

peared in the first edition of Freund's work, thus representing survivals of a test of nearly thirty years of teaching.³⁵ Several of these latter also appear in the casebooks of Professors Stason and Maurer.³⁶

This slight degree of duplication in case materials, and the widely varying analyses and treatments of the subject matter afford the most convincing demonstration of the tremendously broad and rapid development of administrative law in this country. Despite the fact that there are now five (and six, if the first edition of Frankfurter and Davison is included) casebooks in the field of selection, there is no overcrowding. Each has made its own particular contribution, all, of course, coming after Freund, and all building on the foundation he laid so well.

FRANCIS C. NASH†

CASES AND OTHER MATERIALS ON JUDICIAL REMEDIES. By Austin W. Scott and Sidney P. Simpson. Cambridge: Published by the Editors. 1938. pp. xi, 1309. \$7.00.

When competent and experienced scholars turn their hands to casebook editing, the product is fairly sure to be so scholastically and technically impeccable that the only thing left for the reviewer to do is to discuss his own pedagogical preconceptions. That, I believe, is the present situation, or at least I like to think so. As previous experience has shown, the editors can be depended upon for careful workmanship and a collection of cases and other material all fully annotated and documented. The present casebook is no exception. This voluminous work is a mine of trustworthy information on procedural materials, useful no less to the practicing lawyer and judge, as to the student and teacher. It deserves the high place it will undoubtedly assume as a source book of procedural law. So let us turn to the teaching ideas which it supports and illustrates.

It can be demonstrated, I believe, that the general field of civil pleading and procedure is the one field which the Harvard Law School over the years has failed to treat in the grand manner, and that this omission has had profound effects in making our law administration—until recently—technical, particularistic, and backward. True, Ames, as a part of a busy career, turned his attention to pleading and made a sound start in organizing materials in a single and general synthesis, rather than in the disparate segments which still seems to be a usual practice. But the work was not carried on from this substantial, if overhistorical, beginning in such a way as to develop a great master comparable to, say, Thayer in the field of evidence, or to affect profoundly both the future teaching and the case law of the subject. After various vicissitudes the initial procedural work at Harvard came to be a first-year

35. See the italicized cases in footnote 34. Also appearing in Freund's first edition, and reappearing in Professor Sears' casebook is *Commonwealth v. Kinsley*, 133 Mass. 578 (1882). In Freund's second edition the Kinsley case is merely cited by way of a footnote reference (p. 188).

36. *Lowe v. Conroy* and *Ohio Valley Water Co. v. Ben Avon Borough*, both italicized in note 25, *supra*, are to be found in the casebooks of Professors Stason and Maurer. Also to be found in the casebook of Professor Stason (of the cases italicized in footnote 34, *supra*) are *Langenberg v. Decker*; *North American Cold Storage Co. v. Chicago*, and *Smith v. Ill. Bell Tel. Co.* And also to be found in the casebook of Professor Maurer (of the cases in footnote 34, *supra*) are *I. C. C. v. Louisville & Nashville R. Co.*, and *United States v. Abilene & So. Ry. Co.*

† Professor of Law, Georgetown University Law School.

course which it seems fair to characterize as a brief historical survey of the field. This is now to be superseded by, or, as I view it, expanded into, the course subtended by this volume.

The further point that this limited conception of the subject has had a definitely deleterious effect upon law administration in this country is obviously more difficult to establish. We do know, however, how certain subjects such as evidence were profoundly affected by the Harvard teaching, and we do know that civil procedure was long the forgotten subject of both law schools and courts. I mean, of course, that there was assumed to be no general philosophy of the subject deserving of study in school or of application in judicial decision; of technical rulings of vocational instruction there was no end. It almost seemed to be an axiom that the abler the court, the more it frowned upon and slighted procedural issues. Had this resulted in subordinating pleading to be "a handmaid," not "the mistress" of justice, of making it clearly not an end in itself, but only a means, we should all have rejoiced. Unfortunately it actually had just the opposite result. As is well known, procedural history shaped our substantive law, and it seems impossible to get rid of supposed obstacles presented by this history by ignoring them. Moreover, a decision motivated by "fire-side equities" is often rationalized in terms of procedural demands, to the destruction of a sound philosophy of adjective law, whatever may be the result in the particular case. Experience is clear that only by having knowledge and taking thought as to objectives may pleading and procedure be regulated to its proper subordinate position. And this has not been done in the past.

Nevertheless there has now developed a new spirit. The law schools have become increasingly aware of the truism that knowledge means power in the field of law administration as elsewhere, and now the lawyers and the judges are coming to the same view. The crowning proof of this new attitude is the adoption of the new Federal Rules of Civil Procedure and their enthusiastic approval by the bench and bar. Here is now a marvelous opportunity for an adequate national and philosophical, as distinguished from local and vocational, study of this subject. This our authors properly recognize, albeit with an appropriate Bostonian rating of relative importance, for they say that "by a fortunate coincidence, the new curriculum of the Harvard Law School is going into effect at the same time as" the new Federal Rules.¹ Such recognition is to be commended, even if one feels that the pedagogical change it implies has not been extensive.

For after all, this book, valuable as it is as a reference source, seems but an expansion of Professor Scott's earlier casebook presenting an historical survey of the field of Remedies. True, it is stated that the more detailed study of civil procedure is reserved for the third year, and the current Harvard catalogue tentatively announces a year course in "Pleading and Practice" of two hours a week. I do not know what is proposed as the content of this course. Nevertheless, I venture to believe that if it covers much the same ground as this course in Judicial Remedies, it is a duplication of work after an unfortunate emphasis has been given in the first year; while if it covers new ground, it must take up relatively unimportant matters. From any point of view this course as here outlined must take the cream of the subject.

Now, to say that this course approaches the subject in the wrong way because it is at once a running history and a bird's-eye view is not to say that we do not need

1. May a mere outsider wonder at the apparent tremors with which the new curriculum is viewed at Harvard—witness Simpson. *The New Curriculum of the Harvard Law School* (1938) 51 HARV. L. REV. 965—for it seems to reflect only the natural, non-violent changes made necessary by a changing legal world?

either history or completeness of survey. History is an essential for adequate knowledge of procedure. The difficulty comes when the history of the way we got where we are is made to seem more important than where we are. History should be used to explain the present, not to bring back the past. As it is, we are continually jerked back and forth between the ancient and the modern law, so that it is difficult even for an experienced person, not to speak of a first-year student, to realize where we are or what century we are in at a given point. Thus, after we are given a realistic approach to modern law by the full record in an important case—the famous *Palsgraf v. Long Island Railroad Co.*²—we find ourselves flung in the midst of the common law actions, and that, too, as though they were modern problems. Here, indeed, is the statement of one problem (p. 96): “Suppose defendant wrongfully distrains plaintiff’s horse and refuses to return it after gage and pledge. Will trespass lie?” And *The Six Carpenters Case*,³ decided in 1611, is indicated as giving the final answer.

Perhaps some of this switching back and forth between centuries is necessary, but the matter becomes acute when the central point about which modern procedural reform must turn—the union of law and equity—is postponed to some sixty-five pages near the close of this 1300-page book (pp. 1145-1210). (The *history* and the *survey* of equity occupy the space from 693 to 1144.) To understand what the modern pleading is, what has happened to the abolition of the forms of action, and the substitution of one form of civil action, a study of this material, thus so summarily treated, is absolutely essential. True, the problem is hinted at in various places earlier, beginning perhaps at pages 146-167 on the abolition of the forms of action, though this material is determinedly limited to non-equity cases. In like fashion the right to trial by jury appears at page 311, and trial without a jury and waiver at page 479, but with pains to exclude the vitally important subject, without which the problem cannot be understood, of trial of equitable issues (since the latter was to be treated briefly and more or less by inference at pages 1192-1210). Instances showing this kaleidoscope occur continuously. Of course, it follows from the plan which is to treat the subject by pictures, and not as one deserving of a philosophy which must be erected by diligent study before details become important. But query?

The character of the book as a survey emphasizes this method. Thus, we meet the recent reform of the summary judgment (pp. 226-230) before we have had the background of the long struggle for pleading reform in England and America and the significance in that struggle of the code reform of pleading. Along in the middle of the book we have a long section, considerably longer than that on the union of law and equity, on extraordinary legal remedies, including “common law certiorari,” prohibition, and habeas corpus (pp. 610-692). Even more substance is given to this arrangement by the relative importance, referred to above, accorded to ancient equity as compared to the modern fused procedure. The result, it is submitted, is to give a definitely wrong emphasis to the whole subject, and a wrong background from which to face the procedural problems of today. But vested interests in “equity” teaching certainly yield slowly.

Though a philosophy is not explicit in this approach, perhaps one is implicit after all. May not the fundamental question which the proposed course seems to me to present be bottomed upon a lack of sympathy for the most important of modern procedural reforms and a feeling that maybe Lord Coke in *The Six Carpenters Case* and the Lord Chancellors in the cases from 1393 on (pp. 749 *et seq.*) did have rather the better of the moderns? Unless there is complete accord with the thoroughgoing

2. 248 N. Y. 329, 162 N. E. 99 (1928).

3. 8 Co. 146b (1611).

reform achieved by the new Federal Rules, it is not likely that a course integrated about them, using history to explain, but not control, them, will result. I had better confess at once that my real concern is here. I should not like to see the development of a truly national uniform system of simple law administration hampered by the lagging steps of brilliant young men from Harvard who have been trained to believe that after all the past is best.⁴ And I believe no course in pleading and procedure is now worthy of the name unless it does teach that national system—which the new Federal Rules offer—and in a grand way as having a philosophy and a methodology of its own right comparable to any course in the school.

Perhaps these remarks are unduly querulous. After all, however, they are a tribute to Harvard and to the authors, for they recognize the influence which a new procedural course at Harvard will have on courts and schools. Of course, that does not change the fact that the book itself has all the material any instructor needs, so that he can, if he wishes, remould it so as to fashion a course in modern procedure.

CHARLES E. CLARK†

RESTATEMENT OF THE LAW OF TORTS (Vol. 3). By the American Law Institute. St. Paul: American Law Institute Publishers. 1938. pp. xxvi, 759. \$6.00.

In 1913, at the request of the Carnegie Foundation for the Advancement of Teaching, Dr. Josef Redlich, Professor of Law in the University of Vienna, made a careful evaluation of the case method of study in American law schools. While in general reporting favorably upon the value of the method Dr. Redlich made two suggestions for its improvement. To quote from his report:

"It is characteristic of the case method that where it has thoroughly established itself legal education has assumed the form of instruction almost exclusively through analysis of separate cases. The result of this is that the students never obtain a general picture of the law as a whole, not even a picture which includes only its main features. This is, in my opinion, however, just as important for the study of Anglo-American law as for the codified continental systems, and is a task which should also be accomplished by the law courses in the universities. To this end, the following seems to me above all things requisite:

"First, as an introduction to the entire curriculum, care should be taken to introduce to the students, in elementary fashion, the fundamental concepts and legal ideas that are common to all divisions of the common law. . . . The more rigorously casuistic the case method of instruction which then follows necessarily has to be,

4. On page 1159 there is a suggestion, with reference to the Federal Rules, that "the unification contemplated by these rules and by the statute under which they were promulgated thus appears to be procedural unification only, and so rather of the English than of the New York type." I do not fully understand this, except that I am sure it must be erroneous in its implications, at least. If it is that certain code reform, such as that of New York, made substantive changes in the law of equity, that was never intended and was not so in result. If, however, it is meant that the reform of the new rules is not so complete as that of New York, that, too, is erroneous, as, indeed, the decisions are already beginning to show. I have discussed this matter often and at length, e.g., (1936) 22 A. B. A. J. 447, 449; (1938) 23 WASH. U. L. Q. 297; (1938) 86 PITTSBURGH LEG. J. 4, 28-31; (1939) 15 TENN. L. REV. 551; and the Proceedings at the A. B. A. Institutes in 1938, Vol. I, p. 194, II, p. 236.

† Dean, Yale Law School.