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Book Review (reviewing Alex Elson et al., Civil Practice Forms, Illinois and Federal, Annotated (1952))

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court accepted, not the view that the evidence pointed to conspiracy in some wider sense, but rather the view that where each member of a group bases his behavior on such identity of interest the coordination thus achieved is to be interpreted as conspiracy. Thus he regards the tobacco decision as an acceptance by the Court of the practical implications of the basic assumption of modern economic theory about oligopoly, namely, "that a few dominant firms will, perhaps independently and purely as a matter of self-interest, evolve non-aggressive [*i.e.*, non-competitive] patterns of behavior." Coupling this interpretation with the Court's decision that the test of monopolization is the existence of the power to exclude competition rather than the abuse of that power, he finds that the case has gone far "toward closing the wide gap between the legal and economic concepts of monopoly, which became so apparent to economists during the 1930's."

Mr. Nicholls poses clearly and cogently the question whether a fine in a criminal proceeding or any antitrust decree short of dissolution is capable of altering the pattern significantly; and he argues persuasively that the Government's legal victory has not changed the major characteristics of price control over cigarettes. He thinks, however, that the competitiveness of the cigarette industry might be substantially increased by a tax upon advertising, graduated to reduce the advertising advantage of the larger manufacturers, and by a shift of the excise tax to an *ad valorem* basis until it can be entirely eliminated, in order to reduce the tax burden upon the cheaper cigarettes.

CORWIN D. EDWARDS*

CIVIL PRACTICE FORMS, ILLINOIS AND FEDERAL, ANNOTATED. By Alex Elson and Willard J. Lassers. Indianapolis: The Bobbs-Merrill Company, Inc. 1952. 2 vols. Pp. xlii, 968. \$30.00.

Eighty years ago Oliver Wendell Holmes, Jr., reviewed a Massachusetts form book in language which describes these volumes well:

"This is one of the first books which a lawyer practising in [Illinois] needs to buy. Indeed, it needs no recommendation to the profession in this state, for its merits are already known. Unpretending as it is, it could not have been produced without a great deal of patient industry, a familiarity with the reports and statutes, and a union of ability and experience, which have enabled the author[s] in the first place to discern and then to answer the questions which arise in practice. It is one of those excellent books to which you can go in a hurry and find what you want. . . ."¹

Whatever is missing by way of specific comment from the Holmes' quotation has been supplied by Mr. Chief Justice Schaefer's approving foreword to these volumes (pp. v-vi). Additional comment is unnecessary; but the prolixity of a law professor is not to be denied.

These volumes fit the Holmes review to the smallest detail: "Its merits are already known," for Mr. Elson's earlier work, *Illinois Forms and*

*Director of Bureau of Industrial Economics, Federal Trade Commission. The views herein expressed are those of the reviewer, and not necessarily those of the Commission.

1. Book Review, 6 AM. L. REV. 732 (1872), reprinted in HOLMES, BOOK NOTICES, UNCOLLECTED LETTERS, PAPERS 118 (Shriver ed. 1936).

Precedents,² has been in use for almost two decades. The "unpretending" nature of the volumes is reflected in their title. To label these volumes a "form book" was probably a necessity, since they certainly perform the functions of making available to the user an excellent set of practice forms.³ In addition, however, they contain textual material which not only assists the practitioner in making intelligent use of the available forms, but provides a critical commentary on the present state of the procedural rules in the state and federal courts. Moreover, since it deals with both systems, it affords a basis for the comparative study of the two which should prove helpful to those who would improve them.

One of the primary messages to be derived from the books is that no lawyer can assume because he is versed in one system of procedure, either state or federal, that he is the master of the other. The similarities are necessarily great since they are derived from a common source.⁴ Unfortunately, their disparities are at least as numerous.

Both the Federal Rules and the Civil Practice Act are comparatively recent procedural codifications.⁵ Yet both have been in use long enough to have been well tested by time. Each was a thoroughgoing overhauling of the previously effective system. Each is the product of first-rate minds. Each had the same objective: to provide "the means" to the end of "full, equal and exact enforcement of substantive law."⁶ There are divergent opinions as to which has better met that objective.

As already noted, a comparison of the two systems cannot help but point up deficiencies and areas for improvement in both.⁷ For example, as the authors note, Illinois practice in the field of discovery would do well to emulate the Federal Rules:

"In most respects, the Illinois Civil Practice Act compares favorably with the Federal Rules of Civil Procedure. In the field of discovery, however, the Civil Practice Act makes a poor showing. This state of affairs is due to several facts. The Act itself, merely authorizes discovery by motion, where a bill of discovery would have been available and permits other discovery techniques to be prescribed by court rules.

"With respect to depositions, Rule 19 of the Supreme Court permits the taking of depositions in the manner provided by law for taking depositions in chancery cases. Unfortunately, the deposition

2. (1934).

3. The authors make quite clear the limitations of a form book: "A form book is not a substitute for the careful analysis of the facts and the law which must be made in connection with the preparation of a court document. It is indeed an unusual case that will fit exactly into the precise language of the printed form. Forms such as we have included in this book can be helpful as a point of departure and as an outline and foundation for the fact and law situations facing a particular lawyer in a particular case." P. viii.

4. A landmark volume on procedure in the trial court and its historical derivations has just been published. It deserves the careful attention of every member of the bar who considers his calling a profession and not merely a business. It is Professor Millar's *THE PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* (1952). See Clark, Book Review, 47 Nw. U.L. Rev. 739 (1952).

5. The Civil Practice Act became effective in 1934; the Federal Rules of Civil Procedure, in 1938.

6. Pound, *The Etiquette of Justice*, 3 REP. NEB. STATE BAR ASSN. 231 (1908).

7. It is Mr. Chief Justice Vanderbilt's view that "the basic pattern of the Federal civil rules is bound ultimately to prevail throughout the country." VANDERBILT, *CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* 10 (1952).

provisions in the Evidence and Deposition Act, are cumbersome and outmoded. Other weaknesses in Illinois discovery procedure will be noted in connection with individual topics." (p. 566)

At the same time, Rule 17 of the Rules of the Supreme Court of Illinois could well be adapted to the Federal Rules and improve the discovery procedure thereunder.

Again, Illinois procedure might benefit from the experience of the federal system and amend its governing rules as the Federal Rules were amended in 1947, to distinguish between the powers of a judge in dealing with a motion to dismiss for insufficiency of the evidence in a non-jury case and a motion for a directed verdict on the same ground in a jury case:

"In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)."⁸

The purpose of the amendment was to permit a court to pass immediately upon conflicts of evidence and credibility of witnesses on a motion to dismiss rather than to postpone such decisions until the end of the trial as it would do where it must leave such issues to resolution by a jury. The obvious value of shortening the time of trials in this manner must certainly commend itself to a judicial system which finds its dockets in such horrible condition as the Illinois courts now do.

Such a comparative approach to reform will not, however, supply all the answers. One of the primary sources of difficulties in both systems is to be found in statutory provisions outside of the Rules or the C.P.A. which either conflict or confuse the application of the appropriate procedural rule. Here again, these volumes provide a guide to improvement. To cite two examples: the defects of the Illinois discovery procedure are due in part to the deficiencies in the Evidence and Deposition Act; problems in federal interpleader result from inconsistencies between Rule 22 and 28 U.S.C. §1335.

These are but samples of the valuable materials to be found in these books outside of their primary function of providing the practitioner with useful practice forms. Incidentally, another value is to the law professor who can use these volumes to bring to his students raw materials of procedure not usually available through ordinary course materials.

In conclusion, it is to be noted that these volumes point up the basic problem of the administration of justice. Assuming the perfect set of procedural rules, only a judiciary which is competent, honest, and faithful to the underlying purposes of those rules can effect the desired results. Assuming perfect judicial administrators, they cannot effect justice when bound by procedural rules harking back to the theories and methods of Baron Parke. As of this time we have neither the perfect set of rules, nor the perfect set of judicial administrators.⁹ Efforts are under way to secure both.¹⁰ "Fit legislation and fair adjudication are

8. Rule 41(b).

9. Only rhetoric recommends such gross understatement.

10. Adoption of the proposed Judicial Article for the Constitution of the State

attainable. The ultimate reliance of society for the proper fulfillment of both these august functions is to entrust them only to those who are equal to their demands."¹¹

PHILIP B. KURLAND*

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

Some years ago Professor Moreland became particularly interested in cases in which a defendant has been convicted of criminal homicide or of battery as a result of death or harm caused unintentionally—other than cases based upon the perpetration of felony or other “unlawful act” or resistance to arrest. The result of an intensive study of this area was a contribution entitled *A Rationale of Criminal Negligence*, which appeared first in a series of law review articles¹ and later in book form.² It forms the nucleus³ of the present volume and is sufficiently well known to warrant the limitation of attention here to new materials plus such changes as are found in the original part of the field.

This book is divided into five parts: I, The Law of Homicide Prior to the Eighteenth Century; II, Homicide at Common Law; III, Statutory Regulation of Homicide; IV, Defenses to Homicide; and V, Recommended Legislation.

In part I the author gives a concise picture of the origin of the law of homicide and the development of the malice aforethought concept. In this part of the volume he is entirely “orthodox,” but from there on he does not hesitate to leave the beaten path. Under the label of “intentional murder” (Chs. 4, 12), for example, he includes all murder resulting from an intent to kill or to do grievous bodily harm. It has not been uncommon to speak of such murders as having been committed with “express malice,” but the phrase “intentional murder,” heretofore used as a factual designation rather than as a technical term, has customarily been reserved for a homicide resulting from an actual intent to kill (without justification, excuse, or recognized mitigation). The author apparently finds his usage necessary to fit in with his proposal to eliminate “malice” from the homicide terminology. Thus, in a later part of the volume he says: “The retention of ‘malice’ in the law of murder is a constant source of trouble and confusion.” This follows a statement to the effect that “it should be excluded completely” (p. 205). Often more is lost than gained by the abandonment of a term which has back of it centuries of judicial inter-

of Illinois would go far toward improving the calibre of the judiciary. The Joint Committee of the Illinois and Chicago Bar Associations is now actively engaged in preparing amendments to the Civil Practice Act to effect some of the necessary reforms.

11. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 546 (1947).

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1. 32 Ky. L.J. 1, 127, 221 (1943-4).

2. In 1944.

3. The earlier book had 138 pages exclusive of appendix, tables and index. And the material found on more than 120 of those pages has been reproduced almost word for word. The chief omissions are former Chapters 7 and 9. Chapter 7 could not be included in its original form because the author has changed his views in regard to what he terms “negligent murder”; and Chapter 9 dealt with battery which is not within the scope of the present title.