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## Book Reviews

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## BOOK REVIEWS

A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW. By John Henry Wigmore. Third Edition. Boston, Little Brown and Company, 1940. 10 volumes. pp. xcii-7320. \$100.00.

When Mr. J. Pitt Taylor (later Mr. Justice Taylor) brought out his treatise on the Law of Evidence Lord Chief Justice Cockburn in 1864 wrote to him as follows:

"I cannot sufficiently express my sense of the value of the work in its present complete and perfect form. Nothing more is required. All that could be done or desired in this department of our jurisprudence is accomplished."

However, the Lord Chief Justice changed his opinion of the learned author after Taylor's criticism in a letter to the London *Times* published November 17, 1879; of the ruling of the Lord Chief Justice excluding the declaration of the decedent accusatory of the defendant in *Regina v. Bedingsfield*<sup>1</sup> on the ground that it was not part of the *res gestae*. For in a twenty-four page pamphlet answering Taylor and among other things describing his search for authority on the point, the Lord Chief Justice wrote:

"I take down . . . and what could I possibly do better—that great repertory of Evidentiary Law, Taylor on the Law of Evidence. . . . I am doomed to be disappointed."<sup>2</sup>

Had some American Cockburn written a similar encomium—as well he might have<sup>3</sup>—when the first edition of Wigmore's treatise on the Law of Evidence appeared in 1904 it is safe to say that had a similar occasion subsequently arisen he never could have addressed successfully to Professor Wigmore the same *argumentum ad hominem* as later was hurled at Mr. J. Pitt Taylor by the Lord Chief Justice in the celebrated controversy between them. For the industry and indefatigable energy as well as the clarity of mind which led Professor Wigmore to collect, classify and philosophize upon some forty thousand citations of judicial decisions in the First Edition did not exhaust themselves there. They continued, so far as we can discover, substantially unabated. Thus in 1923 they produced Professor Wigmore's Second Edition, which contained reference to some fifteen thousand additional authorities with fifty topics newly treated, and in 1934 his Supplement with some seventy additional topics. Now after thirty-six years these same qualities of head and of heart have been responsible for the ten volumes of the Third Edition, with a further extension and development of many of the newer topics and the citation of some eighty-five thousand cases, or more than double the number contained in the original work. But this is not all. There are as well some twenty thousand citations of statutes and many expository quotations from recent judicial opinions as well as some scores of quotations of anecdote and comment from recent professional memoirs. Truly it may be said that Hercules with

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1. 14 Cox's Cr. Cases 341 (1879).

2. For a description of the controversy, see Professor James Bradley Thayer's articles on *Bedingsfield's Case* in 14 AM. L. REVIEW, 817, and 15 AM. L. REVIEW 1 and 77 reprinted in his "Legal Essays" (1927) at p. 207.

3. Professor Joseph Beale in his book review (18 HARV. L. REVIEW 478) wrote of the first edition that, "It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written."

all his labors was a drone in comparison with Professor Wigmore. Certainly too, one may well adopt and apply to this great work the language of Lord Chief Justice Cockburn's letter to Mr. J. Pitt Taylor and say in all truth that "all that could be done or desired in this department of our jurisprudence is accomplished." Moreover, it may be said safely that on any point of evidence which may arise if there is worthwhile authority anywhere available to throw light on it, it will be found in this edition of Wigmore.

In the present edition, as Professor Wigmore states in his preface, every passage of the text has been scrutinized for improvement with a view to representing the present state of the law. In addition the entire work has been reset in type, consolidating the 1934 Supplement with the Second Edition of 1923. Although perhaps some rearrangement of his topics might be thought desirable by many, the author has elected—probably wisely—to retain the same arrangement including section numbering of the old edition. Where further material has been necessary the additions have been made by inserting new sections or by expanding existing ones with lettered sub-numbers. In consequence, as the author points out, all citations in judicial opinions to the original text of the Second Edition are equally available for this edition.

Where additions or modifications of the author's earlier text appear in the present work they are characterized as naturally would be expected by the same felicity of expression, lucid analysis of the problem and that fertility of imagination which enables him to devise and project a remedy for defects which he points out in the present law, that always have marked Professor Wigmore for the genius that he is. A notable illustration of his ability in this last respect not merely to tear down but to construct, is his discussion of the problem of presumptions and burden of proof and his proposed rules of court<sup>4</sup> directed at removing the defects of the present law.

In the main his views on the topics where the experts in the field differ have not been altered substantially by the passage of time. He adheres to his previously expressed opinion on the theory underlying admissions, although he has added a section<sup>5</sup> on Professor Morgan's view—with which, however, he does not agree—on the theory underlying vicarious admissions. Of course the whole matter of admissions presents difficulties whatever explanation be adopted. It always has seemed to the writer that while not entirely free from objection the old theory of Greenleaf and Thayer that an admission is a dispensation from the need of evidence, had much to commend it. The forceful argument of the late Professor Ralph W. Gifford for this position in his review of the Second Edition of Wigmore's treatise is worth re-reading in this connection.<sup>6</sup> The dynamic Gifford put it well when he said:

"Why, now, should such a statement, as the above, be received even against the party making it? A sufficient answer is found in the fact that any party is given by law the power to state his case away if he will. Just as he may make admissions (erroneously if he will) by way of pleading or stipulation, so he may make rebuttable admissions by informal statements out of court, which are good until explained away. Indeed, the underlying thought governing the reception of evidence of an admission is almost crudely

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4. § 2498a IX (3d ed.) p. 335 *et seq.*

5. § 1080a IV (3d ed.) p. 139.

6. 24 COL. L. REVIEW 440, 443.

simple. It is, as the late Professor James B. Thayer used to say in the classroom, 'a case of the *argumentum ad hominem*.' The law says to the party making the admission: 'What you say is as good as proof against you; you can state the facts of your case adversely if you will; either your admission is true, or if not, that is due to your own falsehood or folly. Against another, your statement isn't good because he isn't responsible for it, and because it carries with it no recognized earmarks of truth; against you, the fact admitted requires no proof, because you yourself have stated it to be so.'

One minor change in the author's views on admissions may be noted in that in the new edition Professor Wigmore classifies admissions as either *express* or *implied*.<sup>7</sup> Previously his view was<sup>8</sup> that since admissions are statements, i.e., assertions in words, conduct although undoubtedly receivable in evidence and sometimes spoken of as an admission, was not strictly such. Now he more accurately points out that the implied admission is reached indirectly, that is by a circumstantial inference from some conduct such as flight, falsehood, bribery and the like, to the supposed mental state of belief beneath it, this state when reduced to or defined in words being inconsistent (more or less loosely) with the party's claim.

Professor Wigmore has added to § 1427 a most interesting discussion of the probable future development of the Hearsay Rule and Its Exceptions. His suggestion as a solvent for our present difficulties is the adoption of a rule to provide that the rule against hearsay evidence need not be enforced if the trial judge is of the opinion that strict enforcement would needlessly interrupt the witness' narrative, and the hearsay incidentally testified to is not likely to mislead the jury in their understanding of the facts. As a safeguard he would provide further in his proposed rule that opposing counsel or the court in its discretion may require the examination of the person whose statement is thus reported by hearsay. Moreover he would admit any duly authenticated written statement of a person in lieu of calling him to the stand, subject again to the discretion of the Court on demand of the opposite party to require that the person be called for cross-examination if the Court deem the matter of sufficient importance.

This seemingly would get rid of most present complications. However, as Dean McCormick points out in his article reviewing the Third Edition,<sup>9</sup> there is the possibility that lawyers preparing their cases which might depend on written statements against interest or book entries, might choose to support the admission of such evidence upon one of the present exceptions—thus perpetuating them—rather than run the risk of bringing in the writing without the witness in reliance on a rule such as that proposed. This is a difficulty of course that any simplification of the rules of Evidence is likely to encounter. Under modern statutes facilitating the use of entries in the regular course of business for example,<sup>10</sup> whether the entries be of the type formerly classified under the old shop-book rule or business entries by witnesses dead or otherwise unavailable, the lawyer preparing his case for trial may remember that his object is not merely to get his evidence in but to carry conviction to the jury. Hence if he is able to lay the foundation that

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7. § 1052 IV (3d ed.) p. 11.

8. § 1052 IV (2d ed.) p. 510.

9. XXXV ILL. LAW REVIEW 540, 543.

10. C. P. A. § 374a in New York and the Federal Statute enacted in 1936 (28 U. S. C. A. § 695) cited in *Ulm v. Moore-McCormack Lines*, 115 Fed (2d) 492, 494 are typical.

is required at common law for the admission of such evidence under recognized exceptions to the hearsay rule, he may choose to continue to do so if such proof be available and thus as Dean McCormick points out, help to perpetuate the exceptions despite the statute. One can still agree, however, with Dean McCormick's conclusion that Professor Wigmore's suggestion is manifestly a liberal and sensible one.

In this connection it may be noted that Professor Wigmore is hopeful for the future. He points out in his preface<sup>11</sup> that "the marked trend of the present period is a forward movement destined within the coming generation to renovate radically the rules and the practice under the rules." This is a wholesome thing without doubt, and yet it is not without its hazards. First, a too rapid arrival of the millennium with abolition of most of our present rules of exclusion, and dependence almost entirely on judicial discretion would render worthless—for all practical use at least—the magnificent monument to the industry and learning of our author which the present work represents.<sup>12</sup> Probably this will trouble Professor Wigmore least of all. Secondly, if our system of evidence at common law with all its conceded imperfections, which has been built up over the last several hundred years by a painstaking process of trial and error, be over-simplified and streamlined and most of our rules of exclusion be abandoned, we may find ourselves back where we were at the beginning, facing the Sisyphean task of putting them all back again over the next century or two. In this connection it is well to remember that while certainly this is not true of Professor Wigmore with his profound knowledge of the historical background of his subject, sometimes it is true of well meaning reformers that the greatest progressive may turn out to be merely the greatest reactionary, who has forgotten—if he ever knew—the lessons of experience and history. Improvement and simplification of our rules of Evidence are to be desired provided we proceed with caution and do not neglect the signposts set up by experience in the past along our way.

In the meantime, however, and despite all of the present ferment for reform, one need not be equipped with the gift of prophesy to predict that for a long time to come Wigmore's treatise will continue to be, as it has been over the years since its first appearance shortly after the turn of the century, the *vade mecum* of all teachers of the law of Evidence and the court of first and last resort of prac-

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11. I (3d ed.) p. vii.

12. In his article in the ILLINOIS LAW REVIEW *supra* N. 9 Dean McCormick writes at p. 545: "This, of course, is the last treatise of massive proportions that ever will be written by a writer of comparable parts in the field of evidence. Wigmore himself has shown most clearly that the masts and spars must be stripped of most of their cumbersome rigging, if we are to make fair headway. In twenty years one small volume should hold all the law of evidence."

Continuing Dean McCormick's maritime metaphor, a word of caution may be added that if masts and spars be stripped of most of their rigging, both standing and running—whether cumbersome or not—it may be impossible either to keep the masts and spars aloft or to make sail at all. Then we are more likely to be concerned not about making headway, but about whether we shall make sternway or mayhap lie broadside on, with little or no progress in any direction. But perhaps our streamlining reformers hope to fashion—and in Evidence obviously this would not be inappropriate—a *jury rig*, or else to install a Diesel-engined auxiliary of modern reformed procedure to furnish the means of propulsion.

tioners and judges alike who have conundrums in Evidence to which authoritative answers must be found.

IGNATIUS M. WILKINSON†

CONQUEST AND MODERN INTERNATIONAL LAW. By Matthew M. McMahon. Washington: Cath. Univ. Press. 1940. pp. 233. \$3.00.

Although of little interest or direct value to practicing lawyers, this volume forms a convenient and ably organized discussion of a problem which all international lawyers will wish to see so well surveyed at the present time. All of the authorities and most of the incidents connected with conquests of modern times have been covered and are here readily available.

One must distinguish between conquest in international relations and conquest in international law. One is a motive and the other a legal consummation. If a war ends in the acquisition of territory, and the cession of territory seized in the war is confirmed by the treaty of peace, the legal bases are exactly established. The immediate effects of conquest may be merely "temporary rights" under the law of hostile occupation. Those rights may be confirmed by treaty later, or even by prescription. There is an analogy to civil law here. If a contract be accepted under coercion, it may be held void; but Spain cannot void the transfer of Puerto Rico to the United States simply because with her fleet sunk and the war lost, she was forced to end the war and cede the territories demanded.

We are very likely, then, to come to the conclusion that our concern must be mostly with international relations, rather than with international law. It might have been acceptable to conquer portions of America, Africa, and Asia from uncivilized native tribes (although Vittoria would object on grounds of morality), but in civilized decades the formalities of treaties and the paucity of still seizable lands have tended to credit legalistic, if not legal, bases for jurisdiction which arose out of military conquest. With the advent of the New Freedom of Woodrow Wilson, however, a more honest world began to return to the theories of Vittoria. Wilson said: "The day of aggrandizement and conquest has gone by." Article X of the League of Nations Covenant barred conquest by protecting the territorial independence and integrity of all states. The Briand-Kellogg pacts reinforced the position. The general condemnations with regard to Manchuria and Ethiopia, although they led to the death of the League, showed a new public conscience of the twentieth century. The leadership of the United States in this development is marked, in spite of "the winning of the west," in spite of New Mexico and California (if not Texas), and in spite of Puerto Rico and the Philippines. Indeed, the Monroe Doctrine was the first outstanding policy against an air of conquest that had dominated the world for many centuries.

The difficulty in discussing this subject is to determine whether a conquest is a cause or a result. If land is lost in war, the incidents of conquest cause the formulation of a treaty which gives validity to later possession. If a treaty ends a war and transfers territory, we might also say, the war ends in an accepted conquest. To municipal law and to many phases of international law, either inter-

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pretation of the conquest may result in valid titles and rights, national or individual. Conquest thus becomes a mere academic question. Is the war waged for purposes of conquest, or was the war waged perhaps truly for purposes of defense—as it is claimed that of 1914 was—and merely happens to end in a victory which transfers conquered territory, as the Treaty of Versailles transferred Alsace and Lorraine to France in 1919?

We come back, as thus we toss about Dr. McMahon's problems, to the idea that conquest, if not concerned merely with the rights of hostile occupation, ends with being merely an ethical question. However, obviously since the book was written, we have had conquests by force and threat of force in Czecho-Slovakia, Austria, Poland, Norway, Holland, Belgium, France. These are real conquests, and no less real because so many of them were achieved without formal legal declarations of war. If no treaty is signed validating these, will conquest recur again as a legal as well as an ethical problem? For those whom this problem interests in this new and future vital phase, this book will be a pertinent preface.

ELBRIDGE COLBY†

CASES AND MATERIALS ON PROPERTY SECURITY. By George E. Osborne. St. Paul: West Publishing Co. 1940. pp. xxiv, 1039. \$6.00.

A pressing need for this casebook could hardly have been felt because the subject has already been ably covered in several late collections of cases. Any special importance which it has, therefore, will perhaps lie in the degree to which the author, by selection or organization, has contributed to the thinking on the subject.

The scope of the book is broad, and this fact is the clue to its merits and its weaknesses. Its worth cannot be judged by comparing what the author proposed to do with what he did. For example, the statement is made that *stress* has been placed upon "topics which have developed or have become of greater importance in the last fifteen years." No one would dispute that such an aim is laudable and proper. But to suggest that the book covers with any appreciable fullness, "judicial and legislative protection of mortgagors from depression hardship (upset prices, refusal of confirmation, enjoining power of sale foreclosures, limitations on deficiency judgments, moratoria, redemption from foreclosure sale, etc.); rights and duties of trustees under trust indentures," and a great many other topics enumerated in the Preface, is misleading. That such topics in many instances are at most only suggested in the book may be fortunate. The field is too broad and the problems too complex for treatment in a single casebook. On analysis, then, Part I is largely conventional in form and organization, and as the author states, follows in the main "the material used by the late Dean James Lewis Parks," with noteworthy additions of recent cases. The first chapter, Historical Development and Introduction, is a clear and succinct text treatment and in some respects is the best part of the book.

Part II, styled Personal Property: Pledges, Chattel Mortgages, Conditional Sales, Trust Receipts, is wholly separate from Part I dealing with Real Property. This organization, it is submitted, conforms to the understanding and usages of the legal profession. The author has avoided the pitfall of lumping the whole lot together because the credit concept is a common factor. Part II all in all is an adequate treat-

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ment of personal property security and could, it is believed, be profitably used as the vehicle for instruction in those subjects.

The footnotes are good and frequent, but unfortunately are too heavily annotated. The notes and comments sprinkled through the book are uniformly helpful.

A feature of the book is a list of Leading Law Review Articles and Important Notes. The usefulness of this list could have been greatly enhanced either by some sort of index or a topical arrangement.

WILLIAM A. MCRAE, JR.†

CASES AND MATERIALS ON THE LAW OF EVIDENCE. By Charles T. McCormick. St. Paul: West Publishing Co. 1940. pp. xxii, 1035. \$6.50.

Without departing from the approach of Thayer, an approach standardized by use in all leading casebooks on Evidence except Wigmore, Dean McCormick has produced a book incorporating many changes in arrangement and content. Because these changes are accentuated, by elimination of cases showing the history and development of the doctrines<sup>1</sup> and concentration on trial evidence-law,<sup>2</sup> this casebook is unique.

That the analysis here presented came about through new thinking and enterprise, rather than from the shifting of chapters and substitution of cases, is evident from the start. Appearing for the first time in an Evidence casebook is an introductory chapter, Preparing and Presenting the Evidence, which contains comprehensive text material on the following topics: preparation for trial on the facts without resort to the aid of the court, invoking the aid of the court in preparing the case for trial, and the order of presenting evidence at the trial.

Other innovations are the inclusion of the rule against opinions in the next chapter, Examination, between cases on direct and cross-examination, and the use of succeeding chapters for three other topics relating to witnesses, procedure in questions of admissibility, competency, and privilege. Chapter 5, Privilege, departs from tradition by covering, in addition to the usual topics, material on evidence of repairs or precautions after an accident, evidence illegally obtained and confessions.<sup>3</sup>

New content of a striking nature is found in chapter 6, Relevancy, where the sections on Character, Custom and Practice, and Similar Happenings and Transactions are followed by sections on Insurance against Liability, Evidence of Experiments, and Evidence Based on Scientific Techniques. And in chapter 9, The Hearsay Rule and Its Exceptions, following chapters on Demonstrative Evidence and Writings, there are two notable contributions: a section labeled Records of Past Recollection which ties in nicely with the next section on Business Entries now made more understand-

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1. Preface, p. vii.

2. *Id.* at viii.

3. Departure from the usual classification under rules of exclusion is explained in McCormick, *The Scope of Privilege in the Law of Evidence* (1938) 16 TEX. L. REV. 447, 451, 455, 460, where it is said that the applicable rules cannot be supported by the policy of truth-finding and that their purpose is merely to encourage safety measures, and "discourage future unlawful seizures" and "secret violence of the police."

able by specimen forms of business and hospital records; and the editor's own text material on Official Written Statements, Treatises, Statements and Reputation as to Pedigree and Family History, Recitals in Ancient Writings, and Reputation.

The omission of cases on preliminary questions of fact should cause few regrets, even though its usual companions, burden of proof and presumptions and judicial notice, are treated in the concluding chapters. Questions as to the functions of judge and jury are bound to come up in connection with the discussion of specific topics and it is extremely doubtful whether anything is to be gained by separate treatment of this topic.<sup>4</sup>

Carefully prepared note material presents many problems of interest to students and instructors, and frequently gives references to law review material, Wigmore's treatise, and A. L. R. annotations.<sup>5</sup> These references, which often include Decennial Digest key numbers, and the detailed index of eleven pages should also prove of great service to practitioners and judges.<sup>6</sup>

Each chapter indicates that it was put together after a first-hand study of judicial decisions and other materials and shows a clear understanding of how evidence is handled in trial and appellate courts. As a consequence, attention is given to many problems of practical importance which would pass unnoticed if the cases were continually viewed "backward". The workmanship places the book on the highest level of excellence and it will undoubtedly be accepted in a manner befitting a casebook of permanent interest and value.

WILLIAM T. FRYER†

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4. See Morgan and Maguire, *Looking Backward and Forward at Evidence* (1937) 50 HARV. L. REV. 909, 918: "There seems, therefore, to be little hope of curing the present confusion either by judicial decision or by legislation addressed solely to this problem. The cure must involve drastic treatment of the exclusionary rules, and that not piecemeal."

5. See, for example, the notes on pages 724-725, after *Dickerson v. United States*, 62 App. D. C. 191, 65 F. (2d) 824 (1933) (statement of a defendant read to a codefendant held admissible against the latter because "it does not appear that he then made any denial of its truth"): "See WIGMORE, EVIDENCE, §§ 1071, 1072; Notes, 80 A. L. R. 1235, 115 A. L. R. 1510; 17 MINN. L. REV. 665 (1933). Does it suffice for the proponent to prove that the statement was made in the presence of the adverse party, or must he go further and prove or offer to prove the adverse party's conduct in response thereto, to entitle him to have the statement admitted? . . . Should the trial judge be satisfied that the circumstances called upon the party to speak, before admitting evidence of the statement and the party's silence, or should he merely require that the preliminary proof go far enough to indicate that a jury could reasonably so find?"

6. It is to be hoped that the time will soon come when lawyers and judges will acknowledge the use of law review material. This was done in *Worth v. Worth*, 48 Wyo. 441, 49 P. (2d) 649 (1935), reprinted at page 949, where the court referred to articles by Morgan and McCormick and a student note. For the contrary view, recently voiced by a member of the Massachusetts Supreme Judicial Court in lecturing to members of the bar on the preparation of appellate briefs, see *From Writ to Rescript* (1941) 286: "Look in the legal periodicals. We do not cite those because there is a certain tradition against it, and perhaps it is wise, but there is no reason why you cannot, and we are perfectly willing to crib what we can from them. There is a lot of useful material in articles that have been written from time to time for legal periodicals."

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CASES AND MATERIALS ON CREDITORS' RIGHTS. By Gerrard Glenn. American Casebook Series. St. Paul: West Publishing Company, 1940. pp. xxii, 1177. \$6.00.

Professor Glenn is not a newcomer in the field of Creditors' Rights. He was long a successful practitioner in this field before he became an equally successful teacher on the subject. In fact, he is credited with being the originator of the title, "Creditors' Rights." His texts, *Creditors' Rights* (1915), *Liquidation* (1935), and *Fraudulent Conveyances and Preferences* (1931, revised in 1940) have been the standard works in this field. His long experience as a teacher has given him ample opportunity to test out his theories in the classroom.

In the main, Professor Glenn has followed the plan of his original text book: Part I. The Single Creditor's Right of Realization; Part II. Liquidation of Debtors' Estates; Part III. Rehabilitation and Reorganization; Part IV. Features Common to Liquidation and Reorganization. He has emphasized the rights of the single creditor as well as the collective rights of creditors. His footnotes are few. As he says, he has sought to save all possible space for the presentation of judicial opinion. He prefers "to let the cases teach rather than present a collection of essay material." As his cases are short, he crowds in many more legal principles than he could have with lengthy opinions. This policy of carefully editing the opinions of the court and omitting parts that have no direct bearing on the particular subject under discussion, marked the earlier selections compiled by the Harvard faculty when developing the case system of teaching law. This was notably true of the casebooks of Dean Ames. Many of the selections in his trust and equity casebooks covered less than a page. There are many advantages to be found in following this policy. In Professor Glenn's book, we find that there are few cases covering more than one or two pages. This suggests careful editing on his part. A case extending beyond four pages is very exceptional.

Professor Glenn has sought to make his casebook usable in schools where time will not allow three or four hours a week for one semester. He suggests the possibility of omitting the chapter on Commercial Devices altogether, shortening the study of Fraudulent Conveyances, and making a selection of cases presented under the topic of Assets and Expenses of Administration. The appendix containing the National Bankruptcy Act with annotations indicating the changes made in recent years, and also the General Orders in Bankruptcy, is worthy of more than passing notice.

This casebook shows careful preparation and represents scholarship.

W. LEWIS ROBERTS†

GOVERNMENT AND ECONOMIC LIFE. By Leverett S. Lyon, Victor Abramson and Associates. Washington: Brookings Institution. 1940. pp. xi, 1301. \$3.50.

This work is indispensable to the lawyer who looks forward to a career in the public service. The general practitioner of the law, the economist and the casual reader will here find numerous topics of immense interest because these essays are up to the standards of excellence which we now take for granted in the publications of the Brookings Institution. The documentation is complete and conducive to further study; the style is, on the whole, easy and free and the discussion is objective—even when a spanking is administered or a criticism sharply leveled.

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The general plan of the essays is to present the background of control in some of our most important industries; e.g., Public Utilities, Agriculture; then to the evaluation and finally to the discussion of current issues in the light of the premise that we can achieve greater economic prosperity and security in the fuller utilization of our unparalleled natural resources, labor-power, capital and management. Naturally many topics are incidentally discussed. There are some defects but these are for the most part minor and subject to the individual taste.

The chapter on War, for obvious reasons, first claims our attention. As we read about the laws and the regulations of the first World War, we unconsciously realize that we are moving closer and closer to war-controls—and that in view of some Congressional bills less and less reliance will be placed on private initiative, if and when we enter another war.

The Army and Navy Munitions Board has formulated plans for industrial mobilization, the Civilian War Resources Board has presented its report, the Defense Commission has exercised its powers as in priority-orders, and (after the printing of this book) the Federal Government has started to organize a most extensive set of economic survey boards. To this add the Selective Service Act and the billions appropriated for armaments and we realize that if war does come upon us, we shall be far more prepared than in 1917 but that regulatory boards are also prepared to direct our economic actions far more thoroughly than ever before. Great Britain has conscripted capital and is now conscripting labor. In a total war or a "total emergency" can we avoid that action?

In the exportation of arms, we have had more than one "fundamental shift of policy." The Neutrality Act of 1935 (as is pointed out) was one shift, the Cash-Carry Plan of 1939 was another, and the current Lease-Lend Act is still another. Policy and the course of British arms, not tradition, have written our practice. It is not unlikely that further "shifts" are to come.

We miss a discussion of the pertinent problems of excess-profit taxation and, more particularly, an examination of the question "Can we provide and continue to provide for Agricultural relief and Social Insurance and, at the same time, spend billions ('and more to come') for our defense?"

One lesson to be remembered forever from the era of the Blue Eagle, is that a nation-wide remedy demands extensive information, expert administration and almost infinite patience. President Roosevelt in 1937 pointed out that in the days of the NIRA "Policy was necessarily made largely in the dark. . . . Policy shifted so frequently that no program can be said to have been adequately tried" (pp. 1038-9, n. 6). The most ardent opponent of "government by administrative bureaus" cannot deny that many problems of industry-control are far too vast and difficult for Congressional supervision. The most ardent champion of government control cannot deny that, at times, the delegation of power may "run riot" with its attendant turmoil of inconsistent policies, of contradictory regulations, of delay and confusion. If there be a middle course—a course constitutional and effective—we have yet to find it. Let us be frank about that. The statesmanship of economic control will test the highest capacities of our most able citizens. Nowhere is this better seen than in the regulations of Public Utilities.

This chapter, in the opinion of the reviewer, is the best in the book. Here, Professor Lewis skillfully examines the course structure and techniques of public utility regulation. Perhaps, all of us will not be too happy about his violent attack on the Supreme Court for its decisions about the valuation of Utility properties. It enjoys,

we are told, a "naive unawareness" and after following the theory of original costs, then reproduction costs, it ends with a test—a hybrid one combining "without theory or purpose, the wholly irreconcilable features" of both techniques, (p. 684), so that a state regulatory commission today faces a review of its findings by a method "still undetermined and unannounced and which will contain mutually inconsistent and irreconcilable elements joined together without pattern in completely indeterminate and unpredictable proportions" (p. 699). This language is strong, but admittedly some of the decisions of the Court are strange.

However, the Court in *Smyth v. Ames* was not "distressingly" vague but unduly optimistic of human mentality. Few minds can give "just and right" weight to all the elements therein enumerated, presupposing, of course, that they could, first, accurately determine original costs and present costs and could forecast the probable earning capacity of the adjudicated rates. With the benefit of hindsight, it is clear that the Court was bound to waver in its allegiance to any single method of valuation.

The author flatly favors the prudent investment method of valuation because of its superior "equity, economics and expediency." For it, he makes a strong case. For example the reasoning of the reproduction cost theory neglects the very important fact that "Something over 70% of the capitalization of the public utility industry is in the form of fixed-return securities—" (p. 687).

No one more clearly appreciates the defects of commission control than does Lewis but for him the path to improvement does not include increased dependence upon judicial control of policy. To achieve fuller utilization of resources and to satisfy more needs the author urges the commission to consider the demand elasticities to the end of purposive price fixing. This is more easily recommended than attained for, though the mathematical economist has gone forward in his effort to measure exactly the correlations of price changes and demand changes, his goal has not yet been fully reached.

Out of the present confusion, the author, seemingly, would rig a system of control wherein the state commission, as a final court, would use prudent investment as its main test of valuation, ever watchful of the amounts—and direction—of operating expenses, daring enough to force lower rates in the interest of returns and consumption, watchful of accounting techniques, financial policies, inter-company action and expansion needs. This would not be a Utopia but "a better 'ole." The outlook is not hopeless, for within the past fifteen years some of the above measures have been enforced; better still from some utility organizations have come manifestations of interest in the service for the general public—manifestations thoroughly consistent with their invaluable privilege of monopoly granted by society.

The railroads have seen the progress of control as it passed from the States to the Federal Government and from an "essentially negative or punitive" to a "positive managerial system of supervision." The Interstate Commerce Commission, grown stronger over time, possesses and "has consistently exercised the power to substitute its judgment for that of private management" (p. 860). To what end? The major problems of the Railroad have not been solved: scientific rate-making, under any of the standards failed to materialize, no major consolidation was effected, the recapture provisions were abandoned, and the valuation proceedings far exceeded the cost and expense estimates as originally made. True, some of the ills have been cured, but on past performances the outlook for a successful administration of the Emergency Transportation Act are none too bright. The economist, the lawyer, the valuation expert, together with the rugged individualist and the socialist have their particular

reasons for the failures and their favorite remedies. The author, aware of all these viewpoints, argues that if we are to continue managerial supervision of the railroads then to really effectuate it, the government must be prepared to regulate all transportation under "unified direction" with "compelling authority." The reader may disagree but his burden of proof will be an onerous one.

The structure of American Capitalism, in many of its parts, has been radically changed. Nowhere is this statement better proved than in Agriculture—true example of competitive, unregulated and unsubsidized Capitalism. The American farmer has seen a growth of government aid, control and subsidy which is unsurpassed in the economic history of the world. The Federal Farm Board (1929) was invested with vast powers and 500 million dollars to aid cooperative marketing. As an "underwriting agency" it supported the butter market and the grape market, and, as early as 1931, there were recommendations by some of its officials for a "more definite control of production." Of the main aims and practices of the A.A.A. and its implements—production control, subsidies, crop insurance, credit agencies—the reader is aware. Later techniques looked to a long term action wherein private initiative can be curtailed by majority vote, as in cotton production (1938). Export subsidies are being paid on wheat and cotton. Will they be extended to other commodities? Shall we continue or abandon commodity loans and credit action? The author insists on the necessity of settling these problems. Under the present emergency they will not be settled but will probably drag on embroiled in political maneuvers and oratory. Finally, it is necessary to realize that the larger nations of the western civilization have seen extensive suffering and social turmoil arise out of their respective agricultural crises.

No longer, in agriculture, is the competitive price regarded as the invaluable and best regulator of production, wages and profit. In Bituminous Coal, Petroleum and Natural Gas, also, regulation by market price has been discarded for regulation by government action. Conservation of resources is the given reason in these industries but in the Interstate Oil Compact "the ostensible conservation program becomes one of market stabilization," (p. 1013) and stabilization "is concerned primarily with increasing the profit of producers" (pp. 1018, 1021). For Bituminous Coal, the conservation argument appears at this time to be of "dubious merit" (p. 985), and, more bluntly, the price controls of the Bituminous Coal Acts of 1935 and 1937 were "to protect the operators and workers from the results of market competition" (p. 981). This industry, long wracked by numerous forces, wanted and sorely needed some form of government regulation. Whether it will agree with the conclusion that it is highly improbable that effective price-fixing can be achieved "without the imposition of governmental controls over output" is another matter. It is not unlikely that the Bituminous Coal Industry will experience further controls if the present emergency becomes more tense. Splendid examples of the enormous difficulties, legal and economic, of price-fixing by the government will be found in pages 972 to 981.

The development and current issues of Relief and Social Security are considered in the final chapters. Practically everyone is dissatisfied and annoyed with the emergence of public relief as a national necessity. Once started it has become a nightmare. In March of 1932 government-owned wheat was distributed to the needy by the Red Cross, but from 1933 to 1937 the total cost of relief and emergency work—Federal, State and Local—was 19.3 billion dollars. More than seventy per cent of this staggering sum came from the nation's capital because according to the Pres-

ident, the Federal Government was the only agency "with sufficient power and credit to meet the situation." With a new philosophy of the relief problem, we shall continue to expend substantial sums for relief payments even though the country experiences a sound and deep business recovery. Can we continue to make these payments and those for Old-Age Insurance and Unemployment Insurance while we finance the present (and future) costs of the National Defense? If we do continue, the author's suggestion that a permanent program be considered to replace the "jerry-built emergency system" of today is undoubtedly sound.

While it is true that a full appraisal of our social security program is not yet possible, still there loom certain large issues which must be considered wisely. With the modifications of 1939 in our Old-Age Insurance plan—the benefits were increased, the date of operation was shortened to January 1940—it will be necessary in ten or fifteen years to increase the pay-roll tax, to reduce the benefits or to make government contribution from general revenues. Further, the individual states face severe problems in the administration of their Unemployment Insurance plans. In the advent of a widespread depression, will their reserves be strong enough to meet the strain? Will those industries with high stability in their employment continue to pay the same rates as the "unstable ones"? To judge by the English precedent there probably will be no differentiation. If these plans are abandoned it is not unlikely that some social turmoil will ensue. As difficult and disagreeable as these problems may be, the effective time to face them is now.

Control, Regulation and Subsidy have been the main intrusion on our economic activity by the government. Its part in the production of services, and more particularly, of goods, is relatively very small and at this date does not seem destined for great increase. However, the States will continue, perhaps enlarge, their efforts in education, highways and general welfare. The Federal Government operates the Panama Canal, the Post Office System and has a monopoly on the Alaska Seal Trade. More lately it has become banker, mortgagor, landlord and producer and distributor of electrical energy. This latter activity will probably be increased. In the main, however, private management will most likely retain its present position as producer of our goods and services. But, a "great deal of our semi-commercial public production has originated on special occasions like war or economic emergency." Today the Spring of 1941 may be the setting for new extensions.

No two readers of this book will entirely agree on the necessity or the merits of our efforts at economic controls. All will agree on the need for extensive control over drugs and "adequate" control over foods. Some will argue eloquently for some form of protective tariff; let them realize that the abhorred practice of "dumping" goods is not confined to certain foreign nations but that some of our producers dump their goods abroad—and that with the aid of government subsidies. Some will approve control of our public utilities—perhaps will urge further controls; they should read about the complexities and the failures of past controls. Above all, everyone interested in the economic welfare of our country should realize that the twentieth century and especially the last fifteen years, has seen an enormous growth in the extent and depth of government controls.

To see this, those who must apportion their reading time, may content themselves with the chapters on Agriculture, Public Utilities and National Industrial Recovery Act. Every reader should reflect on Part VII, for here, in summary, is found a general exposition of our controls, state and federal, general and special, and the objectives and techniques of these controls. Here are enumerated some of the pro-

posed remedies for a better economic society—increase the responsibility of corporate officers, “tax” the chain stores, construct utility yardsticks, increase the progressive taxation schedules and so on. These and the favorite remedy of the reader must be tested in their answer to the questions raised in these pages. Can the controls and regulation be flexible but not arbitrary? Will the administration be capable, honest and resolute?

If thinking be a precious act, then, this is a precious book.

DANIEL J. AHEARN, JR.†

CORPORATE DIVIDENDS. By Donald Kehl.<sup>1</sup> New York: The Ronald Press. 1941. pp. xl, 367. \$7.50.

“ . . . *The question of dividends likewise calls for much more than is contained in the legal concepts of capital and surplus. It leads one directly into accounting and financial management. To forsake these areas and to hew strictly to the line of the legal concepts is to neglect the legal problem of control over dividends. . .*”<sup>2</sup>

During the period of the past generation lawyers and their clients have discovered that there are many problems that cannot be solved by legal principles alone. Limited budgets prevented many law schools from experimenting with new courses; old ideas deterred schools with adequate budgets. Therefore, only comparatively recently has there been actual experimentation by introducing new courses, by revising old courses, or by changing entrance requirements. One of these problems has been that of integrating accounting, business management, economics, and the law pertaining to business associations.

Mr. Kehl has not only attempted to present all aspects of the problems relating to the declaration and payment of corporate dividends, but he has succeeded. Accountants, managerial employees, directors, stockholders, bondholders, economists, and lawyers will all find the book *Corporate Dividends* of great value. The footnotes cite pertinent cases, statutes, casebooks, texts, articles in law, business, and accounting periodicals, rulings of various administrative boards, and annotations. Thus each foot-note is in itself an integrated bibliography of the material discussing a particular problem. The fact that many lawyers will not be able to secure much of this material is not serious. Their demands for it should induce many law libraries to add business periodicals to their subscription lists and to secure the back issues.

The lawyer who is familiar with corporation law and who knows the general nature of a balance sheet and of a statement of profit and loss should be able to follow the discussion of accounting principles. Any difficulty that might be encountered can be solved by reading a treatise on elementary or advanced accounting, both of which are inexpensive and indispensable.

Perhaps lawyers are prone to overestimate the need for their services, but it does seem that Mr. Kehl's first sentence in his preface is not wholly accurate. He writes: “The declaration of every corporate dividend presents managerial, accounting, and

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1. Member of New York Bar.
2. DOUGLAS, *DEMOCRACY AND FINANCE* (1940) 283.

often legal questions." The word "often" should have been omitted. Accountants might well object to the introductory statement in chapter three:

"The principal statutory restriction on the payment of dividends defines the fund available as the excess of assets over liabilities including in the latter capital. The application of this rule in practice necessitates the use of a corporate balance sheet. Specifically, the problem becomes one of determining what particular assets and what particular liabilities must or may be included in a balance sheet in order to meet the broad statutory definition. *It is at this point that services of the corporate accountant become necessary. . . .*" (Italics added)

Many corporate difficulties might be avoided if there is continuous and full cooperation of directors, managerial employees, accountants, and lawyers from the beginning.

Mr. Kehl's presentation of divergent views with polite emphasis on the one he prefers and his practical observations as to the application of different principles stimulate reflection and suspend judgment.

Persons familiar with business corporations know the many problems connected with corporate dividends. Mr. Kehl has discussed most of them in a clear and concise manner. His histories of various statutes and corporate practices are interesting and useful. His analysis and explanation of statutory provisions should awaken many to the need for more adequate legislation.

ROBERT N. COOK†

**INJURIES OF THE SKULL, BRAIN AND SPINAL CORD.** Edited by Samuel Brock. Baltimore: Williams-Wilkins Co. 1940. pp. xii, 632. \$7.00.

Cranial injuries, their causes and sequelae have been studied for centuries and form an important subject of medical research and discussion. Early writings dealt chiefly with fractures and the mechanism of their production. But with the increased knowledge of the physiological function of the brain, and the advent of the automobile and myriad other mechanical devices with an attendant increase in brain injuries, has made it essential to go further and examine particularly such subjects as injuries to intracranial contents and the spinal cord and their post-traumatic results. Therein lies the utility of Dr. Brock's book.

The book is a collaboration by twenty-two contributors who have written extensive monographs in each chapter, on neurology, psychiatry, neuro-surgery, radiology and forensic medicine. The material is well organized, is clear and concise, and well suited for the needs of the physician. But it is somewhat intricate for the purposes of the legal profession.

The book contains only sixty-three illustrations, and since it is intended for both a lawyer and doctor, would be enhanced by additional gross pathological illustrations.

Many of the chapters are excellent and bear particular mention, such as Chapter 4 on concussions and contusions of the brain, *et sequelae*; Chapter 6, on massive intracerebral haemorrhage; Chapter 12 on neuroses following head and brain injuries; Chapter 15 on the relation of brain injuries to other organic diseases of the brain; Chapter 16 on Roentgenological aspects of fracture of the skull and injuries of

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the brain; and Chapter 22 on medico-legal aspects, which cites many useful cases and decisions as illustrations.

In contrast, Chapter 10, dealing with cerebral birth injuries is disappointing, in that it concerns itself largely with unsubstantiated generalizations.

After all has been said, there still remains much to be learned about head injuries, and this is mirrored in the fact that physicians entertain varied differences of opinion. But they are honest differences, and should not form the basis of unfair criticism by the lawyer in court. For out of scientific controversy is born the truth.

A clear and concise summary of medical opinions concerning post-traumatic cranial injuries such as this book gives, is needed to help clarify misconceptions. The author is to be commended for his fine work; and his book should prove useful as a source of reference for the medical and legal profession.

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