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Book Review (reviewing Clarence Morris, *Morris on Torts* (1963))

Harry Kalven Jr.

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RECENT BOOKS

Morris on Torts. By Clarence Morris. Brooklyn: The Foundation Press, Inc., 1953. Pp. xxviii, 375. \$5.00.

There is only one thing I do not like about Mr. Morris' book, and it is a petty dislike. He has peopled his text with such characters as Mr. Bellicose and Mr. Quiet, Mr. Iceman and Mr. Walker, Mrs. Shopper and Mr. Merchant, and Mr. Nasty and Mr. Highstander. I simply wish he hadn't yielded to the impulse.

I state this point at the outset to clear the deck for unqualified praise of the Morris venture and his skill in bringing it off. He had a very clear objective in mind—he wished to write a concise discussion of tort law for the student as a supplement to the traditional case book classwork. He has succeeded admirably, and tort teaching everywhere is the beneficiary. In no small part his success is due to the integrity with which he has stuck to his purpose. He was not led off into trying to make the book useful to the bar, too, by loading it with references. It cites perhaps five hundred cases in all, and the large majority of them are avowedly taken from the better-known torts case books. Again, he was not seduced into trying to revolutionize torts teaching by writing a book which would replace, at long last, the case book. I do not quite see how one could teach this book. I do see very well why one should use it as an adjunct of class discussion and as a stimulus toward making full use of the class hour.

Finally, the book has been done so thoughtfully and honestly that it is not simply a rehash of Morris' formidable series of law review articles, even in those areas of negligence law which directly overlap the content of the majority of essays collected in his *Studies in Torts*. One, however, cannot help slightly raising an eyebrow, in passing, at his devoting eight pages to administrative safety measures.

Perhaps to keep the book accessible to as many law students as possible, the organization has been left unexciting. We start once again with the intentional torts, proceed to negligence and then to strict liability, and conclude with misrepresentation, defamation, and malicious prosecution. The economic torts, except for misrepresentation, are not treated; the emotional dignitary torts are given little emphasis; and damages are touched very briefly indeed. The strength of the book does not lie in giving a unifying vision of the tort field.

The table of contents approach is, however, particularly misleading in this case. If the sequence is conventional, the emphasis is at times quite striking. Thus there is a decisive emphasis on negligence as the central problem and a generous last chapter is reserved for a sober assessment of the current personal injuries scene and for proposals for reform. Chapter VII on proximate cause is a sane, lucid fifty-page essay on a topic to which Prosser's fine book devoted approximately sixty pages. On the other hand, two staples of tort teaching, occupier-liability and manufacturer's liability, are treated merely as obsolete examples of the no-duty problem and disposed of in ten pages, whereas the use of criminal statutes

in changing civil no-duty rules, an esoteric topic on which Morris almost deserves a trademark, receives about the same amount of space. The sharpest shift of emphasis is found in Chapter V on problems of proof of negligence. Here Morris provides another superior fifty-page essay which integrates his prior law review reflections and has the special virtue of demoting *res ipsa loquitur* to where it belongs, as but one of many aspects of the proof problem.

The book, then, is first of all a superior dope sheet written in a clean, concise style, brief enough that a student can readily read it through more than once. But it constantly transcends the dope sheet category, without, I think, losing its basic utilitarian quality. And it does this because Morris does not treat his material as a junior Restatement, nor does he condescend to the beginner. He treats his reader with intellectual respect and his subject with a steady tone of curiosity and perplexity. The utility of the book to the student, therefore, is not simply that it aids in the digesting and memorizing of a mass of detail. It is that, but it is at least equally a stimulus to serious reflection. And it is here that the book has a clear edge, for student purposes, over Prosser's invaluable hornbook.

The book bears the marks of many other virtues: it is eminently sane, it is stubborn about working through the points it raises, it has some genuine originality, and it is at home at more than one level of analysis and with more than one approach. These are, of course, well-known Morris virtues and need not be labored, but I was particularly impressed by the last characteristic. The text constantly stresses the realities of tort life. It is, however, a controlled realism and we are reminded that "the current scene must not be caricatured." Again, the text is insistent about the importance of procedure and about the role of the advocate in selecting alternatives. But here again there is balance, and it is done without the crusader's fervor to make everything procedure. The book is so successful on this score that the discussion of advocacy in tort cases is itself a distinctive contribution.

Finally, Morris' versatility adds another dimension. He is at once the hardheaded trial lawyer and the serious student of jurisprudence. A further sustained theme of the book is the candid and explicit facing of the policy issues that permeate tort law. He is not an urgent reformer nor is he simply fashionable in his views. It is a principal thesis of his that not all tort losses should be handled by society on a single principle. He is articulate and informed about risk-bearing analysis, but does not use it to exclusion of all other possible considerations. And the final chapter on reforms of personal injury law is not an afterthought, but an appropriate continuation of the policy discussion which has been going on throughout the book.

One brief series of illustrations of these points from the start of the book will have to suffice. Selecting, of all things, the deadly topic of trespass *q.c.f.*, Morris in ten introductory pages moves through a series of cases and succeeds in raising the chief policy issues of tort law. Then as we turn to Chapter II on assault and battery, we seem solidly in the dope-sheet type of summary but suddenly in the discussion of consent to breach of the peace, he flashes a pretty point, upsetting the classic Bohlen attack on the majority rule. A few pages later in a conventional summary of the defense of public necessity he carries through a risk-bearing analysis

with sufficient persistence to upset the fashionable conclusion that this is the clearest of cases in which the community should bear the loss. And so it goes.

Clarence Morris says in his preface: "I have tried to cut as deeply as I know how." With remarkable frequency he has succeeded. And that is sufficient praise for any book.

*Harry Kalven, Jr.**

The Law of Real Property. Volume III. By Richard R. Powell. Albany: Matthew Bender & Company, 1952. Pp. ix, 880. \$18.50.

The third volume of Professor Powell's projected five-volume treatise continues his treatment, begun in the second volume, of permissible interests in land. It completes the discussion of future interests (in the usual sense of that term) by considering a variety of problems in the construction of deeds and wills, especially the effect of gifts limited with reference to the death, or the death "without issue," of someone receiving a prior interest by force of the same instrument, and of class gifts, including therein limitations to heirs of a grantor or a grantee. Thereafter, it deals in turn with powers of appointment, easements (including the interest ordinarily distinguished under the label of *profit à prendre*), licenses, franchises (a very brief examination), and security interests (mortgages, judgment liens, mechanics' liens, tax liens).

All judges of Powell's work seem to agree that its merits are substantial, though of course there is no universal agreement concerning the relative extent of its merits and demerits.¹ In truth, if the treatise is to be evaluated with reference to the objectives he envisioned for it, it is difficult to believe that any man now alive—and very possibly none who ever lived—could have made a better job of it; and from one point of view, criticism might well stop there save for the usual laboring of minor good and bad qualities far beyond their relative importance. A few reviewers—with whom the undersigned casts his vote—have voiced a regret that Powell should have spent his great learning and ability on the task of writing a treatise in the traditional fashion, the great bulk of which necessarily repeats what has been set forth equally as informatively or usefully in many other places, feeling that the legal world, and perhaps broader worlds as well, would have been better served had he directed his attention to work which may variously be described as more pioneering, more penetrating, or more creative. But to wish vainly that he had aimed at accomplishments nearer to one's desire seems hardly a proper means of appraising his success in accomplishing the task he set for himself.

* Professor of Law, University of Chicago Law School.

¹ The first and second volumes were reviewed by Howard Williams at 28 *TEXAS LAW REVIEW* 611 (1950) and at 29 *TEXAS LAW REVIEW* 860 (1951), respectively. The *Index to Legal Periodicals* lists many other reviews, particularly for the first volume.