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Book Reviews

LAWFUL ACTION OF STATE MILITARY FORCES. By Edmund Ruffin Beckwith, James G. Holland, George W. Bacon and Joseph W. McGovern. Foreword by Lt. General Hugh A. Drum. Random House: New York, 1944. Pp. xviii: 199.

In normal times, the National Guard constitutes the active arm of the state's militia. Since 1940, however, the National Guard units of the various United States have been called into federal service and will remain a part of the military forces of the federal government until returned to the state service. In the absence of the National Guard, the various states have set up their state militias which, at the present time, are popularly referred to as "State Guards." Service in the State Guard does not excuse one from his obligation to render military service to the United States, so that the individual members of the various state guards may be called to serve in the military forces of the United States whenever they are needed.

While the National Guard is in federal service, and with all eligible males subject to federal military service, state guard personnel must for the most part, consist of civilians who are, at best, part-time soldiers. As such, their knowledge of things military and of their lawful powers as soldiers is more than likely to be quite limited. The average state guard officer or soldier might well think of himself as the exact equivalent of a member of the federal military forces and of his unit of the federal military forces. If, however, he did, he would be quite wrong and the book here reviewed would readily point out his errors and set him on the right path. The authors first set for themselves the task of pointing out the differences between the functions and duties of the National Guard and the state guard troops. This done—and most satisfactorily—the authors take up the following matters in a comprehensive treatment of their subject: State Troops in War—Action Against Enemy Forces; State Troops in Domestic Disturbances—Order to Active Duty; Status of Troops and Their Relations with Other Governmental Agencies; State Troops—Powers and Limitations; Restraint of Persons—Detentions—Searches—Crimes; Use of Force—Protection and Control of Civilians; Protection, Control and Military Use of Property; Military Justice. A bibliography and index complete the book, which, in the cloth-bound edition, is accompanied by a supplement containing annotations to case law and other legal materials, which cover a portion of the text. Complete annotations are stated to be in preparation.

The citizen-part-time-soldier who reads this book will find practical, clear and succinct guides to the formulation of policies and to action in the field. He will find that, as a member of a state military force, his actions are always restrained by the civil law, but that there is much room for practical operation of his unit within its prescribed orbit. He will also find guide posts for action in the various types of emergencies in which he and his writ may be called upon to function.

To the reviewer, it seems that one of the most efficient uses to which this book

may be put will be to have it serve as a framework or skeleton upon which the judge advocates of the various state military forces may construct bodies of local material which will be authoritative within their respective states. In many instances throughout the text, the authors point out conflicts in the authorities upon various questions. Here, then, are the places where the judge advocate of a given state should determine the applicable law within his state and so mark out, decisively, the lawful spheres of action for the state guard of his state. The authors have neatly isolated the problems for the local judge advocate and the local solution of the problem awaits only the industry of the local judge advocate in order that the local commanding general and the soldier in the field may know what should be done, how it should be done and when it should be done. Without this book, such a task would be a forbidding one for a part-time judge advocate, but the publication of this book makes that task not only an easy one, but also, an imperative necessity. As a general discussion, this book could hardly be better, and, as the first of its kind, it will stand as a landmark in its chosen field.

The book is published in a cloth-bound edition for the use of technical students of the subject and in an abridged, paper-bound edition for the use of those who will use it as a guide to immediate action.

The authors have accomplished their joint mission in a splendid manner. The various state military forces are happily indebted to them for their foresight, analysis and industry in pioneering in this field of present day importance.

LEE-CARL OVERSTREET*

HANDBOOK ON EVIDENCE. By John Jay McKelvey. Fifth Edition. West Publishing Co.: St. Paul, 1944, xxiv:814.

In 1898 the West Publishing Company, as one of its Hornbook Series, brought out the first edition of McKelvey on *Evidence*. From time to time, as the law on this subject has changed and developed, new editions have appeared until, in this year 1944, there has come to this reviewer's desk, fresh from the press, the fifth edition of McKelvey.

In the years since 1898 this one-volume work has won a place in the front rank of all the shorter treatises on this broad subject, and it is probably the text most widely suggested by law teachers in answering inquiries as to the best elementary collateral reading in connection with casebook instruction. This fifth edition meets the standards set by its predecessors and will doubtless have the same wide popularity.

Probably the best part of the work is the introductory chapter, which reviews the history of the law of evidence, points out its strength and weaknesses and prophesies as to its future development. While the author shows himself to be

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thoroughly in sympathy with various efforts for reform, he is by no means willing to agree that the best reform would be to abolish the rules altogether. As to this he says, "The foundation principles of the present system have withstood attacks from lay and professional judicial reformers delivered through legislatures, legal organizations, and writers, yet still remain the only co-ordinated set of procedural methods for arriving at the truth, which satisfies our sense of justice."

Every law student who is about to enter upon the study of Evidence would do well to precede his study by a reading of this introductory chapter.

While this reviewer hesitates to criticize a book which has so well withstood the test of time and use, there are, in his opinion, certain defects which existed in the former editions that have not been corrected in this one.

While the text is well arranged as to chapter headings, yet when one reads the material in the separate chapters, he finds that such material is quite often set forth in a more or less haphazard manner, apparently as it came to the mind of the author rather than in a planned logical outline.

For example, chapter fourteen is entitled Writings; yet one finds discussed in that chapter, and discussed well, the material on physical objects as evidence, the material that most writers list as Real Evidence. In the chapter on Witnesses, under Privilege the author has a Section entitled Professional Communications. One would expect to find discussed there not only communications between attorney and client but between physician and patient. The Section discusses, however, only the relations of attorney and client. Nowhere under Privilege is any mention of physician and patient. Looking at the generally excellent index to see if that subject was purposely omitted as purely statutory, one finds that it was discussed in a preceding Section entitled Certain Special Cases of Disqualification in which Section, strange to say, there is also a discussion of Legal Advisers.

The impeachment of witnesses is discussed under a chapter headed Character. When one looks to see where there is a discussion of impeachment by self-contradiction, there is no help even in the index. A careful reading of the book finally locates the material in a later chapter under the heading Cross-Examination, where the foundation rule is discussed, not as a condition precedent attached to the right of impeachment, but as a rule of cross-examination.

The point on which this reviewer would most criticize the author, however, is in the latter's recognition and apparent acceptance, in his chapter on Hearsay, of that indefensible concept called "part of the *res gestae*."¹

1. "...lawyers and judges seem to have caught at...this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one,—some things belonged there, other things might for purposes of present convenience be put there. . . . this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression." James Bradley Thayer, XV AM. LAW REV., 5, 81.

"The phrase 'res gestae' has long been not only entirely useless, but even posi-

While it is true that the author can find abundant judicial authority for the use of this catch-all phrase, the question remains as to whether it is the duty of the text writer to lead students into sound thinking or merely to report to them the utterances of some judges. This is not a question of a rule of law as to the soundness of which judges and text writers differ and on which the judges should be reported as having the last say, but of the unthinking use by judges of a term they cannot themselves define; a term which is useless, because, in the words of Mr. Wigmore, "every rule of evidence to which it has ever been applied exists as a part of some other well established principle and can be explained in the terms of that principle."

Ann Arbor, Michigan

JOHN E. TRACY

FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS, 1943-1944. By Robert H. Montgomery. The Ronald Press Company, New York, N. Y. 1943. Pp. x:821.

This is one of the annual series of books on federal taxation whose appearance has become as much a matter of course as the enactment of federal tax legislation. The scope of the present volume is indicated by its title. But, as has been Mr. Montgomery's practice for many years, he begins this with a general introduction in which he leaves no one in doubt as to his opinion on whose is the responsibility for the indefensible complexity of the federal tax laws imposing taxes on income, profits, estates and gifts. The present introduction is the same as that used for the volumes on corporate income and excess profits taxes in the current 1943-1944 series, and most of its content is more pertinent to those taxes than to those that constitute the subject-matter of the volume to which this review relates. While some of the views expressed in this introduction may impress some readers as stated in language that is somewhat extreme, the reviewer confesses that he feels very sympathetic to Mr. Montgomery's general point of view. And that point of view is expressed in the vigorous type we have come to expect from the author when dealing with this general subject. Scattered throughout the text itself are many additional critical comments on specific statutory provisions that give point to the general criticisms contained in the introduction.

The main body of the book opens with a very helpful chapter dealing with problems of planning the distribution of an estate. The discussion of this matter comprised the final chapter of previous editions. Its shift to the beginning of the text is a decided improvement over the former arrangement. Its content serves to give the reader a vivid reminder of the importance of the problems of taxation in estate planning, even before he begins the study of the important and complex

tively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology." 6 WIGMORE, EVIDENCE (3d ed. 1940) § 1767.

statutory provisions that are relevant to his task. The chapter should be reread after the rest of the text has been mastered.

The three federal taxes that are treated are the income tax, the estate tax, and the gift tax. They are taken up in that order. The income and estate taxes receive the major part of the author's attention, as they should. Only those parts of the income tax provisions of the INTERNAL REVENUE CODE that deal with the taxation of estates and trusts are considered. The material drawn upon includes the statute, the regulations, and decisions of the tax and other courts of the United States. The materials are well selected and well organized. The changes introduced by the Revenue Act of 1942 receive considerable attention even when authoritative interpretations of their meaning and scope is meager. The parts devoted thereto are in general more valuable than those that merely repeat the content of prior editions. What has been said above with respect to the treatment of the income tax provisions applicable to estates and trusts applies equally to the discussion of the estate and gift taxes. The index is on the whole adequate to help those having some degree of familiarity with the law to locate the material he may happen to be interested in at any given time. The result is a useful and helpful text for those who have to search the law in a field in which the author believes our lawmakers and courts have done a rather abominable task. While one may doubt the necessity for a new edition as frequently as the publishers have put them on the market, this does not militate against the value of the latest.

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HENRY ROTTSCHAEFER