Notre Dame Law Review

Volume 28 | Issue 1 Article 5

10-1-1952

Book Reviews

Marshall Smelser

John W. Curran

Roger Paul Peters

Alfred L. Scanlan

BOOK REVIEWS

CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS. By John C. Miller.[1] Boston: Little, Brown and Company, 1951. Pp. 253. $3.50. —When the United States was organized under its Constitution of 1787, there was no reason to be certain that the great republican experiment would be a success. The founders could not be sure that a republic could be administered on such a grand geographical scale. To one element it seemed that it might easily be perverted into a plutocratic monarchy which would abolish states' rights. An opposing group, called the Federalists, feared that states might secede and that a condition of anarchy would prevail. It was also a question whether the public safety would allow of free debate on foreign policy. Each faction feared that the other would betray the nation—to the British or French respectively. And finally it was doubted whether Americans could remain free. The Federalists thought that every tendency of critics of the government was toward democracy, which they equated with mob rule. Their opponents, called Democratic Republicans, thought they saw a steady drift of the administrations of Washington and Adams toward a tyranny which would nullify the Bill of Rights.

These fears might have come to nothing except that they coincided with a period of tensions in foreign affairs. As the United States settled into a "cold war" with France in the late 1790's, every complaint of either faction was magnified into a threat to national security. As it happened, the Federalists were in power. They saw in a fevered vision, whipped up by newspaper invective, a love of anarchy which led certain American politicians (among them Jefferson, Madison and Monroe) to collaborate with French revolutionaries for the purpose of throwing the United States into a mobocratic chaos as a satellite of France.

They took steps to prevent this by the passage of statutes which rigorously controlled resident aliens, and which, in effect, put a muzzle on the Democratic Republican press, a suppression of liberty after a method, most scholars today are agreed, which the First Amendment was written to prevent.

Professor Miller, of Leland Stanford Junior University, has told

[1] Professor of History, Stanford University.

the story of the Alien and Sedition Acts briefly but well. His account begins with the political philosophy of the Federalist group and their reaction to the attempts of the Democratic Republicans to refute this philosophy. From this he proceeds to an account of the acts themselves. He devotes the bulk of the book to the prosecutions (mostly against Democratic Republican editors), to the peculiar tone of the dominantly Federalist courts, to the deflation of Federalist-inspired fears when peace was negotiated with France, to questions of constitutionality, and to the decline and fall of the Federalists. The analogy with current fears and tensions is obvious.

The few defects of the work are mainly mechanical. It lacks a table of contents and its chapters are numbered but have no titles, a combination of economies which makes it difficult to find one's way around when tracing topical threads. The bibliography is impressive in size and quality and would be of great use to anyone interested in the federal period. It may be noted that there is a later edition of the diary of Gouverneur Morris than the one cited. The Columbia Historical Society is cited as "Columbus." The quaintly misspelled title of the pamphlet *The Key to Libberty* has been corrected, perhaps intentionally.

Any reader will find this book an interesting historical parable. Lawyers should be intrigued by the conduct of the trials of the allegedly seditious defendants. Historians will find it useful in their work but will, perhaps, regret that the causes of the national paranoia, causes which extend back a decade before the enactment of the Alien and Sedition acts, have not been fully explored.

*Marshall Smelser**

ILLINOIS ESTATE PLANNING AND DRAFTING OF WILLS AND TRUSTS. By William D. Rollison.[1] Albany, New York: Matthew Bender & Company, 1952. Pp. vii, 937. $18.50.—The author of this timely volume has been a Professor of Law at Notre Dame University for over twenty years. He has likewise authored many significant volumes beneficial to the law student and the practicing lawyer along with other activities, such as Faculty Advisor for the *Notre Dame Lawyer.* He spends laborious days and sleepless nights as every scholar must do today. Although his home is in Indiana, he magnanimously gives the benefit of his long experience to Illinois lawyers

---

* Associate Professor of History, University of Notre Dame.

[1] Professor of Law, University of Notre Dame.

in this "How to do it" book about Illinois estate planning and the drafting of wills and trusts.

Every lawyer who has drawn up a will for a client will be disturbed by this volume because it will make him realize that in 1952, a will is not as wide a tax avoidance document as an interwoven testamentary trust, properly drawn, would be. If a husband has a $100,000 estate and executes a will leaving all the estate to his wife, the taxes on that estate will be striking. If he leaves that estate to his wife, and she in turn executes a will, leaving a $100,000 estate to her family, the collectors of taxes (plural), will eat into the estate for the second time within, often, a few years. The total taxes on the two wills would in the aggregate probably be in the neighborhood of $25,000 more or less. If a lawyer were to set up a living trust for a husband-client with a family and a $100,000 estate by following the tax avoidance technique suggested in this volume, most of the taxes that would be payable, on the death of the client, under an old fashioned will would be avoided. If, for example, upon reading this volume, you get the idea that a Foundation is something to be considered in estate planning and the drafting of wills and trusts, then, I say, such a volume is a constructive book. In some groups of men it is a common saying that if so-and-so has over $100,000, he has a Foundation.

In Illinois the Rule in Shelley's case still applies although there is a bill pending to abolish it. The Rule against Perpetuities is ever present, as is a technical statute relating to Accumulations. As to the latter statute, there is a bill pending, to change the Illinois law, as it evolved in the statute of 1907, it is said, as a result of the Marshall Field will. A bill to abolish spendthrift trusts has been pending for years. In Illinois, due to a gap in the law, practically every trust is a spendthrift trust, so when using any of the myriad of forms in this volume, the status of the beneficiary of a trust may have to be detailed rather specifically. Lawyers are nonplused when they seek to reach the interest of the beneficiary in Illinois. In Illinois estate planning, another question that is disturbing is the tort liability of the trustee. There exists a very peculiar land trust in which, contrary to all common law, the trustee is possessed of the legal and equitable title. There is no split of interest as in the orthodox trust. In Illinois estate planning that hybrid land trust is used a great deal and it is interesting to consider, even for the novelty of it. Forewarned is forearmed.

In this volume there are nearly one thousand pages of estate

planning lore. If you scan the various Illinois statutes in the 1952 Illinois Laws, with the wonderful set of forms contained in Professor William D. Rollison's volume, and with the additional text material therein, you will say, to use a marine metaphor, there is no frigate like a good book.

A word before concluding. Form No. 973, "Trust for the Care of Graves," reminds me of the case of *Hampton v. Dill*,[2] which involved a will that among other things provided:[3]

> . . . it is my will that my estate shall be held in trust and administered by a committee of brother members in good standing appointed by the Skekinah Lodge No. 241, A. F. & A. M., of Carbondale, Illinois, U. S. A., and that they be specially charged with the duty of perpetually maintaining the burial lot of W. T. Hampton in exceptionally good state of repair and beautified by blooming flowers during their seasons.

The court held:[4] "The attempted creation of a trust to provide for the maintenance of the family burial lot was void because it restrained the alienation of the property of the testator for too long a time." In other words, the facts in this case did not come within the Illinois statute.

I meant to say something about the sections on "Joint Wills," "Mutual Wills; Joint and Mutual Wills," "Contract to Make Joint and Mutual Will" and "Advantages of and Objection to Joint and Mutual Wills," but the Book Reviewer is shouting "Deadline." Hence I must recommend those sections and this excellent volume to all students, libraries and lawyers. Rollison's Estate Planning does what it sets out to do and does it in the way an expert would do it.

*John W. Curran**

SUCCESSFUL TAX PRACTICE. Second Edition. By Hugh C. Bickford.[1] New York: Prentice-Hall, Inc., 1952. Pp. xxi, 463. $5.65.—Most of the material in the second edition of this informative book on federal tax practice is word for word the same as in the first edition. Some might consider this fact rather remarkable in view of the rapid developments in the field of internal revenue taxation.

---

[2] 354 Ill. 415, 188 N.E. 419 (1933).
[3] *Id.*, 188 N.E. at 420.
[4] *Id.*, 188 N.E. at 422.
* Professor of Law, De Paul University.

[1] Lecturer in Federal Taxation, American University. Formerly, Chairman, Committee on Tax Court Procedure, American Bar Association (1946-50).

Perhaps it is comforting to note that an experienced tax lawyer finds it necessary to change so little in what was published in 1950. Many small changes had to be made, of course, because of the new designations of officials and units of the Bureau of Internal Revenue under recent reorganization plans. This review will indicate, however, only the more extensive alterations that the author has seen fit to make.

First of all there has been inserted a new section on the lawyer and accountant in tax practice. The major part of this section consists of a statement of principles promulgated in 1951 by the National Conference of Lawyers and Certified Public Accountants.

The next change worthy of notice is in Chapter 9, where several pages have been added to permit a discussion of requests for rulings in tax matters. This new material is valuable in that it throws light on what is for many an obscure but important corner of tax administration and practice.

Chapter 10—"Controlling the Tax Burden"—has been expanded by adding two brief sections, one concerning different forms of business organizations, the other concerning possibilities of tax savings with regard to the excess profits tax. In the latter section the author recommends consulting TAXES, the tax magazine published by Commerce Clearing House. This is a signal departure from his recurring references to the publications of Prentice-Hall, Inc., his own publisher.

Chapter 12, which deals with the Bureau of Internal Revenue, has been largely rewritten so as to reflect the changes made by the reorganization plans referred to previously. Similar changes are reflected in the next chapter, relating to the audit process. A few pages have been added to Chapter 15, which is now entitled "Appeal to the Appellate Staff (formerly Technical Staff)."

Chapter 20—"Hearing Before the Tax Court"—has been expanded to provide for a discussion of appeals from decisions of that tribunal.

Finally, Chapter 22, relating to tax practice before the Court of Claims, has been considerably revised to conform to the new rules of that court referred to by the author in the preface.

Little need be added to what this reviewer previously said with respect to the first edition as a readable and helpful guide to the intricacies of tax practice.[2]

*Roger Paul Peters**

[2] See 25 NOTRE DAME LAW. 791 (1950).

* Professor of Law, University of Notre Dame.

TRIAL JUDGE. By Bernard Botein.[1] New York: Simon & Schuster, 1952. Pp. 337. $5.00.—Here is a rewarding book which ought to be required reading for practicing lawyers, as well as for teachers and students of the law. The material it presents, the accumulated experiences which it reflects, the lessons it should teach, and the ideas that form its rationale, warrant the attention of those members of the legal profession who look forward to the improvement of that profession both from the standpoint of techniques used and results achieved, as well as the reputation the law should enjoy with its fellow citizens. *Trial Judge,* by Judge Bernard Botein of the Supreme Court of New York County, is not a collection of amusing anecdotes serving as the memoirs of a tired old county judge (although many of the anecdotes related are worth reading and remembering for their humor and reader interest). To the contrary, this book is the product of an active, inquiring and sensitive legal mind. If anything, it is less than an integrated narrative attempting to tell a story, and more a collection of valuable materials, ready for the examination and use of lawyers and laymen interested in improving the administration of justice at the trial court level or "courthouse government," as Judge Jerome Frank[2] referred to it in his equally stimulating work on this subject, *Courts on Trial.*[3]

As a matter of fact, *Trial Judge* is closely related to this earlier book of Judge Frank's with respect to the theme with which both are concerned, *i.e.,* the how and why of trial court decisions, both judge and jury-made. In some respects, it is a superior book to its predecessor from the viewpoint of their mutual objective. Judge Botein is less philosophical about, and more intimately acquainted with, the functions of trial judge and jury than was the case with the illustrious Judge Frank whose daily routine is carried on in the more rarified atmosphere of the appellate court. However, it is perhaps more accurate to say that *Trial Judge* is a partial sequel to, and answers some of the provocative questions raised in, *Courts on Trial.* Certainly both books complement one another in idea and content and, in the opinion of this reviewer, are indispensable reading matter for students of the subject. Judge Botein enjoys the advantage of speaking from the deep well of his personal experiences and those of his colleagues on the bench in presenting his subject, and has also found time during his judicial career to take a special

---

[1] Judge, Supreme Court of New York County, New York.

[2] Circuit Judge, United States Circuit Court of Appeals for the Second Circuit, New York.

[3] Reviewed in 25 NOTRE DAME LAW. 396 (1950).

interest in jury behavior. His book bears the fine fruit of the many hours of interviews and discussions which he has made it a point to have with a great number of jurors who have served in the court at which he presided and before other trial magistrates. These talks have convinced the author that, while jurors may at times (by disregarding the principles of contributory negligence and the legal fictions surrounding corporate defendants) exhibit tendencies toward what Dean Pound termed "jury lawlessness," collectively they are nobody's fools. In case after case with which the author is familiar, juries have demonstrated remarkable adroitness in sifting truth from mistake and deception, and seem to possess a congenital shrewdness in assessing relative justice among plaintiffs and defendants. But Judge Botein, like Judge Frank, is not content to rest his hopes for improvement in the administration of jury justice on the basic common sense of human nature alone. He candidly acknowledges the weaknesses of the jury as a fact-finding mechanism and recommends various reforms for the improvement of the jury system. The most important of these is the author's outline of a jury educational program, to be undertaken under the direction of the courts themselves in which prospective jurors would be lectured by permanent instructors concerning the operations of our court system, with special emphasis to be given the jury, its origin, history, functions and purpose. However, receptive as the author may be to suggestions for improvement in the jury system, he falls back on tradition and Anglo-American political history when he discusses the provocative recommendation which so often has been made recently, *i.e.*, that the jury trial should be abolished in civil cases. This reviewer feels that such a rejoinder may miss the point. Trial by jury may be an indispensable part of our civil liberties structure when a man's life or freedom are at stake in a criminal trial, but query, whether the obvious limitations of the jury system serve to make it an unnecessary luxury on the civil side of the calendar?

Judge Botein has a word or two of good advice for the law schools to follow, based on the fact that trial judges often have to work hardest in guiding young lawyers, who were at the top of their classes at law schools, through the maze of a trial. His point is not that the average or less-than-average law student makes the better trial lawyer, but that the curricula of modern law schools are geared to appellate advocacy and not to the ordinary, but much more frequent and necessary, business of trying a case. While the author concedes that trial advocacy is an art which, like most, comes to one

only through doing, this reviewer feels that more books of the type similar to *Trial Judge* will help the law student to bridge more easily the gap which exists between the learning and application of legal principles in the cause of flesh and blood clients in the trial courts of the country.

Some of the most valuable material in the book is found at places where the author takes us behind the ordinary court room scene, upon those occasions when judicial robes are hung outside the door and the judge acts in the capacity of a mediation expert rather than as a solon of the law. These consist of his descriptions of the pre-trial conferences utilized in many jurisdictions today and successfully avoiding needless litigation, saving the time and money of the public and private parties, and reducing the element of "surprise, surprise" with which our adversative trials have been so rife in the past. The legal purists may look down their jurisprudential noses when Judge Botein asserts "settlement is more peaceful than trial as a method of adjudicating controversies" in law as well as in other areas of societal activity. When a judge is conducting a pre-trial conference, including discussion of the possibilities of settlement without trial, he descends from the bench to the market place. The legal abstractionists may not like it, but, to the extent a judge performs this modern auxiliary judicial function well, he is serving his profession in a fashion which will increase the respect in which it is held by other Americans vastly more than they might think.

Further evidence that the author is interested in improving his chosen vocation is found in his treatment of the problems attendant to judicial commitment of the mentally unsound, and the custody crises which inhere in almost all divorce proceedings where children are involved. The chapter entitled "A Day at Bellevue" (mental hospital), dramatically illustrates how the courts, by utilizing the expert counsel and objective medical reports of trained psychiatrists, can make an 18th century judicial mechanism a workable instrument for solving some of the more perplexing social problems of the 20th century. While the author is aware of the severe limitations surrounding the process of judicial commitment of the insane, he makes out a good case for the proposition that a day in court, even in this adumbrated area, gives a priceless psychological reassurance to patients, friends and relatives, which no administrative commission or tribunal, no matter how qualified by special experience, could provide.

When he comes to the heart-breaking, and so often insoluble,

problems of custody following divorce, Judge Botein candidly admits that the judge is a poor party to whom to assign the responsibility of rescheduling the lives of children and parents. He feels that if trained social investigators were attached to the courts, checking the fitness of parents before and after custody is granted, it might help the over-all situation. However, this reviewer received the distinct impression that the author regarded the emotional conflicts of custody as beyond the judicial ken, even under the best of circumstances. If this was his feeling, Judge Botein was probably right. It is unfortunate that he did not also discuss the main evil from which the problems of custody arise, namely, the promiscuity of divorce in America. However, he can be forgiven for not addressing himself to that. The great moral issue posed by divorce demands the time and attention of all of society before we can hope to make any progress in preserving family stability in the manner which was once regarded as conventional. Judge Botein's chapter on the related subject of custody confirms what many have observed — divorce is predicated almost entirely on a base human selfishness, which may be cleverly rationalized by sophisticated psychiatrists and psychiatric sophisticates but which can not be divested of its essentially ugly character so easily.

Space does not permit additional comment on this worthwhile book. Suffice it to repeat what was said at the outset, this is "must" reading. Although there is little discussion of legal absolutes and the immutable verities of law and jurisprudence, nevertheless, the author may be doing even more important work. He has turned his attention to the pressing problem of how to improve techniques for making the general propositions of the law applicable in the courtroom. To those who prefer preoccupation with the more esoteric areas of legal philosophy, such mundane efforts may rate only an extension of the tongue and the usual derogatory sneer of "pragmatist." To many others, equally interested in legal philosophy in action as well as in theory, it merits justifiable praise as a fine contribution to a problem that will occupy legal thinkers and doers as long as a free society functions, *i.e.*, how to achieve justice in action as well as in the pages of legal tomes. To some, Judge Botein's book may appear as "pragmatism"; to this reviewer it is rather a practical work of the spirit.

*Alfred L. Scanlan**

* Assistant Counsel, Munitions Board, Department of Defense, Washington, D. C.

BOOKS RECEIVED

ADMINISTRATION OF NATIONAL ECONOMIC CONTROL. By Emmette S. Redford. New York: The Macmillan Company, 1952. Pp. xvii, 403. $5.50.

ANGLO-AMERICAN LAW, A FIRST BOOK ON. Second Edition. By Charles Herman Kinnane. Indianapolis. The Bobbs-Merrill Company, Inc., 1952. Pp. xvi, 810. $8.50.

ARCHITECTURAL & ENGINEERING LAW. By Bernard Tomson. New York: Reinhold Publishing Corporation, 1951. Pp. xiii, 424. $7.00.

CASE OF ALFRED PACKER THE MAN EATER, THE. By Paul H. Gantt. Denver: University of Denver Press, 1952. Pp. 157. $3.00.

CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE. By Rollin M. Perkins. Brooklyn: The Foundation Press, Inc., 1952. Pp. xxxv, 851. $8.00.

CASES AND MATERIALS ON TORTS. By Young B. Smith and William L. Prosser. Brooklyn: The Foundation Press, Inc., 1952. Pp. xix, 1239. $9.00.

*CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS. By John C. Miller. Boston: Little, Brown and Company, 1951. Pp. 253. $3.50.

EQUALITY BY STATUTE: LEGAL CONTROLS OVER GROUP DISCRIMINATION. By Morroe Berger. New York: Columbia University Press, 1952. Pp. xii, 238. $3.25.

FARM LAW IN WISCONSIN. By J. H. Beuscher. Appleton, Wisconsin: C. C. Nelson Publishing Company, 1951. Pp. x, 388. $4.00.

FEDERAL INCOME TAX, THE. Second Edition. By Joyce Stanley and Richard Kilcullen. New York: The Tax Club Press, 1951. Pp. xviii, 374. $7.50.

HENRY CHRISTOPHE AND THOMAS CLARKSON: A CORRESPONDENCE. Edited by Earl Leslie Griggs and Clifford H. Prator. Berkeley: University of California Press, 1952. Pp. 287. $4.00.

*ILLINOIS ESTATE PLANNING AND DRAFTING OF WILLS AND TRUSTS. By William D. Rollison. Albany, N. Y.: Matther Bender & Company, 1952. Pp. vii, 937. $18.50.

---

* Reviewed in this issue.

JURISDICTION AND JUDGMENTS, CASES AND STATUTES. By William Wirt Blume and Charles W. Joiner. New York: Prentice-Hall, Inc., 1952. Pp. xxii, 718. $8.75.

LAW OF HOMICIDE, THE By Roy Moreland. Indianapolis: The Bobbs-Merrill Company, Inc., 1952. Pp. viii, 338. $7.50.

LAW OF MUNICIPAL CONTRACTS WITH ANNOTATED MODEL FORMS, THE. By Charles S. Rhyne. Washington, D. C.: National Institute of Municipal Law Officers, 1952. Pp. 192. $7.50.

MARITAL PROPERTY IN CONFLICT OF LAWS. By Harold Marsh, Jr. Seattle: University of Washington Press, 1952. Pp. xi, 263. $4.50.

PARENTAL RIGHTS IN AMERICAN EDUCATIONAL LAW: THEIR BASES AND IMPLEMENTATION. By Sister M. Bernard Francis Loughery. Washington, D. C.: The Catholic University of America Press, 1952. Pp. xii, 243. $3.75.

PARLIAMENTARY LAW FOR THE LAYMAN: PROCEDURE AND STRATEGY FOR MEETINGS. By Joseph F. O'Brien. New York: Harper and Brothers, 1952. Pp. xxii, 248. $3.75.

PLEADINGS AND JOINDER, CASES AND STATUTES. By William Wirt Blume. New York: Prentice-Hall, Inc., 1952. Pp. xviii, 684. $8.00.

POLICE ORGANIZATION AND MANAGEMENT. By V. A. Leonard. Brooklyn: The Foundation Press, Inc., 1951. Pp. xviii, 507. $5.00.

REAL ESTATE LAW. Second Edition. By Robert Kratovil. New York: Prentice-Hall, Inc., 1952. Pp. xxv, 461. $5.75.

STATE AND LOCAL TAXATION, CASES AND MATERIALS. By Jerome R. Hellerstein. New York: Prentice-Hall, Inc., 1952. Pp. xxiii, 871. $9.75.

*SUCCESSFUL TAX PRACTICE. Second Edition. By Hugh C. Bickford. New York: Prentice-Hall, Inc., 1952. Pp. xxi, 463. $5.65.

SURVEY OF THE LEGAL PROFESSION: REPORTS OF THE CONSULTANT AND THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR. Colorado Springs: Shepards, 1952. Pp. xvii, 498. $5.00.

TEXTBOOK OF LAW AND BUSINESS, A. Third Edition. By William

---

* Reviewed in this issue.

H. Spencer and Cornelius W. Gillam. New York: McGraw-Hill Book Company, Inc., 1952. Pp. xi, 838. $7.50.

THEFT, LAW AND SOCIETY. Second Edition. By Jerome Hall. Indianapolis: The Bobbs-Merrill Company, Inc., 1952. Pp. xxiv, 398. $10.00.

*TRIAL JUDGE. By Bernard Botein. New York: Simon and Schuster, 1952. Pp. 337. $5.00.

---

* Reviewed in this issue.