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Book Reviews

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BOOK REVIEWS

RELIGION AND EDUCATION UNDER THE CONSTITUTION. By J. M. O'Neill. New York: Harper & Brothers, 1949. Pp. xii, 338. \$4.00.

This is a controversial book upon a most controversial subject. Professor O'Neill is aroused because of the historical inaccuracy and injudicial approach which characterized the opinions of the great majority of the members of the Supreme Court in the *Everson*¹ and *McCullum*² cases. He has attempted in great detail to show that in interpreting the language and meaning of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," members of the Court have (1) disregarded the plain meaning of the English language and the facts of history and (2) have superimposed upon such language and meaning their own personal views, influenced or buttressed by the arguments of groups, such as "Protestants and Other Americans United for Separation of Church and State," who have successfully sought to give to the First Amendment a meaning never intended by those who drafted, nor by the people who ratified, the Bill of Rights. In this task Professor O'Neill has been eminently successful. The fact that others³ have by critical analysis also disclosed the fundamental error to which the Supreme Court has committed itself in no wise detracts from the inherent merit of Professor O'Neill's book.

Professor O'Neill informs us that for twelve years he has been a member, and for four years a chairman, of the Committee on Academic Freedom of the American Civil Liberties Union and that in writing the book, which was started before the decision was handed down in the *Everson* case, he is not arguing for any particular policy or legislation, such as federal aid to parochial schools, but seeks to make clear and preserve the true meaning of the Constitution as the bulwark of our civil liberties. The author considers the Supreme Court's two decisions as the culmination of an "attack" upon the true meaning of the First Amendment and, therefore, an attack upon our civil liberties. His primary theme is that Jefferson's "wall of separation between church and state," as this phrase is erroneously interpreted by the Supreme Court, is not a true American or constitutional principle.⁴

Considering the accomplishments attained in the volume under review, its defects are comparatively minor and to some extent forgivable. Professor O'Neill's exposition of the errors permeating the decisions of the Court is marked, and at times marred, by an unconcealed exasperation and by the use of intemperate language. The author's demonstration of the Court's "spurious display of the appearance of scholarship,"⁵ of the "complete nonsense"⁶ of the "incredible"⁷ dissenting opinion

1. *Everson v. Board of Education of Ewing*, 330 U. S. 1 (1947).

2. *Illinois ex rel. McCollum v. Board of Education, Champaign County*, 333 U. S. 203 (1948).

3. See PARSONS, *THE FIRST FREEDOM* (1948).

4. Professor O'Neill makes it clear that in expressing his views, he is not representing the American Civil Liberties Union. The official position of the American Civil Liberties Union appears to be diametrically opposed to Professor O'Neill's view. The Union's board of directors has adopted a resolution stating: "It is an important principle of American democracy that the separation between church and state be an absolute one." *N. Y. Times*, July 26, 1949, p. 25, col. 5.

5. P. 196.

6. P. 11.

7. P. 201.

in the *Everson* case and of the "semantic and historical nonsense"⁸ attending the Court's misinterpretation of Jefferson's much quoted phrase concerning the separation of church and state, is sufficiently effective without the necessity of using the quoted labels. Nevertheless, it is at least understandable that the entire lack of legal and historical substance behind the Supreme Court's reasoning should have engendered the expression of such frank and extreme characterizations by one who has taken the care to examine the question. The other defect in the book, from the reader's standpoint, is the repetition in succeeding chapters of points already made. This apparently results from the fact that the various chapters of the book have to some extent been written as self-contained things apart from each other.⁹

As against the sketchy and careless scholarship disclosed particularly in the dissenting opinion in the *Everson* case and in the majority opinion in the *McCullum* case, Professor O'Neill has marshalled the facts of history to show that the First Amendment and Jefferson's "wall of separation" have always meant to Jefferson, to Madison (at least when he was discussing the First Amendment), to the legislatures of the states, to Congress, to those who wished to amend the First Amendment, and to the Supreme Court itself—until the *Everson* case was decided—that the First Amendment interdicted the establishment of an exclusive national church or religion, such as the Church of England or the Congregational Church, the latter of which was not disestablished as the state church in Massachusetts until as late as the middle of the nineteenth century.

The decision in the *McCullum* case that the First Amendment "aimed at establishing freedom of all religions means freedom from any religion in our public school system"¹⁰ was definitely foreshadowed by the decision in the *Everson* case wherein Justice Black, speaking for the majority, referred to the First Amendment as prohibiting "a law respecting *the* establishment of religion."¹¹ By the simple expedient of substituting the article "the" for the article "an", the members of the Supreme Court gave to the First Amendment a meaning of their own, never intended by those who wished to prohibit "*an* establishment of religion", *i.e.*, a religious establishment.¹²

8. P. 200.

9. Rev. Robert C. Hartnett, S.J., reviewing Professor O'Neill's book in *AMERICA*, Vol. 81, Number 3, p. 125, April 23, 1949, while considering the book generally praiseworthy, notes two exceptions: (1) the author's too heavy reliance upon the *opinions* of Jefferson and Madison, which, after all, cannot change the meaning and intent of the First Amendment; (2) the State's Rights view expounded by Professor O'Neill, particularly his ignoring of such decisions as *Meyer v. Nebraska*, 262 U. S. 390 (1923). It is difficult to perceive how *Meyer v. Nebraska*, which involved purely and simply the Fourteenth Amendment—declaring unconstitutional state legislation requiring subjects to be taught in the English language during the period of grade school—is pertinent to any criticism of the Supreme Court's practically wholesale assimilation of the First Amendment into the Fourteenth Amendment. Even granting that decisions such as *Gitlow v. New York*, 268 U. S. 652, 666 (1925) and *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940), which hold that the freedoms of speech and of the press and of the exercise of religion, protected by the First Amendment from abridgement by Congress, are likewise protected by the due process clause from impairment by the states, are correct, it does not follow that the "an establishment of religion clause" in the First Amendment was ever intended to be binding upon the states. See PARSONS, *THE FIRST FREEDOM* 69-79 (1948).

10. Schmidt, *Religious Liberty and the Supreme Court of the United States*, 17 *FORD. L. REV.* 173, 199 (1948).

11. 330 U. S. 1, 14-15.

12. Professor Hages, of Loyola University School of Law, in reviewing Professor

Justice Black states for the majority in the *Everson* case: "Neither a state nor the Federal Government can set up a church. [So far, so good] Neither can pass laws which aid one religion, *aid all religions* or prefer one religion over another."¹³

The author conclusively proves that the First Amendment was not intended, when it was adopted, to mean what the Supreme Court now says that it means, namely, that the Constitution prohibits all aid to any religion. One reviewer of the book recognizes this. Benjamin F. Wright, Professor of Government at Harvard University, says of Professor O'Neill's book:

"The position defended in the book has somewhat more historical justification than the extravagance of the author's language would suggest. He is probably correct in his assertion that the establishment-of-religion clause had a relatively limited meaning in 1789 and that Madison and Jefferson did not support so sweeping a doctrine of separation in their time as that now accepted by every member of the court.

"The weakness of his position lies less in his conception of the original meaning of the clause than in the assumption underlying the entire argument. This is that the meaning of constitutional clauses is fixed and unchangeable except by formal amendment. Yet surely most of the major developments in American government and constitutional law since 1789 have come through custom and interpretation, not through formal amendment."¹⁴

Professor Wright's review has this to be said for it: it honestly and squarely recognizes that the majority of the members of the Supreme Court¹⁵ have by judicial fiat informally amended the Constitution in an instance where Congress and the people of the United States have expressly refused to amend. The clear intent of the framers of the First Amendment, all of the historical data pertaining thereto, and the very language of the Amendment itself prohibiting "*an establishment of religion,*" have given to the First Amendment a definite and categorical meaning. The members of the Supreme Court must have known this. The brief submitted by the Appellee in the *McCollum* case made it crystal-clear. And yet the members of the Court, with the exception of Justice Reed, chose to deny "that the meaning of constitutional clauses is fixed and unchangeable except by formal amendment." The Constitution, including our very Bill of Rights, is not a primordial document, which is to guide and govern Congress, the Executive and the Supreme Court itself. It is what the majority of the Supreme Court, drawing upon their own philosophical or political ideas and predilections, choose it to mean for the moment!

O'Neill's book in the September, 1949 issue of the American Bar Association Journal at page 758, states: "Professor O'Neill's book might well have been subtitled 'An Essay on the Importance of the English Article'", referring to the point so well made in Professor O'Neill's book (pp. 190-196).

13. *Everson v. Board of Education of Ewing*, 330 U. S. 1, 15 (1947).

14. N. Y. Times Book Review, July 10, 1949, p. 16. Professor Wright is in error when he states that the Supreme Court's present view is "that now accepted by every member of the court." Justice Reed who dissented in the *McCollum* case (333 U. S. 203, 238), definitely did not accept the majority view. His weighty dissenting opinion gave recognition to the true historical and literal meaning of the language of the First Amendment and represents the view that should prevail.

15. Since the decision in the *McCollum* case was handed down, two of the Justices have died: Justices Murphy and Rutledge. The latter wrote the dissent in the *Everson* case, which along with Justice Black's erroneous assumptions in his majority opinion in the same case, became the basis for the decision by the great majority in the *McCollum* case.

Grave and disturbing indeed is this revision of the First Amendment by the members of the Court. As the First Amendment now reads, it calls for a national policy absolutely secular and irreligious. Yet, from the viewpoint of those who believe in constitutional government, be they secularists or religionists, the threat to that form of government implicit in the Court's action should be at least equally disturbing. The expressed attitude of the Supreme Court appears to be that the Constitution means what those men who happen presently to sit on the Court personally feel or believe that it should mean, regardless of what either the Founding Fathers or the Court in the past have considered the Constitution to mean.

Justice Frankfurter's personal views as to how the Constitution should read provide an illustration of this new tendency. On more than one occasion Justice Frankfurter has indicated his preference for "the binding tie of cohesive sentiment"¹⁶ as necessary to what he deems to be a true democracy. Therefore, he would uphold legislation requiring children, despite their religious convictions, to salute the flag.¹⁷ For similar reasons Justice Frankfurter would rewrite the First Amendment to prohibit any commingling of religious with secular instruction in the public schools which might give rise to "a feeling of separatism,"¹⁸ which in turn might destroy the "secular unity"¹⁹ so necessary to the desired "cohesion among a heterogeneous democratic people."²⁰ Justice Frankfurter, as a private citizen of the United States, is entitled to possess and express his own views as to what he deems to be desirable "for promoting cohesion among a heterogeneous democratic people."²¹ As a member of the Supreme Court bench, however, he misuses his position on the Court when he advances such views as a justification for reading amendatory language into the Constitution.

The controversy as to the true meaning of the "an establishment of religion" clause of the Constitution is not finally settled. The Court has reversed itself before when it has realized an error, and it is to be hoped that in time the Court will repudiate the erroneous views expressed in the *Everson* and *McCullum* decisions and reinstate the language of the First Amendment. The final chapter of the book under review is entitled "Antidotes For Chaos" and suggests four possible alternatives for those who disagree with the decision in the *McCullum* case: (1) ignoring the decision much as the Eighteenth Amendment was ignored; (2) a constitutional amendment; (3) public criticism and protest against the decision; (4) Congressional legislation limiting the powers of the Court. None but the third alternative is a proper or legitimate approach to this constitutional problem. The Constitution, even as misinterpreted by the Court, should not be ignored; to follow the example of the Supreme Court will only result in chaos. The First Amendment needs no formal amendment. Its language and meaning are clear and any amendment could do nothing more than restate its present language. The Constitution would be nullified, if that were possible, just as much, if not more so, by Congressional action as by misinterpretation by members of the Court. Only the third alternative constitutes a proper, legitimate, feasible and, it is hoped, effective method for returning to the

16. *Minersville School District v. Gobitis*, 310 U. S. 586, 596 (1940).

17. *Ibid.* This erroneous view was later repudiated by the Supreme Court in *West Va. Bd. of Educ. v. Barnette*, 319 U. S. 624, 642 (1943).

18. *Illinois ex rel. McCollum v. Board of Education, Champaign County*, 333 U. S. 203, 212, 237 (1948).

19. *Id.* at 217.

20. *Id.* at 216.

21. *Ibid.*

true meaning of the First Amendment, as it existed before propagandists, such as "Protestants and other Americans United", and secularists foisted their private notions upon the Supreme Court. Professor O'Neill's book itself, barring some of its impolitic passages, is a good example of the third method he suggests.

It is unfortunate that the *Everson* and *McCullum* cases have been featured at times as involving a Protestant-Catholic controversy, which essentially is not so. If it were a controversy between two such groups, Catholics might be at a decided disadvantage in not having upon the Supreme Court at least one member of their faith to express their views.²² The issue, however, is not of that kind. It is one involving the true meaning of a particular part of the Constitution, the first article of the Bill of Rights. More particularly and fundamentally it is the issue whether we are a nation governed by laws or by men.

FRANCIS X. CONWAY†

ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES. By Chester Rohrich. New York: Matthew Bender & Company, 1949. Pp. xv, 533. \$12.00.*

The author, a practicing lawyer in New York for more than twenty-five years and a member of the law faculty of New York University, where he conducts a graduate course in corporate finance, states in his preface that the primary purpose of this volume is "to make available to the general practitioner, in one volume with a unified approach, guidance in dealing with the many legal problems involved in the organization of a new business, from the inception of the idea down through the death of the owners." Covering, as it necessarily does, a large segment of commercial law, the author's approach is by project rather than by subject, and, as he states, is suggestive rather than exhaustive. His aim in the collection of authorities has been not to cite all cases, but leading and illustrative cases as well as typical statutes.

A glance at the chapter headings and the table of contents indicates well the scope and character of the work. An introductory chapter considers the lawyer's function in organizing a business enterprise, the nature of the business to be put together and the matter of special legal controls, both state and federal, applicable both to certain clients and to certain lines of business activity. Typical of the latter is the common prohibition against the corporate practice of law. Then follow chapters dealing with the disclosure and protection of ideas and other intangibles; promoters, their rights and liabilities; available forms of business organization, with a consideration of their advantages and disadvantages; the best form of business organization, whether partnership or corporation, as the case may be; selection of

22. Recently, in making an appointment to the Supreme Court, President Truman stated that the religious faith of the appointee should be irrelevant. This is true if we assume that the members of the Court will discharge their duty by interpreting the Constitution according to its language and history. See dissenting opinion of Justice Frankfurter in *West Va. Bd. of Educ. v. Barnette*, 319 U. S. 624, 646, 647 (1943). If the Constitution, however, is to be interpreted or amended informally according to the particular philosophical, sociological, political, religious or secular notions of the members of the Court, unequal representation or no representation upon the Court by a large group of our citizenry, is not quite "democratic".

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corporate domicile; incorporation procedure, with an intelligent discussion of purpose and power clauses in the certificate of incorporation; the matter of stock subscriptions; promoter's compensation; corporate rights and liabilities under promoter's agreements; the acquisition of a going business by purchase, consolidation or merger, with a discussion of the desirability of one as opposed to either of the other two of these methods for accomplishing a good result; capitalization and financing; marketing securities; the use of subsidiaries, and, finally, anticipating, in whatever method of organization is determined upon, the ultimate death of the owners.

A particularly valuable chapter is the fourth, which discusses the advantages and disadvantages, especially from the omnipresent tax angle, of the various forms of business enterprise. An exhaustive appendix of some one hundred and fifty pages is also worthy of special note, containing as it does tax tables comparing the tax problem under the corporate as contrasted with the partnership form of engaging in business.

In this writer's opinion the author has accomplished in workmanlike fashion the objective he set out to attain in the book. While the lawyer who specializes in the field of corporate organization in all likelihood will not find any novel ideas to aid him in his work, the ordinary practitioner, who only now and then is called upon by clients to put together a new enterprise or to advise on the incorporation of an existing business, will discover many angles of approach to the solution of his problems which otherwise in all probability would not have occurred to him. Even the specialist, however, should find the volume a useful desk book for ready reference to statutes of the several states, leading cases and law review materials that may be of aid to him in his work. Moreover, he will have at his hand in one relatively small volume the means of checking on many matters for which otherwise he would have to resort to widely scattered sources. To the law student, undergraduate or graduate, as the case may be, who is pursuing a course or courses in the general field of corporate law the book should prove a mine of valuable information and illuminating suggestions.

IGNATIUS M. WILKINSON†

FEDERAL INCOME TAX. By Joyce Stanley and Richard Kilcullen. New York: Clark Boardman Company, Ltd., 1948. Pp. viii, 344. \$6.00.

INTRODUCTION TO INCOME TAXATION. By James M. Henderson. New York: The Lawyers Co-Operative Publishing Co., 1949. Pp. iv, 536. \$7.50.

The work by Stanley and Kilcullen is precisely what it claims to be—a brief presentation, on the beginner's level, of the essential sections of the Internal Revenue Code which deal with federal income tax. The plan of the book is to take up, one by one, the sections of the Code which must be understood before more intensive study of the subject is undertaken.

This book, it is fair to predict, will be enthusiastically received by two classes of readers, namely, students who seek a general familiarity with the subject of income tax law and general practitioners who find themselves confronted with occasional problems and are afraid to move lest they be caught by some hidden snare. To both of these classes of readers the book is of particular value.

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The student will gain from its pages a clear and understandable explanation of the essential sections of those provisions of the Internal Revenue Code which deal with income tax. The book provides a means toward an over-all familiarity with the subject. While it is not sufficiently comprehensive to serve as a textbook in a course on income taxation, it may find a place as an introductory or supplemental text to be used along with a more comprehensive work. The book is perhaps the most excellent set of lecture notes one might want.

From the student's viewpoint, the value of the book lies in the careful way in which the material has been focused. Emphasis is placed where it belongs. Omissions are obviously deliberate, and in many instances where material is omitted, the authors candidly state that the section of the Code involved is not discussed. The skeleton of the subject is presented without the obscuring mass of endless detail which, if included, would soon cause the student to lose not only his sense of direction but his enthusiasm for the whole job of acquiring a knowledge of the field.

The general practitioner who does not read the book from cover to cover will, perhaps, not gain too much from its pages. The lawyer who commences his study by reading the book from beginning to end will acquire an initial grasp of the subject which should serve him in good stead when he subsequently undertakes to give advice in matters where tax consequences are to be considered. The book will not supply the answers to concrete problems raised by clients. That is hardly to be expected, in any field of law, from a textbook which is barely three hundred pages long. What the book will do for the general practitioner is to start him off on the right foot by indicating the pertinent provisions of the Internal Revenue Code and by providing a readily understandable explanation of their meaning.

The book is very definitely not a substitute for the more comprehensive texts and for the standard tax services. Only a loose-leaf publication can keep abreast of developments in federal income taxation. The authors are justified in assuming that lawyers who read their book will not give advice to clients without first consulting other publications which reflect the day to day developments in the law.

If these limitations are borne in mind, and particularly if it is remembered that the volume is only a handbook, its presence on the lawyer's desk will enable him to save time and more readily to recognize and undertake the tax problems which he encounters.

The other book under consideration, Mr. Henderson's "Introduction to Income Taxation," cannot be quite so enthusiastically recommended. Since the author calls his book an introduction to the subject, one would be led to assume that his volume, like the one by Stanley and Kilcullen, is intended for those with no previous background in federal income taxation. Most, but not all of the book is written on that level.

The work, which might otherwise be a valuable addition to the literature of its kind, is marred by two types of faults. First, the law is not always accurately stated; and, second, the author's lengthy arguments with Congress and the courts, if taken too seriously by the reader, would lead to confusion and misunderstanding.

An example of the first type of fault is the statement that if an American citizen resides outside the United States for *six months* of a taxable year, his earned income from sources without the United States for that year is exempt from income tax. This was the law prior to 1942, when the period of non-residence was changed to "the entire taxable year."¹

The second type of fault is illustrated by the author's discussion of Section 102

1. INT. REV. CODE § 116.

of the Code, which imposes a surtax on corporations formed or availed of for the purpose of preventing the imposition of surtax upon stockholders by accumulating corporate earnings instead of distributing them as dividends. Mr. Henderson does not like Section 102. That, however, is hardly an excuse for his failure to state that the surtax is applied only where the surplus is beyond the reasonable needs of the business of the corporation.²

Many of Mr. Henderson's observations on what is wrong with the income tax law, whether one agrees with him or not, do furnish food for thought. However, as a text for one who seeks an introduction to the subject, Mr. Henderson's book does not seem entirely appropriate.

ARTHUR GOODMAN†

A GUIDE TO MOTION PRACTICE. (Revised Edition). By Samuel S. Tripp. New York: Central Book Company, 1949. Pp. xxvi, 550. \$10.00.

Our modern procedural world is atom-activated, jet-propelled, plasticized, push-buttoned, streamlined, televised and telepathic.¹ Yet the old-fashioned concept of Archimedes that, given a fulcrum firmly based, a lever can move the earth, is still a great vision.

This book is the fulcrum firmly based from which the alert modern advocate may effectively move the court.

Its scope ranges along the whole horizon of "Litigated and Ex Parte Motions in New York."

The work can best be visualized as the well-organized notebook of a composite expert who has inherited the highest skills of the most competent clerk or "law assistant" in the Supreme Court's Special Terms, Parts 1, 2 and 3 in each of the counties of the State. Its style is staccato, trigger-quick and sure-shot. Its Index is the work of the author himself.

The gamut of the text commences with the heading "Motions in General", under which are presented the philosophic observations that "Procedural requirements are made to assist in judicial inquiries for the truth and not to offer obstacles to a party's opponent or to confuse the issues. . . . Because motions are frequently emergency operations . . . it is imperative that one develop an intuitive approach 'The more of the details of our daily life we can hand over to the effortless custody of automatism, the more higher powers of the mind will be set free for their own proper work.'"

The author urges that all motions should be argued and that "elementary psychology and good salesmanship should not be discarded in the courtroom."

2. *Id.* at § 114.

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1. Consider, for example, the recently enacted Section 193(a) of the Civil Practice Act, which permits an "action within an action", so that (a) there may now be two judgments in one action; (b) a *defendant* may serve a summons and verified complaint; (c) a party brought into the action by a defendant may contest the *plaintiff's* claim as an adverse party, and in certain cases even counterclaim against the plaintiff; (d) such party brought in may in turn "proceed pursuant to this section against any person not a party to the action"; (e) the third-party action is commenced, not by the service of a summons, but by the service of a summons and copies of pleadings; (f) there may be two summonses in the one action; and (g) there may be one answer to two complaints.

His technical skill is most evident when he deals with the hypertechnical niceties of Reargument versus Renewal of motions, Resettlement of orders and judgments, Amended and Supplemental Pleadings, Change of Venue, Consolidation of Actions, Joinder of Parties and Causes of Action, Interpleader, Security for Costs, Motions to open defaults, Motions to discontinue actions, Motions for a new trial, Motions relating to *Lis Pendens*, Arbitration, Article 78, Substitution of Attorneys and Attorneys' Liens.

The solid meat of the book, however, is to be found in its treatment of the fundamentals of Bills of Particulars, Admissions, Examinations before Trial, and the Production of Books and Records, Discovery and Inspection, Physical Examinations, Corrective Motions, Motions for Judgment under Rules 106 through 111, Judgment on the Pleadings, Summary and Partial Judgment, Matrimonial Motions dealing with the Provisional Remedies of Arrest, Attachment, Injunctions and Receivers.

It is noted that the epoch-making rule of *Marie Dorros, Inc. v. Dorros Bros., Inc.*² does not apply in negligence actions; that in special circumstances, as in *Levi v. Lev*³ and *Stein v. Hart*,⁴ an examination before trial may be had with respect to a husband's financial ability to pay alimony; and that the most recent definitive decision with respect to cross-examination on examination before trial is *American Worcestershire Sauce Co. v. Armour*.⁵

An interesting avenue of procedural and substantive exploration is suggested by the statement that "claims not in being, contingent upon the happening of an event, are not the subject of an attachment."⁶ This recalls the statement in *Sheehy v. Madison Square Garden Corp.*,⁷ that "an indebtedness is not attachable unless it is absolutely payable at present or in the future and not dependent upon any contingency." It has also been said that "the sections governing attachment and those providing for execution must be correlative."⁸ Yet it was held in *Clements v. Dublin*⁹ that a levy upon the interest of a defendant in the hands of factors was attachable though there was nothing immediately due and although ultimately nothing might be due to the defendant, inasmuch as the defendant's only right was to receive any balance from accounts payable in the future in connection with goods sold through such factors.

But enough of exploration which may take us into fields afar. For "back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning; and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn."¹⁰

In format, this is a friendly and manageable book. It is attractively bound in maroon with gold lettering. Its printing is clear and readable, its Index is adequate,

2. 274 App. Div. 11, 80 N. Y. S. 2d 25 (1st Dep't 1948).
3. 182 Misc. 445, 44 N. Y. S. 2d 346 (1943).
4. 274 App. Div. 1085, 85 N. Y. S. 2d 828 (3d Dep't 1949).
5. 194 Misc. 745, 87 N. Y. S. 2d 738 (Sup. Ct. 1949).
6. P. 342.
7. 266 N. Y. 44, 47, 193 N. E. 633 (1934).
8. *Frederick v. Chicago Bearing Metal Co.*, 221 App. Div. 588, 589, 224 N. Y. Supp. 629, 630 (1st Dep't 1927).
9. 209 App. Div. 208, 204 N. Y. Supp. 413 (1st Dep't 1924), *aff'd*, 239 N. Y. 526, 147 N. E. 180 (1924).
10. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 19 (1921).

and it is not too heavy. It fits into an ordinary briefcase. It is a durable book and will readily stand annotation in both pencil and ink.

There are ten thousand and one reasons why a copy of this volume should be immediately acquired by the practicing lawyer. One reason is that Bernard L. Shientag has found it worthy of a favorable Foreword. The other ten thousand reasons are that Judge Shientag has found it so thoroughly worthy that he has written of it the following: "This book is the product of years of study and hard work. The author has put a lot of intellectual sweat into it. It needs no 'barker' to proclaim its great value to our profession. Success or failure upon the trial itself will often depend upon the skill and thoroughness with which these preliminary motions are resorted to or opposed. *The book is a godsend to practicing lawyers.*"

JOHN F. X. FINN†

† Professor of Law, Fordham University School of Law; Member, New York Law Revision Commission.

SUBSTITUTED SERVICE (SUBST.)

	<p>C. P. A. §§ 230, 231; <i>cf.</i> C. P. A. §§ 217, 493 (1), 486 (1). City Cr. Act, § 51; Mun. Cr. Code §§ 21, 21a, 23. 114 Misc. 560, 187 N. Y. Supp. 95; 258 App. Div. 60, 15 N. Y. S. 2d 530.</p>
<p>1. IN WHAT ACTIONS</p>	<ol style="list-style-type: none"> Residents (265 N. Y. 204; 38 App. Div. 60, 62, 55 N. Y. Supp. 962, 963, <i>aff'd</i>, 165 N. Y. 636; <i>Alvord v. Patenoire</i>, 193 Misc. 1023, 86 N. Y. S. 2d 168, 122 N. Y. L. J. 1149, col. 5 (Sup. Ct. Nov. 7, 1949)). Plaintiff unable with due diligence to make personal service.
<p>2. PAPERS NEEDED</p>	<ol style="list-style-type: none"> Order. Affidavit (resident due diligence, R. C. P. 61). Summons. Complaint optional, but "if a copy of the complaint or a notice is to be served with the summons, the order must direct that service thereof be made <i>at the same time and in the same manner</i> as the summons." (e.g., under C. P. A. § 231 (3) or in a case of permissive service of complaint or a notice re default under C. P. A. § 230).
<p>3. HOW LONG ORDER VALID</p>	<ol style="list-style-type: none"> 20 days after order granted. Within these 20 days service must be made and order filed with proof of service; otherwise order "becomes inoperative."
<p>4. WHO MAY SERVE</p>	<ol style="list-style-type: none"> Any person 18 or over and not a party to action.
<p>5. HOW TO SERVE</p>	<ol style="list-style-type: none"> <i>Deliver</i> copy of summons and order (and sometimes complaint and notice) to a "person of proper age" at residence, if found (293 N. Y. 435; 270 App. Div. 391, 60 N. Y. S. 2d 35 (Here no mailing needed)); or <i>Affix and mail</i>: copy of summons and order (and sometimes complaint and notice) affixed to outer or other door of residence; <i>plus</i> mailing "in a post office" another copy thereof (201 N. Y. 404).
<p>6. WHEN SERVICE COMPLETE</p>	<ol style="list-style-type: none"> 10 days after filing proof of service.
<p>7. MISCELLANEOUS</p>	<ol style="list-style-type: none"> Exceptions: a) Matrimonial (<i>Purvis v. Purvis</i>, 167 App. Div. 717, 153 N. Y. Supp. 269); b) Partition (<i>Toole v. Larkin</i>, 206 App. Div. 809, 201 N. Y. Supp. 952). Foreclosure, <i>semble</i> valid (<i>Lauder v. Meserole</i>, 148 App. Div. 739, 133 N. Y. Supp. 340). "Affixing" (230 App. Div. 833). Results in <i>in personam</i> judgment (<i>cf.</i> 311 U. S. 457; 186 Misc. 553, 58 N. Y. S. 2d 654; 74 Hun. 632, 26 N. Y. Supp. 956, <i>aff'd</i>, 143 N. Y. 648).

1. MINISTER* (Matrimonial § 232 (1)); *In rem property actions* § 232 (2); *Non-residents* § 232a (1-6); *Infants & incompetents* § 232a (9); *Stockholders* § 232a (11); *Travelling residents* § 232a (8); *Extend Statute of Limitations* § 232a (10); *Resident Frauds*, § 232a (7).
2. Plaintiff unable with *due diligence* to serve defendant personally within state.
3. In money only actions against both resident and non-resident defendants, *attachment* levied on defendant's property within state is required. (But no attachment required against N. Y. domiciliaries if service is SWO, 311 U. S. 457, 462-3; 15 JUD. COUX. REP. 60-62 (1949). *Cohen v. Cohen*. As to whether alimony with matrimonial relief or deficiency with mortgage foreclosure relief is "money only", *quare*, 272 App. Div. 575, 74 N. Y. S. 2d 1, *aff'd on other grounds*, 297 N. Y. 916; 15 JUD. COUX. REP. 62 (1949).

1. *Order* (court or judge's. C. P. A. § 234). Contents: R. C. P. 50.
2. *Verified Complaint* (C. P. A. § 232a). If "money only" proof of levy of warrant of attachment needed.
3. *Affidavit* (MINISTER,* *due diligence*, nature of action, and if "money only", attachment levied (C. P. A. § 232); R. C. P. 61).
4. *Summons* (To be published after filing. R. C. P. 52).
5. *Notice* required by R. C. P. 52.

1. 90 days (R. C. P. 51).

1. Person over 18 and not a party.

- "File, Mail, Publish,"* preferably in that order.
1. *File* summons, verified complaint, and affidavits *on or before the day of first publication*. (R. C. P. 52).
 2. *Mail*, *on or before the day of first publication* (R. C. P. 50) copy of summons, verified complaint, order, and notice required by R. C. P. 52.
 3. *Publish* summons and notice required by R. C. P. 52 once a week for six successive weeks in two newspapers (R. C. P. 50).

1. On 42d day after day of first publication (R. C. P. 51).

1. Alternative of SOS permitted without express provision therefor in order (C. P. A. § 233).
2. When defendant may defend on merits (C. P. A. § 217). Does not apply in divorce or partition or affect bona fide purchaser of property.
3. Principles of jurisdiction limit service by publication:
 - a) *Pennoyer v. Neff*, 95 U. S. 714; *Milliken v. Meyer*, 311 U. S. 457; *Blackmer v. U. S.*, 284 U. S. 421; *U. S. v. Stabler*, 169 F. 2d 995, 997.
 - b) *Dimmerling v. Andrews*, 236 N. Y. 43. *Cf. Geary v. Geary*, 272 N. Y. 390.
 - c) *Ebsary v. Ruby*, 256 N. Y. 406; *Bryan v. University Pub. Co.*, 112 N. Y. 382.
 - d) *Garfein v. McInnis*, 248 N. Y. 261; *Feuchtwanger v. Central Hanover Bank*, 288 N. Y. 342; *Dirksen v. Dirksen*, 72 N. Y. S. 2d 865.
 - e) *Interpleader: Hanna v. Stedman*, 230 N. Y. 526; C. P. A. §§ 51a, 287a-287e. *Cf. Mondin v. Mondin*, 274 App. Div. 69, 80 N. Y. S. 2d 176.
 - f) Subject Matter: *Robinson v. Oceanic*, 112 N. Y. 315.
 - g) *Stockholders' Actions: Weinert v. Kinkel*, 296 N. Y. 151; *Cohen v. Dana*, 287 N. Y. 405, 83 N. Y. S. 2d 412, 414; *Norman v. Gen. Amer.*, 267 App. Div. 758, 45 N. Y. S. 2d 929; *Keene v. Chambers*, 271 N. Y. 326.
 - h) C. P. A. § 520; *McCarthy v. Culklin*, 254 N. Y. 328; *Heydeman v. Westinghouse*, 80 F. 2d 837; *Morris Plan v. Gunning*, 295 N. Y. 324.
 - i) *In Matrimonial Actions: People v. Baker*, 76 N. Y. 78; *Ditson v. Ditson*, 4 R. I. 87; *Hubbard v. Hubbard*, 228 N. Y. 81; *Atherton v. Atherton*, 181 U. S. 155; *Haddock v. Haddock*, 201 U. S. 562; *Williams v. N. Car.*, 317 U. S. 287, 325 U. S. 226, 229; *Glaser v. Glaser*, 276 N. Y. 296; *Tiedemann v. Tiedemann*, 156 N. Y. Supp. 109, *aff'd*, 169 App. Div. 937, 154 N. Y. Supp. 1147; *Franklin v. Franklin*, 295 N. Y. 431, 434; *Querze v. Querze*, 290 N. Y. 13; *Caldwell v. Caldwell*, 298 N. Y. 146; *Denkman v. Denkman*, 172 Misc. 57, 14 N. Y. S. 2d 450, *aff'd*, 258 App. Div. 954, 17 N. Y. S. 2d 997; *Krause v. Krause*, 282 N. Y. 355; *Goldstein v. Goldstein*, 283 N. Y. 146; *Cohen v. Cohen*, 193 Misc. 1023, 86 N. Y. S. 2d 168; *Matter of Lindgren*, 293 N. Y. 18; *Senor v. Senor*, 272 App. Div. 305, 70 N. Y. S. 2d 909; *Estin v. Estin*, 296 N. Y. 303, 312; *Sherrer v. U. S.*, 334 U. S. 343.

* The word MINISTER is a mnemonic device to recall the first letter of the eight classifications which follow it.

CONSTRUCTIVE SERVICE

SERVICE OUTSIDE THE STATE IN LIEU OF PUBLICATION (SOS)

C. P. A. §§ 233, 493, 520; R. C. P. 192.

1. In all cases when publication of summons is ordered (C. P. A. § 233).

1. Same as in publication (order need not specifically provide for this alternative method of service, C. P. A. § 234).
2. As to *complaint*: 290 N. Y. 512, 515.

1. Within 60 days SOS must be made and proof thereof filed (C. P. A. § 233).

1. Any one of the sixteen persons specifically enumerated in C. P. A. § 233.

1. "*File, deliver and leave with.*"
2. *File.* Summons, verified complaint, order of publication and affidavits must be filed before day of SOS (R. C. P. 52).
3. *Deliver to and leave with* defendant a copy of summons, verified complaint and notice required by R. C. P. 52 (C. P. A. § 233). Note, copy of *order* not required, since referred to in R. C. P. 52 notice. In matrimonial actions, notice of nature of action must be endorsed on summons even though complaint accompanies summons (R. C. P. 53 (10)).

1. 10 days after filing proof of service (C. P. A. § 233).

1. C. P. A. § 217 as to defendant's right to defend on merits does *not* apply.
2. *Redfield v. Critchley*, 277 N. Y. 336, 340; C. P. A. "Sections 103 and 528 are to be read together so that both shall have due and conjoint effect. . . ." Section 103 applies to inquests on default. Section 528 to judgments after trial. (Note that in this case service was SOS and C. P. A. § 217 did not apply). Note, further, that from court's statement at 339 as to "unwarranted conclusion", *semble* an action for declaratory judgment is *in rem* in this case. In others, *semble in personam*.

OF PROCESS IN NEW YORK

SERVICE OUTSIDE THE STATE WITHOUT AN ORDER (SWO)

C. P. A. §§ 235, 493, 520; R. C. P. 53 (6, 10, 11), 192; 9 JUD. COUN. REP. 335-370 (1943); 11 JUD. COUN. REP. 191 *et seq.* (1945); 12 JUD. COUN. REP. 58 (1946) (as to veto).

1. In *any* action against a defendant domiciled in N. Y. State (C. P. A. § 235).
2. Against other defendants only in: a) specified matrimonial actions; b) in *in rem* property actions; c) in "money only" actions in which attachment levied (C. P. A. § 232). [No attachment needed in "money only" actions against domiciliaries].
3. As against a domiciliary defendant, the open question of whether alimony with matrimonial relief for deficiency with mortgage foreclosure relief is "money only", is immaterial. 311 U. S. 457, 462-3; 15 JUD. COUN. REP. 60-62 (1949); *Cohen v. Cohen*, 193 Misc. 1023, 86 N. Y. S. 2d 168. Cf. 272 App. Div. 575, 74 N. Y. S. 2d 1, *aff'd on other grounds*, 297 N. Y. 916; 15 JUD. COUN. REP. 62 (1949).

1. Summons.
2. Verified Complaint (290 N. Y. 512. *Berson v. Scott*, 122 N. Y. L. J. 1238, col. 5 (Sup. Ct. Nov. 15, 1949).

1. No order. But proof of service SWO must be filed within 60 days after service.

1. Only a person or officer authorized by C. P. A. § 233 to make service SOS.

1. *Deliver to and leave with* defendant a copy of summons and verified complaint. In matrimonial actions endorsement must appear on summons (R. C. P. 53 (10)).

1. 10 days after filing proof of service (C. P. A. § 235).

1. As against N. Y. domiciliary resulting judgment is *in personam*, 311 U. S. 457; 12 JUD. COUN. REP. 58 (1946); *Feldman v. Feldman*, 189 Misc. 564, 72 N. Y. S. 2d 390 (separation action, alimony and counsel fees valid). But only *in rem* as to non-resident, *Odiens v. Odiens*, 265 App. Div. 641, 40 N. Y. S. 2d 179. (Non-resident, no sequestration. Alimony and counsel fees invalid).
2. An action for a declaratory judgment that a foreign divorce is invalid is not one of the specified matrimonial actions (C. P. A. § 232 (1) in which C. P. A. § 235 is available). (*Altholz v. Altholz*, 72 N. Y. S. 2d 143). But an action to declare a beneficiary's right in a trust is an *in rem* property action subject to § 235 (C. P. A. § 232 (2); *Engel v. Engel*, 22 N. Y. S. 2d 445).

NON-RESIDENT DOING BUSINESS IN NEW YORK (NDB)

C. P. A. § 229b. Compare C. P. A. § 227a; REAL PROP. LAW § 442g; PENAL LAW § 440.

1. Non-resident "Natural person" (296 N. Y. 395).
2. Doing substantial business here (290 N. Y. 437; 298 N. Y. 27).
3. Action arises out of such business (294 U. S. 623; *cf.* 248 U. S. 289; 28 YALE L. J. 512 (1919)).

1. Summons.
2. Complaint.
3. Notice (if by registered mail). If SWO, no "Notice" needed.

1. File papers in 30 days after receiving registered receipt or envelope with refusal notation (or after SWO).

1. Person 18 or over and not a party (within N. Y.).
2. If SWO, then by one of persons enumerated in C. P. A. § 229b.

1. Leave copy of summons and complaint with person in charge of any business of defendant in N. Y. State.
2. Registered mail copy of summons, complaint and notice (return receipt requested).
3. File copy of summons and complaint, affidavit of compliance, return receipt signed by defendant or his agent, or envelope with notation of refusal by defendant or his agent plus affidavit that notice of such mailing and refusal was forthwith sent to defendant by ordinary mail.
4. Alternative to registered mail: SWO.

1. 10 days after filing proof of service.

1. Perfect *in personam* jurisdiction results.
2. Constitutional (294 U. S. 623; *cf.* 326 U. S. 310; 248 U. S. 289; 28 YALE L. J. 512 (1919)).
3. What constitutes "doing business" (298 N. Y. 27; 293 N. Y. 529, 534; 220 N. Y. 259).

VEHICLE AND TRAFFIC LAW (V & T)

Sections 52, 52a.

1. Operation by non-resident of motor vehicle or cycle "in this state"—need *not* be on public highway.
2. Action "growing out of any accident or collision" while so operating in this state.

1. Summons (always).
2. Complaint (always).
3. Notice (frequently).

1. Such operation is "deemed equivalent" to appointment by non-resident of N. Y. Secretary of State as his agent to receive process in such an action.
2. Must file papers, with proof of service, *within 30 days* after return receipt or envelope with notation of refusal is received by plaintiff (or after SWO).

1. Presumably any person of the age of 18 or over who is not a party to action.
2. If SWO, then only by one of the persons specified in § 52.

1. *Leave a copy* of summons at Secretary of State's office in Albany or at "one of his regularly established offices", with a fee of \$2.
2. May in lieu thereof *mail* a copy of summons, with the \$2 fee, to Albany Office of Secretary of State.
3. In either case *must mail a copy* of summons, complaint and "notice of such service", registered, return receipt requested, to defendant.
4. Plaintiff must *file* affidavit of compliance, copy of summons *and complaint*, and either a return receipt signed by defendant or his agent or original envelope bearing notation of refusal (*Hess v. Pawloski*, 274 U. S. 352) plus affidavit that notice of mailing and refusal was "forthwith" sent to defendant by ordinary mail.
5. As alternative to plaintiff's mailing by registered mail to defendant, plaintiff may cause defendant to be served SWO provided copy of complaint is annexed to duplicate copy of summons served SWO.

1. 10 days after filing proof of service (whether by registered mail or SWO).

1. Such service is "of the same legal force and validity" (1) as if served on defendant personally within N. Y. State; and (2) as if served "within the territorial jurisdiction of the court from which the summons issues". As to (2) *quere.*
2. What is "growing out of any accident or collision"? (35 F. Supp. 638).
3. Constitutional (*Hess v. Pawloski*, 274 U. S. 352).
4. If non-resident motorist dies, his estate is bound.
5. If a *resident* departs from N. Y. State subsequent to the accident or collision and remains absent therefrom for 30 days continuously (permanently or temporarily) § 52 applies to him by virtue of § 52a. (Not retroactive, however. *Kurland v. Chernobil*, 260 N. Y. 254.)

