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## BOOK REVIEWS

**Insurance and Public Policy.** By Spencer L. Kimball. Madison, Wisconsin: The University of Wisconsin Press, 1960. Pp. xii, 360. \$6.00

This book should have more appeal to social scientists than to lawyers.<sup>1</sup> The legal history of insurance regulation in Wisconsin from 1835 through 1959 is outlined in connection with broad economic groupings rather than chronologically. This work was apparently undertaken with the intent to demonstrate to the non-lawyer the part played by law-makers in making effective economic principles appertaining to a business and in legally implementing the desires of a people regarding the permissive operation of that business enterprise. Legal history is used as a sort of "case study" in making the demonstration.

The legal history is adroitly tied to three very broad economic aspects of the insurance enterprise: insurance regulation regarding the creation of and permissive underwriting activities of insurance companies; insurance regulation regarding the maintenance of adequate funds by insurers; and the economic effects of the insurance enterprise upon our society. To the lawyer this seems to be an unusual way to write about legal history; but, as recognized in its introduction, the book's structure is "logical as considered from the vantage point of the business rather than from that of the conceptual framework of the law."<sup>2</sup>

The economist, sociologist, or student of business who believes a particular economic principle supports the use of (or perhaps omission of) a certain insurance regulation might find here an actual situation where such regulation was enacted into law (or perhaps rejected by the legislature). But the lawyer cognizant of the general legal framework of insurance regulation and seeking to learn if a particular control upon insurance represents sound policy, from a social or economic viewpoint, may be disappointed. The fact that a particular regulation existed at one time in Wisconsin is an indication of the public policy of that state, in the sense that public policy means a reflection of the will of a people as expressed in legislation and to lesser extent in court

<sup>1</sup> Relationships between the role of the lawyer and the role of the social scientist are discussed in four articles constituting a symposium regarding law and social science: Ball, *Lawyers and Social Scientists—Guiding the Guides*, 5 VILL. L. REV. 215 (1960); Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224 (1960); Maslow, *How Social Scientists Can Shape Legal Processes*, 5 VILL. L. REV. 241 (1960); and McGurk, *The Law, Social Science and Academic Freedom—A Psychologist's View*, 5 VILL. L. REV. 247 (1960).

<sup>2</sup> KIMBALL, INSURANCE AND PUBLIC POLICY 5 (1960).

decisions and conduct of governmental officials.<sup>3</sup> A state's public policy may, however, be based as much upon political expediency as upon rational social and economic considerations.<sup>4</sup> The lawyer interested in policy considerations needs a thorough analytical discussion of economic and social factors relating to the regulation in question, not case histories listed according to broad economic principles which are assumed rather than proven to be pertinent. He may conclude that much of the discussion in *Insurance and Public Policy* regarding the relationship between economic principles and actual regulations is too general and self-evident for his purposes. It is little news to lawyers or law students, for example, that insurance has had an impact upon the development of tort law,<sup>5</sup> that insurance provides a mechanism for bringing social costs into the private cost accounting of entrepreneurs where-by risk is spread from an individual to society,<sup>6</sup> that the workmen's compensation law "transferred the risk of industrial accidents from the single worker to the employer and thence through the pricing mechanism to the entire body of consumers,"<sup>7</sup> or that there is a basic conflict between "those who would preserve a laissez faire policy and those who would increasingly subject business to legal control . . ."<sup>8</sup> At the same time, the lawyer should realize these and similar observations may orient the non-lawyer who is trying to understand the role of the law in executing economic and social principles.

Regulation of insurers, rather than insurance law generally, is the subject of this study of history. This is not unexpected in view of the book's main purpose, because the relationship between desires of society and needs of the insurance enterprise, on the one hand, and utility of law in the furtherance of such desires and needs, on the other hand, is more easily demonstrated to non-lawyers in the area of statutory regulation than in the more intricate areas of insurance legal doctrine.<sup>9</sup>

<sup>3</sup> "The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 340 (1897). *Accord*, *Wilson & Co. v. N.L.R.B.*, 162 F.2d 310 (8th cir., 1947).

<sup>4</sup> *Mamlin v. Genoe*, 340 Pa. 320, 17 A.2d 407 (1941); see *David v. Atlantic Co.*, 69 Ga. App. 643, 26 S.E.2d 650 (1943).

<sup>5</sup> KIMBALL, *op. cit. supra* note 2, at 314.

<sup>6</sup> *Id.* at 17.

<sup>7</sup> *Id.* at 20.

<sup>8</sup> *Id.* at 310.

<sup>9</sup> The connotation of "public policy" in *Insurance and Public Policy* is not clear. Since Wisconsin's legislative history is used to demonstrate public policy, "public policy" seems to include political or legislative expediency. Many passages in the book indicate, however, that despite a shortage of deep probing into the economic and social soundness of the various regulations, "public policy" was meant to encompass only considerations of sound policy.

Lawyers more frequently deal with problems of insurance law such as the interpretation of the policy and of its various clauses than with problems of insurance regulation. If the book had been written primarily for the lawyer, no doubt sound policy with regard to many insurance legal doctrines would have been explored.<sup>10</sup> Opportunities to do so were plentiful.<sup>11</sup> Do sound economic and social policies indicate that liability insurance should be written so as to afford protection against liability for one's own intentional torts and crimes, or would the cause of loss be too greatly within the control of the insured?<sup>12</sup> If an insurer fails to settle a liability claim and its insured thereafter suffers an adverse judgment exceeding policy limits, do policy considerations regarding proper protection of both society and business indicate the insurer should be liable to the insured for such excess, and if so, should the basis of liability be negligence of insurer or bad faith of insurer?<sup>13</sup> Are the immunities of parent-child and husband-wife proper; if not, why not?<sup>14</sup> Similar opportunities to discuss policy considerations were by-passed as to the omnibus clause,<sup>15</sup> the incontestable clause,<sup>16</sup> the other-insurance clause,<sup>17</sup> and as to the economic effects (for example, upon the size of judgments and upon liability insurance rates) of Wisconsin's direct action statute.<sup>18</sup> Analysis of policy considerations would have, however, exceeded the apparent scope and purpose of the book. Material designed to answer the lawyer's con-

<sup>10</sup> Professor Kimball's writing—for example, his discussion of the economic problems surrounding attempts to regulate maximum and minimum life insurance rates and his discussion of the valued policy clause—indicates he has a keen grasp of economic concepts and an ability to write about them graphically and concisely. In view of this obvious ability, a full discussion by him of policy considerations in the field of insurance law generally would no doubt have been a major contribution. For an unusual discussion of the view that insurance law is only tort, contract and agency law as changed because of policy factors, see Oldfather, *Complexity, Concentration and Children—The Significance of Insurance Law*, 9 KAN. L. REV. 1 (1960).

<sup>11</sup> The author did seize the opportunity to write in some detail about the valued policy clause, since Wisconsin by statute pioneered in its use; see KIMBALL, *op. cit. supra* note 2, at 240.

<sup>12</sup> The discussion of this problem illustrates how policy considerations are generally developed only to the extent that sound policy perhaps is reflected by the historical material available. "In 1929 the Attorney General ruled that in a malpractice policy insurance against liability for intentional torts or crimes was illegal because against public policy. Only negligence might be insured against. The same doctrine would probably not be applied to automobile insurance, though the rationalization of the difference would give trouble. The real reason for the difference was the crucial importance of automobile insurance as compared with the peripheral malpractice coverage." KIMBALL, *op. cit. supra* note 2, at 36.

<sup>13</sup> Since Wisconsin first based liability upon lack of good faith and later added a requirement that the good faith must be preceded by reasonable care, the problem is briefly mentioned. KIMBALL, *op. cit. supra* note 2, at 222.

<sup>14</sup> It is assumed the immunity rules are obsolete. KIMBALL, *op. cit. supra* note 2, at 238.

<sup>15</sup> KIMBALL, *op. cit. supra* note, at 238.

<sup>16</sup> *Id.* at 239.

<sup>17</sup> *Id.* at 240.

<sup>18</sup> *Id.* at 219-22.

stant "Why?" would not fit well in a list of examples for the non-lawyer's study.

The chief benefit derived by the legal profession from this publication will be its contribution toward an understanding by non-lawyers of the function of law in our society. The chief use of the book by the legal profession will be as a legal history book. The sources of material were voluminous, and the undertaking formidable; a scholarly and comprehensive job was performed in assimilating the data in a concise and readable form. Wisconsin was selected for this legal history study because, it was thought, the legal history of insurance there should be typical of its legal history elsewhere. While it is apparent that the atypical political history of Wisconsin with its Populists, Progressives and Socialists and its influential Granges caused some atypical development of insurance law, Wisconsin seems to have been a reasonable selection.

Perhaps the most unusual thing about this book is its publication in two editions. One is documented by several hundred footnotes. The other tantalizes the reader with footnote references sans footnotes.<sup>10</sup> It is difficult to understand the decision to print the different editions, although it must somehow be related to the contemplated use of the book by non-lawyers. Certainly the augmented edition is to be preferred; unlike a historical novel, the book is not suitable for light reading, and only the completed edition is useable as a legal history sourcebook.

Ultimately the contribution of this work will be measured by its effectiveness in demonstrating to non-lawyers some of the law's usefulness. The dust-jacket says "Professor Kimball has taken a long step into what has largely been a no-man's land between jurisprudence and the social sciences." While we are hopeful that the step is significant, the length of the step can be measured only in the future.

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<sup>10</sup> A copy of this "plain vanilla" edition has been reviewed.