

BOOK REVIEWS

HANDBOOK OF THE LAW OF EVIDENCE. By John Evarts Tracy. Prentice-Hall, Inc., New York, 1952. Pp. xviii, 382. \$5.35.

Professor Tracy's preface does not make it clear for whom this book is primarily intended. He says that the functions of "the one-volume treatise have been to serve as a text for those undertaking to study law by the text-book method . . . , to serve as collateral reading by those studying evidence by the case method, and to serve the interests of the practicing bar." For the bar, he continues, such a treatise fills two needs: "one, the needs of the young attorney who must have in his library some book on evidence, but who cannot yet afford to purchase one of the exhaustive works; the other, to serve the interests of the busy trial attorney, as a refresher before going into court, or for quick investigation of a problem arising in the middle of a trial." This certainly seems to imply that the book is directed to law students, among others, although it is to be noted that the author concludes his preface by expressing the hope that the book will be well received by the "practicing bar."

The point of all this is that while it is possible that the book has value for the trial lawyer as a "refresher" (although, as will be pointed out, the treatment of many of the rules of evidence is very sketchy and superficial), it seems to me quite clear that it is not suitable for law school or law student use, because of its general and superficial character and because it is demonstrably incomplete and inaccurate in some particulars. It appears correct to say that in his effort to condense and simplify, the author has over-simplified and over-generalized to the point that in some areas the result may very well mislead any but the already well-informed student of the subject.

I certainly do not mean to say that all parts of the book are subject to this criticism. Much of it is good and there are passages which are excellent. For example, the chapters on judicial admissions, burden of proof and presumptions, documentary evidence, and the parol evidence rule, while rather general and elementary, seem to me adequate in an abbreviated book of this type. Also, the book contains an excellent condensation of the rules regulating the admissibility of the record of a past recollection, an unusually lucid exposition of the problem of the admissibility of intra-organizational reports and a convincing protest against the "res gestae" terminology.

But the book is spotty. As to the matter of over-generality, the following instances are illustrative. In the treatment of the Dead Man's Statute (pp. 123-5), no attempt is made to identify the traditional justifica-

tion for the rule; while the decline and fall of the rule rendering one spouse incompetent to testify for the other and the present status of the privilege protecting confidential communications between husband and wife are adequately presented (pp. 128-9, 133-5), there is only the most oblique reference to the privilege against adverse marital testimony, still recognized in many states and (in respect to criminal trials) in most of the federal circuits. The discussion of the self-crimination privilege includes no reference to the question whether a claim of privilege is essential to immunity. The treatment of the difficult "link in the chain" problem, touching the rules to be applied in determining whether a particular question calls for incriminating matter, is limited to two sentences.¹ The discussion of the tenor of the Federal or American rule restricting the scope of cross-examination is very sketchy, limited to the one sentence.² In a paragraph explaining the purposes of cross-examination (pp. 176-7), no mention is made of the possibility of developing on cross-examination the making of a prior inconsistent statement. In dealing with the use of a memorandum to refresh a witness' recollection (pp. 179-180), the author adopts without qualification the rule, which doubtless reflects the view of most informed students of the subject namely, "that it is immaterial, as a matter of law, what the document handed to the witness is," "it makes no difference what is the source of the writing, by whom it was made or when." But, unjustifiably, I think, he fails to include any sort of caveat of the existence of a much more restrictive rule in a substantial number of jurisdictions.³ In dealing with the admissibility of prior consistent statements for rehabilitation purposes (pp. 199-200), he makes no mention of the possibility of a strong logical argument for admissibility on the issue of the making of an inconsistent statement, where the opponent contends but the witness denies that he has been inconsistent. The author has considerable to say about the admissibility of lay opinion (pp. 202 *et seq.*) where the testimony can be said to be merely a "shorthand rendering of the facts," or where "the whole story cannot be given without a summing up by the witness," but nothing explicit about the unifying principle explanatory of most decisions admitting lay opinion, namely, the impossibility, by the nature of the situation, of the witness reproducing to the jury, in words, the basic facts upon which his opinion depends. Moreover, I find no reference whatever to the question as to whether an opinion, otherwise admissible, is to be rejected because it goes to the "ultimate question in the case," "the very question the jury is to

1. "The fact sought to be elicited may not in itself directly incriminate the witness, but may be one in a series of facts from which the guilt of the person could be inferred. Therefore, the rule is well settled that the privilege can be invoked not only for the facts that do incriminate but also for facts that tend to incriminate." (p. 149).

2. "The cross-examination is not limited to the exact questions asked the witness on direct examination; where the direct examination opens a general subject, the cross-examiner may go into any phase of that subject." (p. 176).

3. *E.g.*, the California rule: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. . . ." CAL. CODE CIV. PROC. ANN. §2047 (Deering 1949).

decide.”⁴ The discussion of agents' admissions (p. 238) seems to me not sufficiently precise in pointing up the distinction between authorized conduct and authorized speaking. The short discussion of the admissibility of the declarations of a co-conspirator (p. 239) makes no reference to the traditional requirement, that, to be admissible, the declaration must have been made in furtherance of the conspiracy; the implication, at least, being that any declaration is admissible if made before the termination of the conspiracy. The chapter on hearsay (pp. 218 *et seq.*) omits all reference to the *Wright v. Tatham* problem, conduct or silence as hearsay. In the treatment of the requirements for the use of former testimony (pp. 250-253), nothing is said about the rule of many cases that identity of opponent is not enough, that there must be an identity of parties on both sides, the so-called “mutuality” or “reciprocity” doctrine.⁵ Also, the requirement of identity of parties is satisfied, it is said, in the view of “most courts,” if the former hearing was between the same parties “or parties having identical interests,” no reference being made to holdings requiring not merely “identical interests” but legal privity.⁶

Then, there appear to me to be substantial defects of commission as well as of omission. Thus: “Immateriality” means that “even though relevant, [the evidence] is so unimportant when compared to an abundance of evidence easily available that the time of the court should not be wasted in considering it, particularly if its consideration would involve lengthy collateral issues.” (p. 5) I had assumed that, speaking correctly, “material” signifies “important” or “significant” under the applicable substantive law and under the pleadings.⁷ “Direct” and “circumstantial” evidence are correctly defined in abstract terms, (p. 6) but I question as an example of “direct” evidence, “The witness saw the defendant riding a stolen horse,” if the charge be larceny, which seems to be assumed. It is said that if a plaintiff makes a “prima facie” case, viz., if he produces sufficient evidence to withstand a motion for a non-suit, he is entitled to a directed verdict if defendant produces no evidence. (p. 22) There is language which seems to mean that it is only what the client tells his lawyer, not the advice given by the lawyer to the client, which is within the protection of the attorney-client privilege. (p. 140) We learn that a cross-examiner may ask “apparently irrelevant” questions, and that if “asked to state the relevancy of a question, he need not do so.” (p. 178) It is said that it is the “thoroughly established rule” that a foundation must be laid for the proof

4. See *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942); *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720 (1944).

5. *Metropolitan St. Ry. Co. v. Gumbo*, 99 Fed. 192 (1900); *McInturff v. Ins. Co.*, 248 Ill. 92, 93 N.E. 369 (1910).

6. See WIGMORE, EVIDENCE §1388 (3d ed. 1940).

7. “Immaterial, in strictness, signifies that the offered evidential fact is directed to prove some probandum which is not properly in issue. The rules of substantive law and of pleading are what determine immateriality; and if the probandum is immaterial, of course no evidence to prove it is wanted.” WIGMORE, STUDENTS' TEXT-BOOK §16 (1935); see also, James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689 (1941).

of a subsequent as well as a prior inconsistent statement (p. 187), no note being made of an evident modern trend to dispense with the requirement when a foundation is not possible.⁸ We are told that where an impeaching witness testifies that the first witness' reputation for truth and veracity is bad, the additional question, "From such reputation, would he believe him on oath?" is not only permitted but *required* in most jurisdictions. (p. 191) The single case cited for this novel proposition merely holds that the question is proper. As to impeaching one's own witness by evidence of a prior contradictory statement, the only prerequisite is surprise (p. 194), no mention being made of the many cases holding that, in addition, the testimony must have been damaging to the proponent's case. The interpretation of *Elmer v. Fessenden*⁹ (the "arsenic in the silk" case) seems questionable. (p. 296) This case (opinion by Holmes), which in the author's view exemplifies a "somewhat puzzling use of the exception to the hearsay rule [which accommodates contemporary declarations of a material mental state]," I have always regarded as entirely orthodox and understandable. Also, the criticism (p. 223) of *Hanson v. Johnson*,¹⁰ the "corn-crib" case (which holds admissible evidence of an utterance constituting the verbal part of a material act), seems clearly unsound. Based on the Minnesota cases only, there appears the statement, in effect (p. 303), that a party may not testify to his own prior out-of-court statement even though the statement qualifies as an excited utterance (spontaneous exclamation). This is clearly wrong on principle because the fact that a statement is "self-serving" in itself offers no basis for exclusion.¹¹ It seems unfortunate to appear to accord this Minnesota quirk the standing of prevailing doctrine. Again, it is stated (p. 303) that "in many exceptions to the hearsay rule the statement will not be received if it is self-serving." It is of course true that the fact stated must have been disserving when stated if the declaration is to qualify as a statement of fact against interest, but I think it is not correct to say that a statement is disqualified under any other exception to the hearsay rule merely because it is "self-serving."

The need of a first-rate, up-to-date student text on the law of evidence is obvious to all evidence teachers. The announcement of the publication of this book engendered hope that it might be the answer. But I do not think that this hope has been fulfilled.

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8. See, *e.g.*, *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946).

9. 151 Mass. 359, 24 N.E. 208 (1889).

10. 161 Minn. 229, 201 N.W. 322 (1924).

11. "In fact, there is no principle of evidence especially excluding self-serving statements by an accused or any one else. If they are inadmissible, it is because they are hearsay, or because of some other reason." Blume, J., in *Worth v. Worth*, 48 Wyo. 441, 468-9, 49 P.2d 649, 659 (1935).

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THE BLACK MARKET: A STUDY OF WHITE COLLAR CRIME. By Marshall B. Clinard. Rinehart & Co., New York, 1952. Pp. xvii, 392. \$5.00.

This volume deals with the enforcement aspects of the government's attempt to impose direct economic controls during and after World War II. The Office of Price Administration was established early in 1942 and continued until May 31, 1947, a little more than five years. For part of that time (December 1942-September 1945) the author of this book was a member of the Enforcement Department, Office of Price Administration, and as Chief of the Analysis and Reports Branch, he had important official responsibilities for the gathering and interpreting of materials relating to the enforcement of price regulations. Aside from official duties, this connection also made possible a wide range of observation and extensive contacts invaluable for research on the problem of the violation of price control regulations. The volume under review is the product of this association, viewed in the light of a sociologically oriented criminologist's perspective on non-conforming behavior among the educated and well-to-do.

The book contains thirteen chapters, documented with thirty-four significant statistical tables and three charts or figures. An appendix gives a seven-page "Classification of Price, Rent, and Rationing Violations" as of 1944. There is an adequate general index and a good, selected bibliography, especially useful for its listing of pertinent government publications and the record of appropriate congressional hearings and of congressional committee reports.

Experience in World War I with shortages, profiteering, and sky-high prices for every day essentials set the stage for the economic controls of World War II. Under the 1920 amendment to the National Defense Act, the development of plans for effective industrial mobilization became the responsibility of the Assistant Secretary of War. The War Department's first published Mobilization Plan (1931) provided for price controls and the 1939 revision of this plan elaborated and extended the range of controls planned. In practice, voluntary controls were first attempted, but shortly after Pearl Harbor, the government was granted statutory powers to regulate extensive areas of our industrial and commercial life, including wage-price-rent controls and consumer rationing. Subsequently the Office of Price Administration issued over 600 price and rent regulations affecting the prices of over 8,000,000 articles and 20 categories of rationed commodities. (Pp. 6-8)

The regulations were hardly in effect before violations began to occur. "During the war at least a million cases of black market violations were dealt with by the government. Illegal profits ran into billions of dollars." (Preface, p. vii) The extent of violations became enormous. Thus in 1945 the Meat Packers Association of Greater Cincinnati estimated that ". . . fifty to seventy-five per cent of all civilian meat was passing in black market channels." (p. 30) A Washington, D.C., survey of food retailers indicated that in their opinion probably only one out of two wholesalers

observed price ceilings. (p. 31) The whole story is a sordid picture of widespread violation of law, despite the national crisis, in order to gain bigger business profits. The enforcement activity of the OPA thus reveals part of the extensive cheating and widespread dishonesty on the part of the well-fed and prosperous Americans on the home front.

Professor Clinard has used admirable restraint in his analysis of this unsavory chapter of American national life. There is neither moralizing nor partisan table-thumping, but instead a dispassionate analysis of the objective record coupled with a balanced discussion of the imponderable "why's" of such widespread collective dishonesty and the almost uniform respectability of crooked dealings undertaken to evade price controls. It is this balanced discussion that gives the book significance as a further contribution to the better formulation of a more adequate theory of crime and criminal behavior.

The theoretical discussion centers in the five concluding chapters: Chapter 9, "Black Market Violations as 'Crimes'"—the author contends that they are "real" crimes; Chapter 10, "Were Black Market Violations Unique?"—no, the author points out many other familiar kinds of business crimes and argues that the patterns are highly similar; Chapter 11, "Explanations of Black Market Violations"—mostly negative in showing in detail that many familiar explanations of crime generally, and of economic crime particularly, simply do not apply to black market activities but that deep-seated cultural and ethical differences among people, businessmen and consumers equally, do point the way to meaningful explanations; Chapter 12, "The Black Market and Disorganization in Our Society"—an exposition of some of the serious value conflicts in modern society that underlie the evident philosophy that law does not apply to certain groups, or is unfair and therefore not to be obeyed; Chapter 13, "The Black Market in the Future"—an expectation of ". . . not less, but more violations; not half compliance, but considerably less than half." (p. 358)

Professor Clinard's provocative analysis should help clarify the appealing but ambiguous concept of "white collar crime" first given systematic delineation by the late Professor E. H. Sutherland. It is unfortunate that some of the more telling distinctions made (*e.g.*, p. 311, note on "differential association") have been spelled out in footnotes rather than incorporated into the main body of the text. A more important limitation, in the opinion of this reviewer, is the omission of any consideration of the hectic and somewhat furious political battle that has centered on the whole idea of direct price controls.

Important economic and political groups have long been joined in a bitter struggle for power and influence in America. The significance of the price control experiment lies in good part in the fact that it represented a battlefield for this struggle, as well as in the fact that it involved a reversal of traditional practice and thinking.

The familiar retort of the typical businessman to the charge of profiteering—"Since when has it been a crime to make a profit?"; or the more self-

justifying one, "No one is forced to buy. If a customer wants my goods enough to pay the price I ask, then it is good business to make a sale, certainly not a crime"—represents a point of view in American economic life and culture that comes very close to being its central axis of organization. To expect this basic orientation to change merely because a legislative majority has adopted as law certain provisions that would regulate the price (and the profits) that the businessman may ask, and has set up a schedule of penalties to implement the declaration of principle that violation constitutes "crime," is to lose sight of the uncertain balance of power that lies back of the organization of any democratic government. With changes in political majorities, attempts at price control also changed. On the whole, there is a fairly close parallel between price control efforts and our experience with prohibition legislation. Violations were finally terminated by abolishing the law that created the violations.

The point to note in this is that impressive legislative majorities do not mean always that basic attitudes and the fundamental mores of a culture have changed to correspond with such political action. It is futile and meaningless to try to convict a nation of treason to itself. To designate the culturally approved behavior of important, respected, and dominant elements in a population as "crime," and to label the "pillars" of that society as "white collar criminals" will appear to many to be an enterprise of similar proportions.

The widespread violations of OPA regulations—the substantial basis of what is called "black market"—need to be viewed in the perspective of basic cleavages in American political life. The bitter exchange between OPA Administrator Bowles and Senator Taft, reported in some detail on pages 108-110, is significant primarily because it is symptomatic of the fundamental and deepseated political alignments represented by each.

Professor Clinard's book would have been an even more compelling document of a significant episode in American life if the analysis had been presented against the back-drop of the political struggles of the time. Such a presentation would have helped to highlight even more than it does now the significance of the difference between legal and sociological definitions of crime. This is, nevertheless, a book that deserves a wide and thoughtful reading by everyone, not only professional criminologists, but lawyers, businessmen, and citizens in general.

If a major national emergency should come again, drastic economic controls may be expected to come again. Thoughtful Americans everywhere will need to think seriously about the story and the analysis of the recent past presented in this book. It may help prevent an even worse debacle in the future.

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CASES AND MATERIALS ON TORTS. By Young B. Smith and William L. Prosser. Foundation Press, Inc., Brooklyn, 1952. Pp. 1239. \$9.00.

Today the teacher of Torts suffers no lack of choice of casebooks. With Harper's fourth edition of Bohlen still going strong and with Seavey, Keeton & Thurston a scant two years old, Foundation Press has published simultaneously a second edition of Shulman & James and an entirely new work by the deans of Columbia and California. With the other books in the field, some explanation for the newest one is due, and the authors have provided it for us in the preface. We are told that the course in Torts is rather desperately crowded, that the problem always has been how to get over the ground in the allotted time, and that few teachers ever succeed in covering the major part of any casebook. The solution offered by these authors is the resort to a considerable amount of textual material. Reading no further, we might expect a much foreshortened Torts book, with some chapters and sections containing only expository statements of the law by the authors. But read on: "The method adopted has permitted the inclusion, or more extended treatment, of a number of topics of real importance for which casebooks in this field seldom have found room." And a glance into the body of the book gives the impression that each topic is covered in much the usual way: cases followed by notes. The result, at first dismaying, is a book at least 20 per cent larger than its competitors.

Hence, the book is not a radical departure in approach to the subject, but rather in the manner of presentation of material. Even this is not too easily seen. With the exception of introductory statements to a few chapters, the text material is presented in smaller type following the cases; only one subject, statutory modifications of the trespassing cattle rule, is given full textbook treatment. The length of these notes and their completeness is what makes the difference. A number are rather long textual statements of the law in situations related to the principal case, some giving much historical background in relatively little space. Others are fairly typical casebook notes containing primarily references to other cases or source materials, or various problems on the theme of the principal case, taken either from cases to which citations are given or from the authors' fertile imaginations. Even in small type, the notes occupy approximately 30 per cent of the book. In essence then, what the authors have really attempted to do is to free the professor from the necessity of lecturing on details by giving the student the responsibility of reading these extensive notes along with his cases.

I was once exposed to Prosser as a visiting professor in a short summer school course. In a maximum of twenty-five class hours, he covered to his satisfactions (and mine) 790 pages of McCormick on Damages. He did not, however, inflict thirty-odd pages a day on the student; much was covered by lecture. As a disciple, I kept up with him, though my feet may have dragged at times, but as an apostle, I cannot maintain his pace.

Last year I was one of several guinea pigs chosen to teach from a temporary (and even longer) edition of the book, and I can report that while the course was much over-crowded, and while I barely succeeded in covering the major part of the casebook, I did cover more subjects and left out no greater proportion of this book than I did of any other. Unfortunately, I found that either the students or I wanted to talk about all those fascinating notes.

So enough of this silly quarrel with the preface. The book is an excellent teaching tool for the course. While some reviews of casebooks consist of comparisons between works, my commission extends only to Smith & Prosser, and this review will be confined to personal comments on it. I see no point in reviewing any particular subject or topic by going over the cases chosen. I do not believe that a description of the book by table of contents headings should be necessary. Suffice it to say that in all respects I found the internal arrangement of material within topics excellent. The old favorite cases are either there or such clever substitutions have been made that they are not missed. The student will find new favorites, and some excellent legal instruction, in A. P. Herbert's discourse on the Reasonable Man¹ and the Ballad of *Brimelow v. Casson*.² A great deal of the book consists of recent cases and it is in every way modern and up-to-date. The topics that have been added or expanded beyond the usual treatment are: nuisance, interrelation of tort and contract, problems relating to joint tortfeasors, the apportionment of damages, and survival and wrongful death actions. Other features of the book are the inclusion of chapters on conversion, on punitive damages, and on the measure of damages in personal injury cases. In view of the disappearance of the course on damages from the curriculum or from the programs of many students, the two latter chapters seem especially welcome. Rather full treatment of alternative remedies appears in the chapters on tort and contract, misrepresentation, and nuisance. The problem of balancing the equities is covered under nuisance, but it seems unfortunate, if equity has disappeared from the particular school's curriculum, that parallel treatment was not given to balancing the equities in the trespass cases.

I have some minor quarrels with the external arrangement of topics. I find it strange that the *Palsgraf* and *Wagner* cases appear almost at the beginning of the negligence material, under the heading "Risk to Whom?", rather than with the proximate cause materials. The chapter on punitive damages seems out of place; though connected in a sense with the intentional wrongs which it follows, it is far separated from the other materials on damages. Some subjects were, I felt, covered in too great detail, by more cases than absolutely necessary. But these are minor matters, and by the use of a practice endorsed by one of the authors,³ they may be turned into a real advantage. Every Torts teacher may now be his own casebook

1. Instant text at 238.

2. Instant text at 1225.

3. Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257 (1949).

editor. By using this book, he may cut whole sections; he may cut cases or notes; he may rearrange at will. Certainly the size of the book and its wide coverage permit the shaping of the course to suit almost every demand, even though the teacher finds himself, as I do, talking too much and simply unable to cover as much material as is so well presented here.

Frank J. Trelease †

STUDIES IN THE LAW OF TORTS. By Clarence Morris. The Foundation Press, New York, 1952. Pp. 432. \$4.50.

Professor Wigmore's two volume casebook on torts, published some forty years ago, was a mighty and felicitous effort toward the sources and philosophy of tort law. Professor Morris seeks and pretends to no such scope. Instead, addressing himself to both theory and practice, he puts under one cover eleven of his tort law articles, which were published over a period of twenty years (1931-1951) in leading law journals.

All the articles except three have to do with negligence. Of the three exceptions, one deals with "Inadvertent Newspaper Libel and Retraction," one with "Balancing the Equities" in encroachment-nuisance situations, and one with "Punitive Damages" in torts generally. (The article on "Balancing the Equities" was written in conjunction with W. Page Keeton, Dean of the University of Texas Law School). Of the nine articles on negligence, four discuss a means of proof: "Role of Expert Testimony in the Trial of Negligence Issues," "Admissions and the Negligence Issue," "Proof of Safety History in Negligence Cases" (with an excellent appendix on Proof of Safety History in Railroad Crossing Accidents, written by James P. Lee under the supervision of Professor Morris), and "Custom and Negligence;" two deal with related topics: "Role of Criminal Statutes in Negligence Actions," "Role of Administrative Safety Measures in Negligence Actions;" one deals with "Proximate Cause in Minnesota" (another reminder of a difficulty because of the mix-up between logic and fate), and the remaining one with "Torts of an Independent Contractor."

Although each article treats a separate and narrow topic, a broad viewpoint is discernible from the whole, for Professor Morris has an ability to classify and show the pattern in the category. With a provocative choice of cases for illustration, he gets to the knowledgable point, using specific cases to deduce the substantive rule. He does not, as Maitland remarks, smother the plain idea under subtleties and technicalities. And he has the pedagogic feeling not to move *per saltum*. In addressing himself to the lawyer as advocate, his work is more than academic; it is law for lawyers and student alike.

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The author's ability to distinguish different and confusing or confused problems has resulted in a series of articles that altogether comprise a workaday book, with pointers here and there delineating the art (Professor Morris calls it 'strategy') required of the lawyer trying a negligence case. His is no barren intellectualism. An instance of his concern for the trial lawyer is apparent when he says, on the question of the statistical inference of danger or safety:

"During argument, the defendant's lawyer may be able to caution the jury against hasty acceptance of a statistical inference of danger inhering in the place of injury by analyzing its potential weaknesses."

While he writes for the practicing attorney, Professor Morris' law comes with a thoroughness that reveals scholarship. His analysis of the part company safety rules play in the proof of negligence typifies an ability to enunciate law with advice on advocacy:

"A defendant's own preformed judgment on what he should do is one of the facts properly taken into account against him. It is not true that a defendant who does the best he can is free from negligence. The standard is the care that a reasonably prudent man would take under the circumstances. But when a defendant fails to come up to his own concrete standards, his standards are properly taken into account in judging him. This does not mean that violation of company rules is negligence *per se*. Men and organizations have ideals impossible of accomplishment, and these ideals may affect the drafting of company rules. Since reasonably prudent behavior may fall short of ideal behavior, a breach of an announced rule may be reasonably prudent."

Though he will not take the position of postulates, Professor Morris can be critical of court-expounded doctrine; he writes: "This is an example of the obdurate use of criminal standards that some courts assume must be made under the doctrine of negligence *per se*." I suggest that, assuming the hazard involved was the one against which the statute was designed to protect, the use of the criminal standard could hardly be called 'obdurate'; otherwise, the objection is well-taken. See *Boyd v. Smith*, 372 Pa. 306 (1953). His critique can be pedagogic, as when he illustrates the corresponding expansion of tort liability with criminal liability, summing up in a sentence a weakness of a particular position: "But the Massachusetts view is a way of closing the court's eyes to a novel fact and thus making old cases out of new ones." That the author can take a stand is evidenced by his declaration (which seems to me to be quite so) that "in new fact situations a court cannot avoid judicial law making," and by his flat statement referring to a court's refusal to hold that the violation of a sound administrative measure is conclusive of negligence, that the decisions are "unwise in policy and unsound in principle." Recognizing the problem arising in questions of violation of criminal and administrative statutes as a basis for

a finding of negligence, Professor Morris treats the problem as the "statutory purpose doctrine," although his essential question here is the same as that involved in Professor Eldredge's treatment of it as the "Hazard Problem."¹

When articles are written separately over a period of years on basically the same subject there is bound to be repetition or overlapping, noticeable when they crowd together into one cover. But this very repetition in itself makes discernible the broad viewpoint of the author, and results in either simplifying or emphasizing his point of view. The functional viewpoint, an animated moderation of clear discussion, the author's command of his own phrase and the comfortable index all recommend this book for the lawyer's trial and research shelf. Every article is choice, but if I am to make my preference I would select "Custom and Negligence" and "The Role of Criminal Statutes in Negligence Actions."

Joseph Sloane †

1. Morris, like Eldredge, suggests that defendant's violation of a criminal statute should be invoked only where the plaintiff is within that class of persons whom the statute was designed to protect, and when his injury is within the class of injuries that the statute was designed to prevent. Morris suggests that this doctrine probably originated as a limitation on liability, but says, "It is susceptible of inverse statement as a justification of extended liability." He suggests also that Professor Thayer would sanction the latter view.

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