

BOOK REVIEWS

AMERICAN CIVIL PROCEDURE. By William Wirt Blume.
Englewood Cliffs: Prentice-Hall, Inc., 1955. Pp. ix, 432. \$6.50.

An orderly approach to a body of knowledge requires classification, usually the first step in achieving status as a science or at least the appearance thereof. Otherwise, no command or systematic exploration is possible. The most comprehensive classification appears in library catalogs. In the law, classification is found in the digests in somewhat crude form.

Classification presupposes an over-all scheme into which can be fitted the developments of the past and presumably those of the future. This intellectual deep-freeze leaves no room for the accommodation of attitudes and trends. Beginning as its masters, we are likely to become its slaves, enmeshed in an Euclidean rationalization of a non-Euclidean world. This is particularly likely to be true of procedure. Litigation is seldom the shortest distance between two points.

Due to long exposure to the climate within which they operate, and perhaps due also to lack of time and inclination, judges and lawyers tend to accept without question or discussion the fundamental plausibility of what they are engaged in doing. Hence it falls to the not always happy lot of the legal scholar to search out the implicit assumptions upon which the structure rests. The hazards of such an enterprise are considerable.

The legal lexicon holds an amplitude of words to describe trees but few, if any, to describe forests. Hence phrases to describe the larger sweeps of procedure must sometimes be coined, with the risks which attend lack of a common standard of value. For example, "cause of action," "prima facie case" and "affirmative defense" are all accepted standard legal terms. But there is no overriding phrase to describe their relationship or the process by which something enters into the one category rather than into another. So we find such verbal inventions as "allocating the case,"¹ which will be sought in vain in *Bowrier*.

Professor Blume, acknowledging the debt owed by all teachers of procedure to the late Professor Michael for restoring logic to procedure, or procedure to logic, as you prefer, adopts Professor Michael's analysis as the organization for Part I of this book (p. vii), dealing with the basic structure of litigation. The table of contents discloses "Legal and Factual Conditions of Relief," "Conditions Barring Relief," and so on. Reading, however, we recognize old friends, the cause of action, the prima facie case, the affirmative defense and others. It may reasonably be asked whether the terminology and classification have actually helped, or have presented additional obstacles to be overcome.

1. CLEARY, PLEADING 48 (1951).

Somewhat similar criticism might be raised concerning Part II of the book, which evinces considerable preoccupation with the word "Commenced." Under the general caption "Commencement of a Civil Action," the subject of parties plaintiff is tagged "By Whom Commenced" (p. 243); parties defendant, "Against Whom Commenced" (p. 256); jurisdiction, "How Commenced" (p. 270); limitations, "When Commenced" (p. 283); and venue, "Where Commenced." (p. 307). On the other hand, "Scope of a Civil Action" (p. 331) is a most satisfactory repository for problems of joinder, although it too becomes overextended at the point where it stretches to include "Minimizing Sham Scope." (p. 365).

The dry subject of procedure evokes marvellously emotional attachments in some people and equally emotional poses of detachment in others. Appraisal of a procedure book is always difficult.

American Civil Procedure is the most important text to appear in the procedure field since 1947, when the second edition of Clark, *Code Pleading* was published. Comparison of the two books may be of interest.

As is indicated by the titles of the two books, Judge Clark confined himself strictly to the pleading area, while Professor Blume deals with the various aspects of litigation from inception to conclusion in the trial court. Due no doubt to pressures of space, some oversimplification is present and critical evaluation is largely lacking in the Blume book. There are those who consider the Clark book, on the other hand, somewhat rich in evangelical fervor. Blume includes a remarkable number of illustrative forms, considering the size of the book, while Clark used very few.

Using both books together in the pleading area, where they overlap, a student could gain a very respectable command of the subject. With either book alone, that possibility seems more remote.

Edward W. Cleary †

A LARGER CONCEPT OF COMMUNITY. By Jefferson B. Fordham. Baton Rouge: Louisiana State University Press, 1956. Pp. 117. \$3.00. (Originally delivered as the Edward Douglass White Lectures on Citizenship at Louisiana State University.)

Dean Fordham's stimulating little book consists of three lectures delivered last year at Louisiana State University. The author's basic thesis is stated in his first sentence:

"It is the genius of a democratic community that the highest values are associated with the dignity and integrity of the individual in an organized group characterized by substantial common interests and a like degree of co-operation." (p. 3).

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The lectures follow this lead through the local, regional and the international community. In the end the author concludes that the integrity of the individual can remain compatible with group interests only if human affairs are organized to deal adequately with common community problems. This demands flexibility in our thinking about governmental organization. It requires new frameworks of government to deal with metropolitan areas, with regional problems such as those of water resources, and with those aspects of international affairs which call for effective cooperative action.

"It is sheer escapism to seek to avoid the problems and responsibilities of the larger community by withdrawal into the lesser one. The challenge of our times asks far more of us. I like to think that, as a people, we can muster the vision and the courage to meet the challenge." (p. 110).

These lectures should be required reading for all planners. One of the greatest difficulties confronting those who seek to grasp this sorry scheme of ours in its entirety, shatter it to bits and then remold it nearer to the heart's desire, is that the tools are not available for the job. It is fairly clear what needs to be done. Metropolitan area problems could be solved readily enough. The all-purpose utilization of the water from the Delaware Valley for the benefit of those who live there is not an insuperable task. Neither, I am bold enough to think, is achievement of world peace. But our concept of community has outrun our creation of the necessary tools of government, whether at the metropolitan, regional or international level. In other words, we suffer from political lag, in itself a variety of cultural lag. Put differently and in the semantics of national defense procurement, we must reduce our "lead time."

Too many of our conceptions, Dean Fordham points out, are primitive. Thus, the local community wants exclusiveness. In the end, it gets an undemocratic community pattern. (p. 7).

Those who speak of the Tennessee Valley Authority as "creeping socialism" are indulging in criticism by slogan. States' rights, thinks the author, is equally obscure. (p. 11). And, I might add, obsolete. Human interest in the problems of government cannot be separated with neat precision into fixed areas of governmental jurisdiction. Yet our whole framework of American government, local, state and national, executive, legislative and judicial, is, to some extent, based on this fallacy. The result is a constant struggle to evolve governmental procedures which will twist existing organizations into forms which will make them tools adaptable for functional use. Increasing flexibility in governmental structure is essential to the solution of modern problems.

Dean Fordham does not confine himself to philosophy. He deals specifically with existing governmental agencies such as home rule charters, the Tennessee Valley Authority, the New York Port Authority. He discusses such techniques as the tool of extraterritoriality, used in the fur-

nishing of police protection and water by a primary city to its suburbs. (p. 21).

There is a stimulating discussion of annexation, "bedroom communities" and the detached contempt with which suburbanites view "crooked politicians" in the cities where they make their living.

In the discussion of the regional community, Dean Fordham deals with interstate compacts, federal control and administration, the activities of the Council of State Governors, and the effectiveness of national and regional governors' conferences. He thinks ". . . we are just beginning to visualize the possibilities of the interstate compact as a means of providing appropriate administrative machinery at the regional level." (p. 58).

The discussion of Missouri Basin problems, soil conservation and power policy, the New England states' experience with the Northeastern Forest Fire Commission and the Marine Fishery Commissions created by interstate compact with respect to Atlantic, Gulf of Mexico and Pacific waters, provides necessary background information for those of us who are interested in the all-purpose development of the Delaware, the Susquehanna and the Ohio.

Finally, invading ground where angels too often fear to tread, the author discusses with a mature sense of realism the practical problem of expanding our present world community organization, the United Nations, into a more effective tool for world peace. He recognizes enormous difficulties resulting from the division of the world into Free, Communist and Gray zones. Leaning heavily on the thinking of Grenville Clark, he presents a program which, in my humble judgment, should make a strong appeal to those dedicated to the prevention of World War III.

The University of Pennsylvania Law School has good reason to be proud of its Dean.

Joseph S. Clark, Jr.†

THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION. By Hans B. Thorelli. Baltimore: The Johns Hopkins Press, 1955. Pp. xvi, 658. \$8.00.

The tired motorist who has steadily driven for days toward a distant objective frequently finds it comforting to stop his car, take out his road map, and contemplate with satisfaction the many miles that he has thus far covered. Deriving encouragement from his past progress, he finds it possible thereafter to continue his trip with renewed strength.

The weary practitioner who has impatiently sought for years to find antitrust perfection, in similar fashion, will derive great comfort in pausing to read Dr. Thorelli's *The Federal Antitrust Policy*. This encyclopedic

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work, in reviewing the background and early history of our antitrust laws, demonstrates clearly the tremendous progress that has been made in the past in this field of law. It thereby gives rise to the reassuring thought that the difficulties ahead, in the last analysis, are relatively minor in contrast to those which are now behind us.

The practitioner is troubled today, for example, with the alleged uncertainties in the construction and application of our antitrust laws. Dr. Thorelli's analysis of the legal, economic, political and ideological background of these laws, however, demonstrates that originally our forefathers were uncertain as to whether there should be any antitrust laws at all. Both in England and in this country the courts, the writers and the politicians struggled with the concepts of unreasonable restraints and monopoly, and only in the United States did statutory prohibition of such practices evolve. Attorneys therefore can now be grateful that they currently do not have to wrestle with the basic issue of whether to be or not to be in favor of any antitrust legislation, but have only to consider how best this legislation can be shaped to accomplish the competitive objective in which all presently concur.

The practitioner is further troubled today with the alleged inroads that unfair practices, combinations and monopolies are making upon our competitive economy. Dr. Thorelli's graphic description of the anti-social acts, agreements and trusts of yesterday, however, dramatizes that our businessmen have come a long way from the 1890's. The restraints which currently agitate Capitol Hill are but faint reminders of the robust robber-barons of the turn of the century.

Dr. Thorelli's book should also prove comforting in other respects. It reminds us that the flexible rule of reason is not a modern device of wilful judges seeking to emasculate statutory commands, but rather a soundly conceived concept of the common law deliberately taken over and incorporated in the Sherman Act. Again, it denies that there is any mystery as to who authored that great act, pointing to conclusive evidence that neither Senator Sherman nor Senator Hoar—but rather Senator Edmunds—was the principal draftsman. It likewise gives us a much more favorable—indeed a decidedly favorable—impression of the contributions of President Theodore Roosevelt toward effective antitrust enforcement.

These rewarding benefits to be derived from Dr. Thorelli's book will not be obtained, it should be noted, without painstaking mental application. The author frankly warns us in the Preface that his primary objective is to “. . . present between two covers the materials needed for a synthesized social science interpretation of the origination and institutionalization period . . .” of the “. . . federal antitrust policy of the United States.” (p. vii). He candidly admits that “. . . in the interest of scientific documentation and future research . . .” he has at some stages sought “. . . to develop the chain of argument in considerable detail. . . .” (p. viii). The mental sled of the reader accordingly does not always glide smoothly over the subject matter being reviewed, but occasionally scrapes roughly

upon accumulated details of the material assembled by the author. On these occasions the reader must slow down to a pedestrian walk—and at times must even get out and push. The reader who wishes to be informed, however, readily submits to these short stretches of bare road in order to follow intelligently the painstaking and rewarding research of the author.

The principal criticism which some may make to Dr. Thorelli's book will be directed to his conclusion that "most of the central characteristics and problems of antitrust policy had already appeared" (p. vii) by the year 1903. The author does not purport to present material for later years. Some readers will assert that the swings of the judicial pendulum in interpreting and adapting the principles of the antitrust laws to our ever-changing and ever-challenging economy make hazardous the adoption of any such early date as "the" year in which antitrust policy became "institutionalized." The earliest that the Attorney General's National Committee To Study the Antitrust Laws felt that it could go in this direction was to select 1911, not 1903, as the year in which the central core of modern legal antitrust concepts was evolved—and even the Committee did not take the position that this meant that our antitrust laws by then were institutionalized.

The concluding chapter of Dr. Thorelli's opus is to this reviewer the most provocative. Here the learned Swedish scholar not only summarizes the material that he has outlined in the preceding pages, but sets forth his objective observations with respect to the purpose, operation and effectiveness of the laws which have thereby evolved. In particular, this reviewer is most grateful to the author for reminding us of the important role played by the antitrust laws in our economy. These laws are not merely static statutes of interest to the antitrust specialist. Rather, as Dr. Thorelli pointedly emphasizes:

"Antitrust's is a mission of morale. Half a century after the policy became institutionalized it is still a living symbol of economic egalitarianism as heretofore defined. In business it helps us to distinguish liberty from license. In an age when increasing emphasis seems to be placed on security and stability, on cooperation and organization in all fields, antitrust serves as a reminder that life is also dynamic, that we must keep cooperation constructive rather than restrictive, that those who would rather compete than congregate are at least worthy of toleration. In a century prone to look to the advantages of centralization antitrust boldly proclaims the merits of decentralization, holds out the thesis that the availability of alternative policies and the wide dispersion of decision-making power are important elements of capitalist democracy. Antitrust persists because it is part of the American tradition." (p. 608).

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