

REVIEWS

CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION. By Arthur T. Vanderbilt. New York: Washington Square Publishing Corp., 1952. Pp. xx, 1390. \$8.50.

REVIEW of this stupendously compendious volume presents difficulties. I have concluded that it must be approached on two levels. The first is as an inclusive procedural reference book for teachers, scholars, lawyers, and reformers. The second is as a teaching tool for law school instruction.

On the first level one can welcome this as a valuable contribution, presenting, with imagination and originality, a modern, forward-looking approach to law administration. The inclusion of rules of criminal procedure, the stress on judicial statistics, the materials on execution of a judgment, selection of judges, jury service, the legal profession and its ethics, legal aid and court organization—all these and similar sections of the book show a reaching for the practical details of judicial administration rare in either texts or casebooks. The culminating touch of a supplement containing the Martindale-Hubbell Court Calendars, thus introducing the student to the judges and taking him right into the courts of the various states, should add final reality to the attempted picture. Interspersed with all this are many legal essays on a variety of issues procedural, such as the undesirability of employing the practice courses as a mere adjunct to substantive courses for the purpose of explaining historical references and allusions. The wonder is how the busy author, among all his manifold duties, could find time to prepare all this—a wonder which grows with each new step of his distinguished career.¹ Since I am developing this phase of the book in another review,² I shall not attempt to cover it more fully here. A single caveat is necessary: the materials are selective and do not exhaust, perhaps at times even distort, the subordinate topics discussed. But this is a limitation inherent in any widely inclusive book of legal reference. It does not detract excessively from the book's unique value as a professional aid and cultural guide in the field of law administration.

When we come to the function of the book as a vehicle for modern case teaching in the American law school, serious questions arise. No one can appreciate more than I the individualistic, nay divisive, characteristics of procedure teaching throughout the country. Even so, there remains a feeling that too much has been attempted for successful accomplishment, and concern—aggravated by the author's imposing professional stature—lest distortion appear and even distrust be suggested as to some of the most basic of modern reforms.

1. See Clark, Review of VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, 59 YALE L.J. 1371 (1950).

2. In 26 CONN. B.J. No. 4 (Dec. 1952).

In our schools the teaching of procedure has followed four major lines, with well-nigh innumerable variations in between. The *local*, emphasizing the law of a particular state, had original vogue,³ but yielded when its emphasis upon vocational training was found inconsistent with both the aims of a national law school and the basic essentials inherent and actually discoverable in the subject. Nevertheless it tends to return intermittently. Next the *historical* provoked great interest because of a general law school trend in that direction at the beginning of the century and because it fitted in well with the rest of the curriculum and was unobtrusively popular with the teachers of other subjects. This approach still has vogue; one might even conclude that most substantive law teachers would consider a combination of the local and historical approaches all that is needed in the procedural field. But this view is so effectively destructive of student interest and so uncondusive to knowledge of the modern courtroom that procedure teachers rebelled and sought their own place in the curricular sun. Since the cases—as well as lawyers and judges—continually proved not only the desirability, but the actual necessity, of some acquaintance with both present-day law administration and the wide movement seeking its improvement, modern procedure could not long be barred from the classroom. But in what form was it to enter in view of the differences in approach and over objectives and the unsettling effect of reform? The immediate answer was, not unnaturally, the *survey*, ranging temporally from past darkness to contemporary light and geographically from those areas reflecting the past to those mirroring the future. Such courses certainly mark an advance into the modern era, but they present a mass of undigested material which cannot help but suffer by contrast with the material presented in substantive law courses. Finally, there is the approach of detail—I should like to say the *scientific* approach,⁴ but hesitate to garb so ostentatiously the program to which I have long been committed⁵—stressing precise and extended study of modern procedure, notably as exemplified in the federal rules. Such an approach is deemed necessary in order that the student may understand the subject and recognize the pitfalls which lurk to trip the unwary.

This volume is distinctly of the survey type, carried to a degree more extensive than usual, consonant with the author's unique experience in law administration and his imaginative grasp of details. So, if it works, this should bring freshness to the schools in a needed area of instruction. But for this

3. For the older view of distinguished authorities that only the local code should be taught, see C. W. Pound, 1922 HANDBOOK ASS'N AM. L. SCHOOLS 99, 105; *Teaching Civil Procedure*, 4 CORNELL L.Q. 143 (1919); Hough, 1922 HANDBOOK ASS'N AM. L. SCHOOLS 110, 112. Cf. CLARK, *CODE PLEADING* 69-71 (2d ed. 1947).

4. See Chorley, *Pleading—A Subject for Scientific Study*, 12 MOD. L. REV. 319 (1949).

5. See the Prefaces to CLARK, *CASES ON MODERN PLEADING* vii (1952), and to CLARK, *CASES ON PLEADING AND PROCEDURE* vii, ix (2d ed. 1940) (with citations at p. x to other discussions by the writer); also Clark, Book Review, 97 U. OF PA. L. REV. 917 (1949). See also Donnelly, Book Review, 60 YALE L.J. 377 (1951).

puzzled or doubting Thomas, it is difficult to see how it can be made to work, except perhaps by an exceptional lecturer of fiery skill or of unusual inquisitorial powers. The case method, in focusing sharply upon the dynamic and the concrete, puts a premium on matters having intellectual bite for the student. That bite is available at once in torts and contracts. The student can get it in the law of procedure, but with more difficulty, since each narrow case illustrating a single point of pleading is rarely as interesting as the individual case of tort or promise. But putting together cases involving differing methods of stating a claim in negligence or upon the "common counts" in an endeavor to work out both a philosophy and a practical course of daily court conduct can become exciting. At least it is to the Pacific Coast lawyers who today are fighting over it in ways that the doctrine of consideration in the law of contracts does not stimulate.⁶ That intellectual attraction, necessary in the competition of subjects in the modern law school, is likely to be lost—to the permanent impairment of intelligent interest by the eventual practitioner—by long dissertations, in themselves unobjectionable or even admirable.

For my part I must confess that, after many years at the game, I would not know how to teach much of this book, particularly with first-year law students for whom it is especially designed. Thus right at the beginning there is considerable monographic material—sixty-two pages—on such topics as the importance of procedure, the unfavorable attitude of substantive law teachers, and "The Complexity of the Organization of American Courts," together with Dean Pound's famous essay on "The Causes of Popular Dissatisfaction with the Administration of Justice." However valuable this is for citation, it suggests only a series of lectures—and one knows what a wet blanket that is. Moreover, even though some cases then follow, they are merely illustrative of selected topics; one must go many pages further to find materials providing conflict or base for intellectual discussion. And these seem all too isolated. Even such original ideas as the incorporation of cases under the rules of criminal procedure with the civil cases really slow the discussion. Although in theory the connection should be close, actually they present quite disparate problems.⁷

Of course, this may mean only that such a book is not for me but is for teachers more skilled in its approach. This I recognize; while I should like to see how such a book may be employed, I do not wish to question the possibility of its successful pedagogical use. But my deeper concern is aroused by the perhaps inevitable consequence of a lopsided, even misleading, treatment

6. See the proposal by the Ninth Circuit Judicial Conference of an amendment to FED. R. CIV. P. 8(a) requiring in the complaint a statement which "shall contain the facts constituting the cause of action." REP. JUDICIAL CONF. OF THE U.S. 23 (Sept. 22-24, 1952).

7. Thus the material on civil process and its service, attachment, and provisional remedies, pp. 234-99, does not mesh with the material on arrest of an accused or search and seizure of his person or property, pp. 299-320. Important as are the problems in each field, those from one area do not throw direct light on those from the other.

of many an important subject. Illustrations are many; they include such diverse subjects as appealability of trial orders, class suits, intervention, joinder, objections to pleadings. One fears that a little of this inheres in almost every special topic. A striking example is the admissibility in evidence of business entries, the treatment of which is confined to the case of *Palmer v. Hoffman*⁸ and a note and map showing the extent of adoption of the uniform or model statute. The case quoted is of course the leading one; but thus to limit the materials is to conceal the scholarly criticism it received and the present judicial trend toward restoration of the statute.⁹ Except as a point of departure for a long classroom lecture, the material is therefore inadequate to the point of inaccuracy.

One further example must here suffice, one of particular importance as touching a basic and apparently still misunderstood issue of modern reform. I refer to the manner of pleading in the new federal procedure and the omission there of a definite admonition that the pleader must "state the facts constituting the cause of action."¹⁰ The history of the confusion in the code emphasis upon pleading "facts"; the criticism of scholars; and the Advisory Committee's attempt to strike a sane middle course, adapting, for negligence and the common counts, the common-law precedents from trespass on the case¹¹ and assumpsit, while abjuring the more technical of the precedents from New York and elsewhere¹²—all make an interesting study which can be presented substantially from case material. This solution is not, however, achieved by a single rule,

8. 318 U.S. 109 (1943). See discussion of the case in Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 565-7 (1946); Note by J.M.M., 56 *id.* 458 (1942); Note, 54 YALE L.J. 868 (1945).

9. See, e.g., *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122, 130 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); *Korte v. New York, N.H. & H.R.R.*, 191 F.2d 86 (2d Cir.), *cert. denied*, 342 U.S. 868 (1951), noted in a number of law reviews, including 37 CORNELL L.Q. 290 (1952) and 5 VAND. L. REV. 651 (1952). See also citations in note 8 *supra*.

10. For recent revival of the issue, see note 6 *supra*.

11. Federal Form 9, "Complaint for Negligence," comes straight from the common law, *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (C.P. 1833), by way of the Massachusetts statute, MASS. GEN. LAWS c. 231, § 147, p. 2892 (1932). See *Reichwein v. United Electric Rys.*, 68 R.I. 365, 27 A.2d 845 (1942), quoting the declaration in 2 CHITTY, PLEADING 574 (16th Am. ed.). So Federal Forms 4-8 are in substance the common counts which were upheld in code pleading. Cook, "Facts" and "Statements of Fact," 4 U. OF CHI. L. REV. 233, 245 (1937); King, *The Use of the Common Counts in California*, 14 SO. CALIF. L. REV. 288 (1941); Note, 30 CALIF. L. REV. 585 (1942); Note, 4 *id.* 352 (1916); CLARK, CODE PLEADING 287-96 (2d ed. 1947).

12. E.g., *City of Logansport v. Kihm*, 159 Ind. 68, 64 N.E. 595 (1902); *Frosch v. Sears, Roebuck & Co.*, 124 Conn. 300, 199 Atl. 646 (1938); *Terner v. Glickstein & Terner, Inc.*, 283 N.Y. 299, 28 N.E.2d 846 (1940). Other cases showing the unfortunate diversities of view, even strange anomalies, which had developed under code pleading are collected in CLARK, CODE PLEADING 225-65, 287-311 (2d ed. 1947), and CLARK, CASES ON MODERN PLEADING 35-271 (1952).

such as the often discussed Federal Rule 8(a), requiring the pleader to give only a "short and plain statement of the claim showing that the pleader is entitled to relief." It is shown more clearly in the federal Appendix of Forms, supported by other provisions, such as Rule 8(e), permitting pleading alternately, inconsistently, or hypothetically; Rule 12(b), the rule for taking objections in law, which tends to turn every such step into a motion for summary judgment on the merits; Rule 15(b), the rule for recognizing amendments to conform to the evidence; and indeed several other provisions pointing in the same general direction.¹³ Of course, the system goes further than some wanted or still accept;¹⁴ but that it is no wild impractical idea is shown not only by its very real success, but also by the serious criticism of able scholars that it does not go far enough toward "notice pleading."¹⁵ This rich vein of important and necessary material is hardly tapped: there are only two or perhaps three relevant cases, which do not meet head on;¹⁶ and there are some references to critical views, and some questions, so stated as to make the nature of conflicts—even among critics and questioners—less apparent than the questions.¹⁷ Finally, the

13. Such as the pre-trial, depositions and discovery, and summary-judgment rules, FED. R. CIV. P. 16, 26-37, 56, removing the emphasis from the pleadings and providing means for quickly uncovering the merits.

14. The original objectors—still unreconciled, see note 6 *supra*—were Professor McCaskill, as in, e.g., *Easy Pleading*, 35 ILL. L. REV. 28 (1940), *One Form of Civil Action, But What Procedure, for the Federal Courts*, 30 ILL. L. REV. 415 (1935), and the article cited note 18 *infra*; and Judge Fee, as in *The Proposed New Rules for Uniform Procedure in the Federal District Courts*, 16 ORE. L. REV. 103 (1937), *The Lost Horizon in Pleading under the Federal Rules of Civil Procedure*, 48 COL. L. REV. 491 (1948), and *Justice in Search of a Handmaiden*, 2 U. OF FLA. L. REV. 175 (1949). Approval of the rules has been so general that it is hardly worth-while to attempt citations; a considerable number appear in the reviewer's books as cited in note 12 *supra*.

15. See the noteworthy criticism in the most recent book and outstanding authority, MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 180-200 (1952). See also Simpson, *A Possible Solution of the Pleading Problem*, 53 HARV. L. REV. 169, 203 (1939). Although at times carelessly so designated, the federal rules are not an example of "notice pleading," as the reviewer points out in CLARK, *CODE PLEADING* 240, 241 (2d ed. 1947).

16. The cases chiefly relied on are *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), an opinion by the reviewer, where the court refused to dismiss summarily on the pleadings a claim against a collector of customs for lost goods, and *Bush v. Skidis*, 8 F.R.D. 561 (E.D. Mo. 1948), where the court granted a defendant's motion to make more definite and certain a complaint following Federal Form 9, which is explicitly "sufficient" by the terms of FED. R. CIV. P. 84. Whatever their opposing trends, the two cases are not directly anti-thetic.

17. References at pp. 383, 384, to "Professor Simpson's criticisms" (see note 15 *supra*) and "Dean Pound's four requirements for the pleadings, as quoted by Professor Blume" (in *Theory of Pleading—A Survey Including the Federal Rules*, 47 MICH. L. REV. 297, 311-12 [1949]), with the admonition to "judge whether the pleadings under the federal rules adequately fulfill these purposes," placed with other material supporting formal written pleadings, tend to suggest deficiency, rather than excess, in the federal system.

section ends with citation of an article by the most persistent critic of the newer procedure as apparently the guide and mentor for all to follow.¹⁸

I conclude, from the evidence above briefly referred to and from some other indications, that the distinguished editor, although generous in praise of the federal civil and criminal rules generally, is, with respect to this aspect of pleading, a critic and an opponent.¹⁹ But this view is not made explicit, and I suggest it with some hesitation because I do not wish to read beyond the lines actually before us. This suggests an incidental point of casebook editing: Can and should the editor keep his personal convictions out of his material? On the whole I have concluded that he should not because he cannot, and that it is much better to disclose enough for all—teachers, students, readers—to shoot at than to leave the matter ambiguous. This volume seems to me an illustration of the principle. Had so Olympian an authority shown a clear and direct criticism of this important segment of modern pleading, it would have been provocative of excellent discussion and debate and consequent increase of knowledge. And there would have been available enough counterarguments to add proper fuel to the controversy. (Incidentally, the editor is selective in the text authorities he cites and approves; obviously he does not regard some prominent procedural leaders as bringing enough to discussion, or possibly as “sound” enough,

18. McCaskill, *The Modern Philosophy of Pleading*, 38 A.B.A.J. 123 (1952), which is cited at p. 401 as “an excellent discussion of the functions to be served by the pleadings and a summary of the opposing modern positions on these matters.” The first is matter of opinion; the second is surely true only in a Pickwickian sense.

19. The author was cited and quoted in the discussion at the Ninth Circuit Judicial Conference, *supra* note 6; his opinion in *Grobart v. Society for Establishing Useful Manufactures*, 2 N.J. 136, 65 A.2d 833 (1949), is singled out for particular praise in McCaskill, *supra* note 18. But the case is not, as there stated, one “reversing a judgment below because of [a complaint’s] inadequacy”; rather it was affirmance of a judgment upon extensive pleadings where, as against new allegations—a “departure”—in the reply, the court said of the facts shown: “It is difficult to conceive of a clearer case of estoppel in pais.” In view of this decision on the merits, the pleading discussion may well be considered obiter. The author’s opinion contains a considerable and admirable historical discussion of the functions of pleadings, leading to a curiously strict admonition against departure in the reply from the original theory. Since the “theory of the pleadings” doctrine is gone, this, if so applied hereafter, would seem a resurrection in a most unprofitable way of a common-law technicality, merely to compel the polishing up of the complaint, rather than the reply. N.J. Rule 3:8-1 does contain a variation from FED. R. Civ. P. 8(a) in that it requires “a statement of the facts on which the claim is based, showing that the pleader is entitled to relief,” rather than “a short and plain statement of the claim showing that the pleader is entitled to relief.” There is nothing to indicate that this entails a difference in interpretation, though the necessity of bringing cases to the “Chancery Division” or the “Law Division,” N.J. Rule 3:40-2, does result in technical formalities reminiscent of unmerged law and equity. See O’Neill v. Vreeland, 6 N.J. 158, 77 A.2d 899 (1951). Perhaps against this background, apotheosis of the old would be not unexpected; at any rate, it appears to be found in *Zabady v. Frame*, 91 A.2d 643 (N.J. Super. Ct. 1952), where the majority rely on the *Grobart* case to repudiate federal doctrine and hold an allegation, “On or about December 18, 1950,” too indefinite, over a vigorous dissent based on federal precedents.

to be worthy of reference.²⁰) As it is, this basic problem remains in so abbreviated and attenuated shape that the students are left in a haze as to the nature of the problem, not to speak of the philosophy involved and its practical implementation in day-to-day litigation.

As I have shown, my attitude toward the book is unfortunately ambivalent. There is so much of good and interest and careful preparation in it that I should like to join in its general acclaim.²¹ So I do to a large extent. But I cannot avoid some query as to whether it provides the intellectual exercise to arouse the student's imagination and secure his permanent and abiding interest. And I end with concern lest undue brevity in detail may stimulate affirmative reactions with undesirable effects in the procedural field.

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RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER. By Samuel Spring. New York: W. W. Norton, 1952. Pp. xviii, 385. \$7.50.

IN the last issue of the JOURNAL, this reviewer discussed a book by Alexander Lindey¹ having much in common with Mr. Spring's work. Both books deal with the law protecting intellectual creations; both are intended primarily for laymen rather than lawyers; both cite cases at the end of the book to support points made in the respective chapters; both are by practicing lawyers in the so-called entertainment branch of the law. The similarities, however, end here.

Mr. Lindey's book is limited to a single branch of this broad field of law, namely, plagiarism; Mr. Spring's work runs the whole gamut in its five parts: Right of Privacy (31 pages); Defamation (34 pages); Copyright (155 pages, of which two chapters cover plagiarism—pp. 177-88; 213-28); Unfair Competition (24 pages), and Television, Ideas, and Censorship (50 pages). With so much to cover, Mr. Spring is forced to rush through his subjects at a rate that leaves little room for an easy style on the one hand, or complete legal analysis on the other. Yet many portions of the book are provocative and worth noting.

20. Thus citation of the writings of Professor J. W. Moore, except as they appear in reported cases, is limited to a few inconsequential matters.

21. Murrah, Book Review, 38 A.B.A.J. 754 (1952); Medina, *Judicial Administration and the Law Schools*, 40 KY. L.J. 359 (1952); Winters, Book Review, 36 J. AM. JUD. SOC'Y 61 (1952); Rooney, Book Review, 27 ST. JOHN'S L. REV. 195 (1952); De Witt, *Chief Justice Vanderbilt's "Cases and Materials on Modern Procedure and Judicial Administration,"* 7 THE RECORD 450 (1952); Parker, Book Review, 5 J. LEGAL EDUC. 265 (1952).

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1. PLAGIARISM AND ORIGINALITY (1952); see Review, 62 YALE L.J. 126 (1952).