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Book Reviews

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BOOK REVIEWS

MODERN TRIALS. By Melvin M. Belli, San Francisco. 1954. Three Volumes, 2763 pp. $50.00. Bobbs-Merill Inc., Indianapolis.

In April, 1952, a train of the Soo Railroad was derailed on a culvert washout two miles east of the hamlet of Falkirk, in McLean County, North Dakota. The engineer was killed. This started a chain of events ending up in the Hennepin County Court in Minneapolis and resulting in an "adequate award". Of counsel for plaintiff was Melvin M. Belli of San Francisco. In between the start and the finish, the full-scale operation of modern bigtime personal injury practice was in function. What this means, no one in the world knows better than Melvin Belli.

Belli is a forty-eight year old San Francisco lawyer. He is a man of definite views and opinions, and he is the recognized leader of a school of thought in the profession of law which is associated with the National Association of Claim and Compensation Attorneys. He thinks of himself as a "plaintiff's attorney".

The profession of law brings forth controversial people—people who have strong views, one way or the other. No attorney reading this work, regardless of opinions, would fail to recognize it as the greatest work on trial practice ever set in print. As a reference work alone, it is without peer, because of its vast scope. As a lead to finding authorities, whether case law, law review articles, or specialized texts, it stands unmatched alone.

The school of thought which Belli represents has its own slogans and its own catch-words. Chief among these is the concept of "demonstrative evidence." Demonstrate to the jury by means which reach the jury's eyes, instead of by means which reach only the jury's ears. That is the thought in a nutshell. Demonstrative evidence is not new, and it is only Belli's ingenious use of it, and advocacy of its use, which is novel.

"The adequate award," is Belli's language for big verdicts.

Belli has applied the ultramodern techniques of salesmanship, investigation, and public relations to the personal injury lawsuit. This is not the salesmanship of the old-time pitchman or the door-to-door salesman. It is the modern technique of the advertising agency, complete with graphic demonstration and statistical analysis. It is significant that Belli prepares, and advocates preparing, a detailed brochure in each case. This is used to sell to the defendant

insurance company or its adjuster, the magnitude of the claim. There is no bag of tricks, rather it is "race of disclosure". Under modern conditions with a corporate insurance adversary, armed with the same techniques as Belli, it is recognized that the plaintiff's attorney is only fooling himself if he thinks he has surprises in store for the defendant on trial.

Already, this review sounds as though it were review of Belli instead of his authored work. That is necessary because Belli and his product are not severable. They are one.

It is clear we have here a new genus, or species. This modern personal-injury trial lawyer needs the right environment to flourish and develop to his present stage. That environment is the big metropolitan center of population. The Darwinian law of "survival of the fittest" governs there. Outside of such a center, it is not likely that many specimens will be found.

About this type of practice, there are things which cannot be greeted with approbation. Belli speaks of the race between claims adjuster and the "investigator" (sic) for a personal injury attorney, to reach a potential claimant. If the adjuster does not get there in five hours after the accident, says Belli, he will find a claimant already "prepared" by a skilled personal injury attorney. Such a claimant cannot be put under "control" by the insurance company. Belli looks with apparent tolerance at the practice of an attorney subsidizing and maintaining such a client, during the pendency of the action.

Such as attorney-specialist gets his jury information in "canned" form from a service, several of which flourish in California. In one case, the service is only paid for if a favorable verdict is received by plaintiff.

Adequate preparation is an old rule in the legal profession. Belli's preparation, accomplished of course with competent assistance, is thorough in a sense not generally known.

Although the work is entitled "Modern Trials" it covers the entire panorama of law practice. That section dealing with settlement negotiation is especially fine. (Belli professes to prefer settlement to trial. It goes without saying that he means his version: "adequate.")[1]

On the subject of jury-picking, Belli feels that the city trial law-

1. Reviewers Note: See also "Settlement Negotiations" by John R. McConnell of the Philadelphia bar. "The Practical Lawyer", Vol. 1, No. 2, February 1955, (a publication of the American Law Institute) contains this superb article.

yer, not knowing his jurors personally, develops necessarily his "intuition", and hence becomes more skilled in that field than the small-town lawyer. This point of view is of interest to us in North Dakota, a rural state. Belli discounts the old theories which generalize about which jurors of which nationality lean one way or the other. Again considering his views in the light of North Dakota practice, it is interesting that Belli thinks farmer-jurors are not good for the plaintiff. He calls them thrifty, selfish, and not inclined to excuse contributory negligence. This reviewer's comment is that it depends on which farmers you are talking about. Agriculture in California, creates a different sociological climate in the rural county, than that in North Dakota.

North Dakota, by the way, is a state classified by the author as a "low verdict center". Since Belli has statistically tabulated verdicts in personal injury cases, in a way no one seemingly has done before, this makes fascinating reading. Our neighboring state of Minnesota, contrarily, is a "high-verdict" center. Wisconsin, again, does not bring in the "adequate verdict", says Belli, and he notes that that state is a comparative negligence state and also one where the insurance company may be joined. This gives rise to a paradox or a non sequitur, which to date is not explained.

Within states, there are variations. San Francisco is high-verdict, and some of the northern rural counties are not. It would seem to this reviewer that the San Francisco metropolitan area, in any event, is the ideal environment for the flourishing of the personal injury law suit. Traffic, harbor activity, hazardous industries, large military-naval installations,[2] the centralizing effect on personal injury law practice of strong organized labor unions, all play their part. This comment is necessary because, although Belli appears to have tried lawsuits nearly everywhere in the United States, San Francisco and its local atmosphere and color, are part and parcel of Belli and his work.

One of the best points about this work, is that it is an index to countless specialized works. This reviewer has previously reviewed for this publication "Aviation Accident Law" by Rhyne, and "Photographic Evidence" by Scott. Taking these two excellent specialized books at random, they were found to be cited, the latter justifiably very often and profusely. Belli's section on Criminal Demonstrative

2. Miltary and naval personnel and their dependents appear frequently in the ranks of personal-injury plaintiffs cited by Belli. The factor of age group alone would help account for this—actuarial studies in the Occupation Forces in Germany have shown a much higher accident rate in the lower ranks, which in turn is largely attributed to the age differential.

Evidence seems to cite every work ever written in the field of any consequence. That section of the work alone would justify its purchase by the States Attorney who actually must try criminal cases of consequence. There is nothing in the field of criminal investigation, down to the latest development in the field of comparison and identification evidence, that is not covered and that which is not completely discussed in the book, can be run down by reference to the specialized works cited therein. At this point, it is well to give Belli's correct estimate of the law-enforcement officer: Underappreciated and underpaid.[3] Belli points out that many phases of demonstrative evidence developed for criminal trial purposes are overlooked by the civil trial lawyer.

A few words are here in order about the section dealing with models and replicas in court. To make something of interest to the Western North Dakota practitioner, there is a fine discussion of model oil rigs, both rotary and old cable-tool models, together with illustrations of models used, principally by Oklahoma lawyers. This is just a small random example chosen from many for its local applicability. A model of practically every device made is shown or discussed in the book, as having been used in some past litigation.

To illustrate the tremendous research that went into his preparation: Belli and his associates leafed through every volume of every Reporter System to find every case where a picture or diagram is included in the appellate report. Although Belli has said (supra) that we are a low verdict state, the North Dakota Supreme Court is cited approvingly here as elsewhere.[4] He also says:

"In the Northwestern Reporter are found perhaps the most liberal uses of demonstrative evidence on appeal, both in frequency and variety." Vol III, p. 1880.

Mr. Belli is manifestly not lacking in self-confidence. Although at one point he says that doctors as a profession are virtually immune in malpractice cases,[5] at another point he tabulates the big malpractice verdicts he has attained. If a remark such as this gives a superficial or snide view of his work, it should be countered by stating, for instance, that his erudition and research in the history and traditions of the Common Law is such as probably few professional teachers of law attain.

3. And very useful in the trial of auto accident cases, as Belli freely acknowledges.

4. The case cited, with illustrations, is *Zeis v. Great Northern, 61 N. D. 18, 236 N.W. 916* (1931) a railroad crossing case familiar to many of our Bar. This work is illustrated profusely, and the illustrations are one of the most attractive and informative features.

5. A rather unique North Dakota malpractice case cited by Belli is *Milde v. Leigh (1947), 75 N. D. 418, 28 N.W.2d 530.*

For the purposes of comparison with trial practice today, Mr. Belli has a brief section on great trial lawyers of the past. The standard figures are mentioned: Earl Rogers, Bill Fallon, Darrow, and others. Most dramatically, though, he brings back to life, through contemporary newspaper comment principally, Bob Ingersoll in his prime—striding the court room in Butte, Montana, in the Davis will contest case of 1891—mesmerizing the jury and spectators despite previous warning by opposing counsel for the jury not to be bewitched by oratory. The warning was of little avail, evidently.

Philosophically, or possibly strategically for the future, Belli is concerned about the adverse publicity given to big personal-injury verdicts. He recognizes that there is the beginning of a school of thought epitomized in the North Dakota Law Review article (reprinted) contained in Volume 30, January 1954, Number 1: "Let's Compensate Not Litigate." (Which article, of course, he has cited.) He deals with seeming tongue-in-cheek good will, with the attitudes of the insurance companies and their attorneys.[6]

In summation then, this work has the character of a doctrinal tract. It would be most superficial to write it off as nothing else. It is an encyclopedic work on the subject of law practice, excluding only those fields which do not involve the trial of cases. It belongs in every law library. It belongs on the shelf of every lawyer who tries lawsuits—and in this state we have not reached a stage of specialization where a lawyer will spend his professional lifetime without entering court. To regard it as a "personal injury" work, would also be superficial. Again choosing an example at random, the lawyer with a flood or drainage damage suit, on either side, will find superb examples of demonstrative evidence such as maps and photographs and their presentation, in that type of case. (The examples are from flood cases arising out of the ravages of the Los Angeles river, which like most things Californian, seems to go to extremes, from dry bottom to flood stage on short notice.)

Only a few rueful notes are to be found. Mr. Belli has found that the sentimentality of San Franciscans about their cable cars has made it difficult to recover in cable car suits. Such a sin, apparently, as bringing such an action, is nearly as bad as to use the appelation "Frisco" which (San Franciscans believe) belongs only on boxcars.

6. Like a military commander studying Order of Batle information about the enemy, Belli has become an expert on claims and insurance procedures from the opposite side of the lines. His discussion on this alone is worth the price of the book, in connection with the subject of settlement negotiations.

Also, Belli had a sad experience in San Antonio, Texas, where one look at a Federal Jury panel convinced him it was a good panel only from the standpoint of passing on membership on a board of directors or that of an exclusive private club.[7] His views on the non-representative nature of Federal jury panels in some jurisdictions will find echoes elsewhere. (However he thinks there is a growing trend to take your chances in Federal Court on personal injury actions).

It is customary to recommend a book, when called upon to review it. Instead of recommending it for purchase this reviewer recommends that the work be examined at a law library, public or private, owning "Modern Trials". It is felt that such examination will, per se, result in purchase. There has been no such work before, and there will not be again. No reviewer can adequately describe its scope or its value. The best "demonstrative evidence" to convince the attorney of its value, is to look at it. "Seeing is believing" whether the potential purchaser is a proponent or opponent of the views represented by the author.

WILLIAM S. MURRAY.*

THE FIFTH AMENDMENT TODAY. By Erwin N. Griswold. Cambridge: Harvard University Press, 1955. Pp. vi, 82. $.50.

"The privilege against self-incrimination embodied in the Fifth Amendment has been a long time with us. It is, I believe, a good friend as well as an old friend. It embodies a sound value which we should preserve. As we increase our understanding of it, and the part it has long played in protecting the individual against the collective power of the state, we will have better appreciation of some of the basic problems of our time."[1] Thus, does Dean Griswold state the basic premise on which this short, highly readable and very informative work is based. *The Fifth Amendment Today* is actually a collection of the texts of three speeches delivered by the author; the first before the Massachusetts Bar Association, the second as a Phi Beta Kappa address at Mount Holyoke College and the third before the New Jersey Institute for Practicing Lawyers.

Though Griswold is known primarily as a taxation expert, his grasp of basic principles of constitutional law and evidence and

7. His fears were justified. He lost the case.

* Member of the Bismarck, North Dakota bar.

1. P. 30.

their social and political implications is excellent. Though one might think that anything written by so eminent a personage in the legal world as the dean of Harvard Law School might be more meat for the legal mind than the lay, it is, in fact, an excellent exposition of the subject it discusses for both. The author strips away much of the emotionalism which has clouded the basic issues raised by the use of the privilege against self-incrimination embodied in the Fifth Amendment, and discusses the question in the light of reason and common sense instead of employing the "sound and fury signifying nothing" used by many commentators and public figures generally. It has become virtually commonplace today for the man in the street to believe that any person who is being investigated for alleged Communist activity makes a substantial admission of guilt when he asserts his constitutional privilege in answer to the classic question. Griswold points out the fallacies underlying the conclusion by the use of two hypotheses which are worthy of note here.

Professor A is a college teacher. He suffers from the occupational disease of many of his brothers known as idealism. During the middle thirties the professor became appalled at some of the excesses being perpetrated by the Fascists in Spain. Moved by his feeling that the Communists were fighting a serious menace, he became a member of the Communist Party, undoubtedly feeling in view of the times, that the party was no more opprobrious than any other political party. The Party stalwarts saw him and others like him as convenient and valuable tools for the infiltration of American education, and were careful therefore to keep A's association with the Party on only the highest academic plane. Thus, he was not exposed to the sordid plots of espionage, sabotage and the like presumably being formed with an eye to the eventual overthrow of the Government. However, despite the Party's elaborate precautions, little by little, A saw the true nature of the monster which he had embraced and broke away, hoping to put the incident forever in his past. Years later, however, he was called before a Congressional committee and asked to testify as to certain of his past associations. Here was a man truly on the horns of a dilemma. He took, in his confusion, what seemed to be the lesser of three evils, and stood upon his constitutional rights, knowing that he would probably be branded a Fifth Amendment Communist, but feeling that there was no other course open to him. No reasonable person could in equity and conscience claim that this

man was guilty of anything more than being subject to mortal failings. It could be said that A should have answered truthfully. and then gone on to state the true reasons why he became a member of the Party, but A, as a layman, may well have been in mortal fear of the possibility of imprisonment if he gave an affirmative answer. It should never be forgotten that fear may falsely taint the testimony of the most honest witness with the color of prevarication. This is especially true where the witness finds himself surrounded by television, newsreel and press cameras, klieg lights, microphones and other equipment that is more properly found in a film studio than in a court room. The author succinctly states that the processes of justice are not, and should not be treated as, show business.

Turning to the second hypothesis, Professor B was also a college teacher, though he was a more realistic man than Professor A, and knew from the start the inherent fallacies and evils of Communism. Hence, he never associated himself with the Party. However, a friend, whom he trusted implicitly, solicited a contribution from him to an organization with a perfectly innocent and apparently worthy name. It was later revealed that this organization was a so-called "front" organization, and that B had inadvertently helped the Communist cause. When he heard this, he was disturbed, and when he was, like A, called to testify some time later before a Congressional committee, he was terrified. When he was asked about his past or present party affiliations, he, also, asserted the Fifth Amendment. It is true that he could have answered truthfully in the negative, but not being a lawyer, he did not realize this. He believed that because he had at one time inadvertantly contributed to the Communist cause, he might be considered a Communist. However, it is obvious that this man was no more guilty than A. Griswold points out that fear of prosecution for perjury may not be a proper ground for claiming the privilege, but goes on to state that perjury is not the only matter encompassed by the situation. If the witness answered "no" to the question put to him relating to past or present membership in the Party, he might, by virtue of the doctrine of waiver of the privilege find himself explaining his membership in front organizations at some length (as in the case of Professor B), since whether his answer to the query was in the affirmative or negative, having given some answer, he could not later assert his privilege as to questions bearing on the point in issue, namely whether the witness had at any time given aid to the Communist cause. This be-

ing the case, answers elicted as a result of this waiver could be used against him in a later prosecution for being a member of the Communist conspiracy. Of course, Griswold's hypothese are only two out of many available to explain why an innocent person might choose to assert his rights under the Fifth Amendment.

The doctrine of waiver of the privilege has been applied, with perhaps questionable wisdom, to committee investigations as well as adversary proceedings. As the author points out, witnesses who have a legitimate fear of prosecution are made reluctant to answer any questions for fear of leaving themselves open to further questions which might be embarrassing to them. This defeats the basic purpose of the Congressional committee, which is not to prosecute, but to elicit facts for the public good.

As Griswold points out, the Fifth Amendment is for the protection of the innocent as well as the guilty. It should be respected. Nothing is gained by adopting police state methods to fight a police state. On the contrary, a great deal is lost, since the nation runs a serious risk, if it does so, of defeating its own purpose.

Generally speaking, this book is to be noted for its promulgation of common sense, a commodity that Americans have always, and it is to be hoped, will always, understand.

DOUGLAS BIRDZELL.