

Tracy: Handbook of the Law of Evidence

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tant that he recognize the symptoms and consult professional advice to head off the arrival of the sheriff. *Risks and Rights* ably sets down the symptoms in language too plain to misinterpret.

The book contains an interesting vignette on the growth and present status of the right of privacy and warnings against some of the dangers lurking in the path of an author of imaginative fiction. It thus serves the useful purpose of suggesting to such an author that he seek professional legal advice before he becomes enmeshed in a suit for damages. Mr. Spring takes a dim view of the present state of the law of privacy in New York, which he seems to feel is rapidly retrogressing to almost a barbaric, if not ridiculous, level. He proves his case conclusively by an able and deft analysis of the decisions. Obviously, Mr. Spring does not intend the 28 pages he devotes to right of privacy to be a definitive work on the subject. The same may also be said of his treatment of defamation to which he devotes 31 pages. It must be said that Mr. Spring has the gift of clear and succinct expression, and that his criticisms of some of the anachronisms of the law of defamation are very well taken. For these vestigial remnants, the term "medieval" is his favorite reproach.

This reviewer was most favorably impressed by Mr. Spring's chapter on "What is Defamatory," in which he deals with defamation and insinuation, the functions of the judge and jury, the difference between opinion and fact, and the like. He seems to have reached the heart of the matter in extremely lucid language, completely stripped of the abracadabra usually found in works on defamation.

The bulk of Mr. Spring's work is devoted to copyright and associated problems. This part of the work should be of particular value, not only to the layman but also to the practitioner who wishes to get the broad scope of the problems in this field as an introduction and guide to a more detailed study of the decisions and statutes needed to solve his specific problem.

The last 47 pages of *Risks and Rights* contain a very interesting discussion on "Television, Ideas and Censorship," and the author gives a very helpful discussion of some of the problems raised by the new medium of television. He makes the suggestion that since television is completely an interstate affair, and since there is no federal common law, there is needed a uniform federal codification of the right of privacy.

JOHN B. MARTINEAU*

Handbook of the Law of Evidence. By JOHN EVARTS TRACY. New York: Prentice-Hall, Inc., 1952. Pp. 368. \$5.35.

One who believes, as does the writer, that our system of Evidence is a practical guide to the determination of matters of fact, and is not a branch of speculative philosophy, will read Professor Tracy's "Handbook" not only with profit, but with pleasure. As a courtroom practitioner for over thirty years, during which time I doubled as a preceptor of the cult, I can unqualifiedly recommend the book to the student, the practitioner and the teacher alike,—to the fledgling who is blissfully ignorant of the basic tenets of the creed, to the tough old birds who have long ago forgotten them, and to those of us in the classroom who might have become so "sor" in our own methods of presentation as to be myopic to the logic of another's topical sequence. A recall

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to basic principles, expressed in simple, non-technical, and even conversational language, not only purges the mind of the dross of refinements, but injects a hearty dose of common sense into the mysteries of our rite.

The great need which this book meets lies in the fact that it is a primer. Most lawyers never really get through the primer stage in Evidence. Within the confines of its 368 pages, Professor Tracy can do no more than pin-point the various topics, and the work would burst its bounds if any elaborate attempt was made to reconcile conflicts. The student and the lawyer get a skeletal outline of the subject as a whole, with a logical tie-up of its various parts, which serves as a ground-work for future more intensive exploration. A thorough knowledge of basic principles clarifies the theory under which specific evidence is offered or resisted, and thereby many apparently irreconcilable rulings of the courts may be harmonized. The multitudinous mass of conflicting minutiae is wisely ignored in the exposition of essentials,—to study the biological “sport” without a thorough knowledge of normal anatomy, would not only be futile, but would be frustrating.

This is particularly true in the treatment of those twin quagmires of the law—the subjects of Presumptions and that of *Res Gestae*. Professor Tracy handles the first by cleaving to the orthodox and well-established, with pregnant remarks on the nature and effect of Presumptions; he disposes of *Res Gestae* by taking to heart Holmes’s dictum, “The man that uses that phrase [*res gestae*] shows that he has lost temporarily all power of analyzing ideas,”—and straightway disposes of the expression by throwing it overboard completely, and substituting therefor the logical kernel for the meaningless shell. In this, Professor Tracy should be emulated, both by lawyers and by judges. There is nothing so annoying in the trial of a lawsuit as to find one’s opponent, when no other ground of admissibility is apparent, offering evidence as part of the *res gestae*. Instead of requiring counsel to explain what he means by the use of the term, it too often happens that trial judges are over-awed by the mystic significance of its superlative ambiguity, and admit the evidence rather than dispute its competency. *Res Gestae* therefore, becomes the cloak of mediocrity and the last refuge of incompetency, both of the practitioner and of his evidence. As Professor Tracy points out, the term should be abolished, and the essential logic of admissibility stressed, without reference to any such ambiguous shibboleth. An out-of-court statement, offered as evidence of the truth of the matter to which it relates, will be rejected as hearsay. But there are many out-of-court statements which will be admitted, not because we are interested in the truth of the matter to which the statement relates, but merely in whether the statement was made. Such statements are not hearsay. The *making* of the statement is the evidentiary fact which, if relevant, may be proved by testimony the same as any other fact. Professor Tracy gives a succinct list of such statements,—often confused with hearsay,—and eliminates them entirely from the frame of Hearsay and its true exceptions.

The chapter on Witnesses, not only deals with the competency and privileges of witnesses, but is expanded to include relevant aspects of trial practice which would normally be considered in a course on Procedure. This, I feel, is of great value. It is unfortunate that the student of law, particularly in the early semesters, necessarily gets a disjointed view of any particular subject studied. Even the senior student might have difficulty in correlating the various courses. Any text therefore, which, while dealing with a specific part of the

law, links it up with its related subjects, lends an inestimable aid to the student. Thus, the writer feels that in the field of substantive law, while teachers of the various contractual subjects are necessarily specialists, the general rules of contract law should be constantly reviewed, and brought to bear on the specific contract studied, be it that of agency, partnership, or the various contracts arising from the negotiable instrument, or from corporate organization. This elucidates the essential coherence of the law as a preface to the consideration of the variations presented by any species of contract. In like manner, a book on Pleading, Evidence or Damages, or any other break-down of the Adjective Law, should fit its subject matter into the frame of Procedure, of which these subjects are but parts. This, within the limited confines of his "Handbook," Professor Tracy has done, with the result that the student may understand what the practitioner will readily perceive, the true setting of the specific topic with relation to the cognate and broader field.

Professor Tracy has more than fulfilled his purpose, as stated in the Preface to the book, to fill the needs of "the young lawyer who must have in his library some book on evidence but who cannot afford to purchase one of the exhaustive works," and "to serve the interests of the busy trial attorney, as a refresher before going into court."

JEREMIAH BUCKLEY*

The Law of Homicide. By ROY MORELAND. Indianapolis: The Bobbs-Merrill Co., Inc., 1952. Pp. viii, 314. \$7.50.

For those who by profession or inclination are prone to read books on law topics, to find a work that is interestingly as well as informatively done is somewhat of a rarity. Professor Moreland's topic, "Homicide," did, it is true, give him the advantage of discussing a subject which holds a peculiar fascination. The history of the law and cases concerning homicides have long furnished the basis for most interesting studies. In this work, the analyses of murder and manslaughter are treated in a different manner than the usual orthodox study of the law pertaining to these subjects, and an attempt is made to modernize the approach to them more in keeping with legislative enactments and later court decisions.

In format, the book consists of five sections. The first part, dealing with early developments, furnishes an interesting background history of the law of homicide prior to the 18th Century. Part Two is devoted to a study of homicide at common law and the beginnings of the various phases of murder and manslaughter. In this section the author traces the early development of the various degrees of murder and manslaughter which arose as the courts attempted to modify and adjust the early rigid provisions which had existed as an outgrowth of Anglo-Saxon customs. In Part Three, the author analyzes the statutes in the various states relating to murder and manslaughter and points up the legislative trend to rest liability on the degree of negligence in the defendant's conduct in determining responsibility for his acts, rather than following rigid rules. The various defenses to a charge of homicide, with special attention focused on self-defense and the defense of insanity, are the subject matter of Part Four. The last section reflects the author's views on what legislative changes appear necessary to modernize our laws in keeping with the

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