

BOOK REVIEWS

PRIMER OF PROCEDURE. By Delmar Karlen. Campus Publishing Co., Madison, Wisconsin, 1950. Pp. xv, 525. \$6.50.

This unique coursebook for first year procedure is the latest solution proposed for "one of the most difficult and stubborn of the problems of legal education."¹ The book is a primer with appendix. First come some 120 pages of simple text covering a modern law suit from its start through pleading, pre-trial practice, the jury, details of the trial, judgment, execution and appeal. Next there is a 50 page description of common law forms of action, equity and its jurisdiction and procedural reform. The appendix, comprising well over half the volume, consists of the Federal Rules and an edited record of the trial of a litigated case including virtually all of the transcript of testimony.

The first paragraph of Chapter I reads, in toto: "A law suit is started by the service of a summons". No caveat is found in footnote, for there are no footnotes. That antecedents and progeny of the Federal Rules are contra the author would undoubtedly consider no basis for legitimate objection. Reviewers as well as students are put on record notice that "practically every sentence" is subject to exception or qualification (p. 4). Fear of losing the main idea has precluded pause in the stream of argument and, on balance, it was thought preferable to omit rather than obscure.

Here then is the major premise of the work: procedure must be made simple. It is a premise founded on dissatisfaction, for "more sophisticated approaches have proved unsatisfactory" (p. 1). The dissatisfaction is not hard to document. It is old and it is varied. No less an authority than Clark, directing his fire at what still remains a substantial portion of first year procedure books, stated bluntly: "I have not yet found a law teacher, even the most distinguished, who has been successful in teaching common-law pleading to first-year law students, and if I ever do, I shall be ready to believe that there is something wrong with the students."² But Karlen does not approve of deleting the forms of action, and Clark did not recommend simplicity. It is the latter which is now offered as the solution. To accomplish it Karlen suggests use of this book, without other materials, in a three hour course.³

Simplifying introductory adjective law by use of textual material was urged by Philbrick many years ago.⁴ Non-case materials are currently

1. MICHAEL, *ELEMENTS OF LEGAL CONTROVERSY* vii (1948).

2. Clark, Book Review, 47 *HARV. L. REV.* 148 (1933).

3. P. xiii. The 1949-1951 Announcement of Courses at the University of Wisconsin Law School 15 (1949) indicates Professor Karlen is there allotted two hours for the course.

4. Philbrick, *A Casebook for the First Year in Procedure*, 6 *AM. L. SCHOOL REV.* 123, 125 (1927). A decade earlier Baldwin had predicted that casebooks would come to include more text. He concludes "the country has certainly reaped one great advantage from the adoption of the case method, wherever it has been in any substantial degree exclusively pursued. We have too large a bar. It would make for

very much in vogue and clearly to the good.⁵ Yet by and large their use comes as an adjunct to case study, as an aid rather than as a competitor. At Nebraska, where case study of procedure has been abandoned, an eight credit practice clinic has replaced it. To substitute primer-approach for the skills achievable by case analysis seems a doubtful course. Karlen suggests that by keeping the student from the reported decisions we will foster acquisition of "the technique of reading statutory materials without the benefit of judicial explanation" (p. vii). This is a goal not to be deprecated, as those who have occasion to work with a new statute soon learn. Clearly the lack of annotations and available judicial gloss forces one to grapple with the words of a statute. But is this a technique which needs emphasis in a first-year introductory course, before the student has acquired the sophistication, and perhaps the sense of frustration, which accompanies judicial torturing and emasculation?

Karlen's proposed solution raises difficulties in the area of teaching method, but they are not the most crucial. They can be remedied to some extent by the teacher in the classroom. For example, if Karlen's text on the beginning of an action seems insufficiently comprehensive or accurate, the Federal Rule itself is to be found in the appendix and the student may readily be encouraged to ferret out for himself the deficiencies of the primer. Who among us has not discovered the effective pedagogy of teaching a poor opinion, a patently "wrong" case? The delight comes in forcing the student to tear down and build up, and here too that opportunity is available. Indeed, in fairness one must say that it appears that to some extent the author intended his book so to be used; the relevant Federal Rules are listed at chapter end and the introduction suggests that they can be compared or contrasted with the textual black letter. However, to the extent that the limitations of primer offerings become an invitation to student creation, we have abandoned (and wisely, it would seem) the drive toward simplicity. And in the same measure we have laid bare a difficulty of using the book as mere collateral reading in a more orthodox course.

The major criticism, however, is that Karlen has projected a survey course in an area which must be covered once again—and thoroughly. No one will quarrel with an introductory lecture, text or movie designed to give a general idea of what a law suit is about. But when the introduction mushrooms into a full-fledged course which requires a complete procedural sequence in addition, one may well ask whether the experience is worth the time. Karlen's materials are difficult enough and sufficiently broad in scope

the public good were there fewer and better lawyers. The case method where it has been most strictly pursued, has caused many young men, after a few months of legal study, to abandon it forever. . . . They have found at the outset confusion, if not disorder." Baldwin, *Education for the Bar in the United States*, 4 AM. L. SCHOOL REV. 8, 15 (1915).

5. Non-case material is essential to make "a casebook modern and to give it that touch essential for streamline styling." Ladd, reviewing HAYS, *CASES AND MATERIALS ON CIVIL PROCEDURE* (1947), of which 25% was non-case materials. Book Review, 61 HARV. L. REV. 1084 (1948). See also SCOTT AND SIMPSON, *CASES AND OTHER MATERIALS ON CIVIL PROCEDURE* vi (1950); ATKINSON AND CHADBURN, *CASES ON CIVIL PROCEDURE* viii (1948).

to require the two or three semester hours he proposes. Yet they have been simplified down to the point where the job must be done over again. Thus Wisconsin recognizes that, after completion of the author's first year course with the primer, the following are still in order: Jurisdiction of Courts (3 credits), Pleading and Pre-trial Practice (3 credits), Trials and Appeals (3 credits).⁶

Within the framework which the author has set for himself he has done an excellent job. The appendix, it may safely be prophesied, will be well read, for Karlen has chosen for full reporting a case of breach of promise and seduction in which the alleged courtship was conducted primarily by mail between two parties with a penchant for disclosure of prior misconduct, and misconduct aplenty to disclose. One of the paradoxes of our procedural courses has been the attempt to teach the trial level requirements through the self-serving hearsay declarations of appellate judges. While he is not the first to include sample pleadings, verdicts, judgments or even a record in a first year book, Karlen makes a genuine contribution with his constant emphasis on the documents of the trial level. These are most worthwhile. From Notice of Adverse Examination to the affidavit covering witness fees, they give the student a sense of reality as well as a wealth of valuable information. Perhaps a publisher with a *Flair*-like flair would make available actual reproductions of certain documents and forms, but this is a realism of greater psychological than intellectual significance and a library file of forms and photostats can achieve much the same effect.

The text, too, for all of its simplification, is stimulating and replete with valuable insights. Why have appellate courts? Karlen challenges his students. How helpful are the rules on what is a "jury question?" he inquires, while urging a mild skepticism about the judicial clichés. The implications of our adversary system are explored from investigation of facts to charging the jury.

In sum, Karlen offers a unique solution, ably executed. This is certainly to the good.

A. Leo Levin †

COURTROOM—THE STORY OF SAMUEL S. LEIBOWITZ. By Quentin Reynolds. Farrar, Straus & Co., New York, 1950. Pp. xiv, 419. \$3.75.

Courtroom—The Story of Samuel S. Leibowitz is unique in this: it is of great practical value to lawyers, particularly young aspiring trial lawyers, and it is at the same time of tremendous interest to the general book-loving public. It is also remarkable for the fact that, although it is replete with thrilling and well-told narratives of famous crimes and the equally celebrated and dramatic trials which sprang therefrom, it is Leibowitz, the

6. 1949-1951 Announcement of Courses at the University of Wisconsin Law School (1949) 17-20.

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superb trial lawyer, and not the succession of sensational cases that holds the unswerving attention of the reader from cover to cover.

Here is revealed with simplicity what it is that makes a great trial lawyer. Almost all the true greats among this class found and reached their zenith not in the civil but rather in the criminal courtroom. They, like Leibowitz, were and always must be men of keen and facile intellect—they will have a profound knowledge of the human heart, its dross and its gold. They must have a process for forming a judgment which is well grounded and seasoned by close contact with and study of human nature and the ways of men.

The reason why Samuel Leibowitz was a great trial lawyer is just that simple. He is a man who can lose himself among the stars and yet remain a hard-boiled realist. He might dream dreams for his city and its people, but in the midst of these dreams it would be time wasted to try to sell him some foolhardy panacea. He knew that you could open any locked door if you found the right key.

Leibowitz had a clear concept of his rights and duties as a trial lawyer for the defense. He knew that it was not for him to sit in judgment on his client—the prisoner at the bar—and determine his guilt or innocence. Even the trial judge has no such right or power. Leibowitz knew that it was his duty to present his client's story and defense in as strong and convincing a manner as possible, consistently with his oath as an officer of the court and a servant of justice, leaving the guilt or innocence of his client to the determination of a jury, on whom the law had placed that obligation.¹ Hence his biography as a trial lawyer reveals a man who applied his indefatigable energy to getting the facts. Every thread of possible evidence, gossip or rumour, he followed as though it were a rainbow, until it led him to a pot of gold, or up a blind alley.

In the courtroom he manifested a ready wit and an ingratiating courtesy to court and jury, which was frequently extended to some unfortunate, though hostile witness caught and wounded in the tragedy which gave rise to the case on trial. The delight of watching Leibowitz in action was occasionally enhanced by his almost puckish stratagem of needling the prosecutor into a line of cross-examination which bounced a bombshell upon the lap of the district attorney in the nature of an answer.

In no case reviewed in the book does the star of Leibowitz, lawyer for the defense, shine more brightly than in the case of *People v. Harry L. Hoffman*, in which the defendant was charged with murder while attempting

1. The Canons of Professional Ethics of the American Bar Association provide as follows:

"Canon 5. It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

the rape of an estimable young woman on a lonely road on Staten Island in 1924.

Leibowitz well knew that, when the finger of accusation is pointed at a man in a rape case, especially when it resulted in the death of the woman, that man is already more than half convicted. Leibowitz' courtroom experience had also taught him the truth of the memorable words of Sir Matthew Hale, uttered centuries before, imploring courts to be cautious in rape cases :

"The court and jury may with so much ease (in cases of this nature) be imposed upon, without great care and vigilance, the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried on to the conviction of the person accused."

Leibowitz in the *Hoffman* case invoked to its fullest the prisoner's ancient right and safeguard, the benefit of a reasonable doubt. The fury and skill with which he attacked vulnerable testimony for the prosecution during the trial was no less effective than the persuasive earnestness with which he accounted for the incriminating actions of a man thrown into a state of panic by the fear that he would be accused of the crime. Building his primary defense upon the right to a reasonable doubt with a skill that was masterful, Leibowitz persuaded the jury to return a verdict that rocked the country.

Leibowitz was dominantly a criminal defense lawyer, and he knew all the rights which the American system of justice gives to a person charged with crime. He didn't overlook or muff one of them; his record as a lawyer for the defense is astounding. Of the one hundred and forty homicide cases in which he appeared for the accused, only one resulted in the execution of the defendant. While some of us may be of the impression that the moral salubrity of New York society would have been considerably improved if the application of electricity among his clients had been more extensive, the fact remains that it was Leibowitz' sworn duty to present their defense as strongly and persuasively as he knew how and to leave the decision to those whom the law had charged with the duty.

He tore the lid off the *Scottsboro* cases and set forth a stench which set America reeling. His physical and moral courage were heroic; he was actually in danger of losing his life. Yet it was his research in preparation and his dramatic ability in the *Scottsboro* trials that gave this country its first insight into the real truth of the case. Those of us who can recall our newspaper reading impressions that the *Scottsboro* negroes were all guilty and ought to be hung should read the admirable defense of those same negroes when, belatedly, the case was placed in Leibowitz' hands. And anyone who denies that in the infancy of the case he believed the *Scottsboro* negroes guilty as charged should not be content to bask in self-exaltation. He didn't do anything about it, but Sam Leibowitz did.

The ultimate and gratifying result of these trials stems from the same old Leibowitz norm as revealed in *Courtroom*: Dogged research, complete

and orderly preparation, earnest, courageous and fervent presentation and, by the Grace of God, general all-around ability.

To Samuel Leibowitz, more than to any other living lawyer or statesman, goes the credit of having made a negro defendant equal to a white man in an American courtroom. He caused a general soul-searching South of the Mason and Dixon Line and made one state in the deep South heartily ashamed of itself.

Of course starry-eyed young lawyers hope, and some of them believe, that Samuel Leibowitz' success in the courtroom was the result of the burning of much midnight oil over law books in his student days. It is well that they should have that impression. In all probability, however, it would be more accurate to say that Leibowitz was the makings of a great trial lawyer when he lay in his cradle cutting his teeth on his thumb.

The reading of Quentin Reynolds' *Courtroom*, with its many vivid narratives of famous crimes and dramatic trials, strengthens the impression which this reviewer has always had: that there are more thrills in one well-written book recording "really-truly" stories of crimes and their subsequent trials than there are in a wheel-barrow load of murder mystery novels.

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BOOKS RECEIVED

- CASES AND MATERIALS ON CORPORATE REORGANIZATION. With Statutory Supplement. By E. Merrick Dodd and De Forest Billyou. University Casebook Series, The Foundation Press, Brooklyn, 1950. Pp. xvi, 625. \$8.00.
- CASES AND MATERIALS ON FEDERAL TAXATION (1950 Edition). By Paul W. Bruton. American Casebook Series, West Publishing Co., St. Paul, 1950. Pp. xxii, 811. \$8.00.
- CASES AND MATERIALS ON FEDERAL TAXATION. By Erwin N. Griswold. University Casebook Series, The Foundation Press, Brooklyn, 1950. Pp. vii, 834, \$7.50.
- CASES ON CONSTITUTIONAL LAW (4th Edition). By Noel T. Dowling. University Casebook Series, The Foundation Press, Brooklyn, 1950. Pp. i, 1273. \$8.50.
- A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW. By Phanor J. Eder. New York University Press, New York, 1950. Pp. xii, 257 \$6.00.
- FEDERAL INCOME TAXATION—CASES AND MATERIALS. By Stanley S. Surrey and William C. Warren. University Casebook Series. Foundation Press, Brooklyn, 1950. Pp. i, 1166. \$9.00.
- INTERNATIONAL LAW—THE COLLECTED PAPERS OF SIR CECIL J. B. HURST. Stevens & Sons Limited, London, 1950. Pp. ix, 302. 30s.
- INTRODUCTION TO COMMERCIAL LAW. By Robert Braucher and Charles Corker. University Textbook Series, The Foundation Press, Brooklyn, 1950. Pp. iii, 308. \$5.00.
- THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES (2nd Edition). By Percival E. Jackson. Prentice-Hall Inc., New York, 1950. Pp. lxxxvii, 734. \$12.50.
- THE NATURE OF OUR FREEDOM—AN INTERPRETATION OF OUR CONSTITUTIONAL HERITAGE, ITS SOURCE AND MEANING. By Leon R. Yankwich. Research Publishing Co., Los Angeles, 1950. Pp. v, 218. \$3.00.
- POLICE ADMINISTRATION. By O. W. Wilson. McGraw-Hill Book Co., Inc., New York, 1950. Pp. x, 540. \$6.00.
- SELECTED ESSAYS ON FAMILY LAW. Edited by Committee of Association of American Law Schools. Foundation Press, Brooklyn, 1950. Pp. iii, 1118. \$9.50.
- SELF-INCRIMINATION—WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? By Fred E. Inbau. Charles C. Thomas, Springfield, Ill., 1950. Pp. x, 91. \$2.50.
- THE UNIFORM CODE OF MILITARY JUSTICE. By Colonel Frederick Bernays Wiener. Combat Forces Press, Washington, D. C., 1950. Pp. 275. \$3.50.