETERNAL LAWYER, A LEGAL BIOGRAPHY OF CICERO. By Robert N. Wilkin. The Macmillan Company, New York, 1947. Pp. xiv, 264. \$3.00.
- FREEDOM DENIED. By Ernest O. Kooser, Berlin Publishing Co., Berlin, Pennsylvania, 1946. Pp. 240.
- INVESTOR'S TAX PLANNING. By John P. Allison. Fallon Law Book Co., New York, 1946. Pp. xvi, 422. \$5.00.
- SPENDTHRIFT TRUSTS (2nd Edition). By Erwin N. Griswold. Matthew, Bender & Company, New York, 1947. Pp. xxxvi, 767.
- NEW YORK PRACTICE. By Julian S. Appleton. Practising Law Institute, New York, 1947. Pp. xv, 293.