Fordham Law Review

Volume 11 | Issue 1 Article 26

1942

Book Reviews

Fordham Law Review

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CASES ON PLEADING AND PROCEDURE. By Charles E. Clark. Second Edition. St. Paul, Minn.: West Pub. Co. 1940. pp. xxxvii, 1023. $6.00.

The second edition of this case book is, as was to be expected, primarily an illustration of how the procedure gospel according to Clark has culminated in the Federal Rules of Civil Procedure adopted in 1938. Only very rarely has a thoroughly prepared advocate of procedural change been presented with the opportunity which was presented to Dean Clark as Reporter for the Supreme Court's Advisory Committee; and perhaps more rarely still has such an opportunity been used to such good advantage.

While the Committee, at times, was apparently unwilling to follow its Reporter to the end of his projected road, it is obvious that the Rules, including those not originally drafted by him, are, generally speaking, an adoption of, or at least consistent with, the views which were urged by the Reporter in his "Code Pleading," in numerous articles, and in his editorial comments in his case books. It is both natural and proper, therefore, that the current edition should, in the main, focus attention on the relative perfection of the Federal Rules.

It is something of a tribute to the first edition that this could be done in the second without greater revision of material than was necessary. Much of the editorial comment and narrative development of problems remains unchanged or is only slightly revised. And the case material already there (probably more than half of it, in fact) furnished the necessary horrible examples of the need for simplification, liberalization, and elimination of purely technical concepts. In fact, it is doubtful if there is to be found anywhere, in such compact form, a better collection of examples of waste motion in the legal process.

Excluding excerpts, not more than twenty cases (about three-fourths of them federal) have been added, though a large number of new cases are cited. As a matter of teaching taste, this reviewer would prefer a few more federal cases under the new Rules; but the author felt, no doubt, that the cases, while numerous and often extensive, have in the main tended simply to confirm that the Rules mean what they say.

The most numerous additions to the book are found in inclusion of introductory notes at the beginning of each chapter, and in inclusion of new and elaborated editorial comments and narrative discussions. These are concise and pointed and should prove extraordinarily helpful to both instructor and student. It is gratifying that this method of supplementing the conventional case material was, in the new material, used much more lavishly than mere quoted excerpts from cases. New citations of other commentators are about in proportion to similar citations in the first edition.

The author no doubt found himself faced with something of a problem in regard to references to and writings by himself. He apparently resolved it in favor of using the material he thought desirable, without being controlled completely by considerations of retiring modesty. Those familiar with the first edition are, of course, familiar with Clark the case book author, Clark the author of "Code Pleading", Clark the article writer, and Clark the Dean and law teacher. In the new edition we find these supplemented by Clark the Reporter for the Advisory Committee, Clark the Lecturer for American Bar Association Institutes, and (with becoming infrequency) Clark, J. It would, however, be incorrect to say that this has been overdone; and, after all, the

ideas of all these gentlemen are merely a part of the numerous ideas of the case book author. Also, we are given a liberal number of citations to and some quotations from those who disagree, in varying stages of violence, with the assembled Clarks. It must be said, though, that the longest of these quotations, that from Chief Justice Maltbie of the Connecticut Supreme Court appearing at page 126, is not exactly calculated to alienate the affections of the teaching profession from the book, in as much as it evidences considerable doubt about professorial capacity to cope with problems of practice. No doubt the reprinting of this will act as something of a restraining influence on public declarations of the case book author should he, now that his position compares favorably with that of Maltbie, ever be similarly minded.

The only place in which old material is really conspicuous by its absence is in the Chapter dealing with actions concerning chattels and land. A total of 33 cases has been dropped and brief editorial discussion substituted. The result is a space reduction from 90 to 19 pages. So far as this reviewer is concerned, the change is all to the good. It will enable him conveniently to substitute some little consideration of these topics for none at all.

The material on the burden of proof, presumptions, and the functions of judge and jury has been revised and elaborated somewhat, but it is probably still true, as Professor Morgan pointed out in reviewing the first edition,[1] that it is questionable whether the treatment is adequate for dealing with all the important problems in this field. There is clear logic, however, in attempting to show in this book how the pleadings are related to these subjects, even though detailed investigation more properly belongs in the course on evidence. What is presented is one of those all-too-frequent situations in which well-rounded courses seem to involve conflicts in teaching jurisdiction. The current reviewer, teaching both courses, is not overly perturbed by the particular instance.

To those who believe, or at least hope, that the new Federal Rules represent the "wave of the future" in civil procedure, it seems inevitable that a survey of the Rules must be an integral part of any reasonably adequate course in Code pleading and procedure. For such a course, this is the book. You probably cannot cover it all unless the curriculum committee is more understanding than usual; but who finishes books, anyway? You can always tell your students that they ought to become familiar with particular problems (preferably the baffling ones) in evidence or equity or trial practice or some other course taught by your colleagues which have available more time than material.

HENRY BRANDIS, JR.†

CASES ON CRIMINAL LAW. By Hall and Glueck. St. Paul, Minn.: West Pub. Co. 1940. pp. xxi, 556. $5.00

This receiver believes that a casebook for use in a short course in Criminal Law should be especially designed for the purpose, and at least roughly proportioned to the time available. To his mind, the compendious tome, overweighted with material obviously unusable under the exigencies of time, presents psychical as well as the more obvious physical disadvantages. While the use of the latter is often recom-

1. Morgan, book review (1934) 48 HARV. L. REV. 366.

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mended on the ground that it permits a greater discretion in individual choice, there is a limit to the amount of sloughing which can be done without either affecting the working parts or rendering the vehicle unrecognizable. While it may be possible to trim the heavily armored tank for a quick, short trip, the result may be a limping chassis with one gun pointing to the rear.

The present casebook meets this first test, for it was especially prepared for use in a half year course, of either two or three hours, which appears to be the limit of time devoted to Criminal Law in many, if not most, law schools.

What of the substance? For the most part, the selection, order and treatment of materials are commendable. In broad outline, the four parts of the book are devoted to "Law, Crime and Punishment", "Protection of the Person", "Protection of Property" and "General Principles of Criminal Liability". The Substantive crimes, treated, necessarily with varying emphasis, include assault, rape, murder, manslaughter, theft and allied offenses, burglary, arson, malicious mischief, conspiracy, attempt and solicitation. In addition, mistake, compulsion, intoxication, infancy and parties are all included in the section entitled General Principles of Criminal Liability.

The devices adopted to keep the book within bounds do not detract from its utility. For example, brief notes upon such subjects as the source of the criminal law, and the guilt of accessories at common law take the place of many cases. Again, except for the chapter, Theft, the milestones in the development of the law are omitted in favor of recent decisions exemplifying the pertinent principles in modern situations, and often containing a statement of the historical development. Problem cases, consisting of a brief statement of facts of an adjudicated case, and the court's decision, are plentiful. A desirable prominence for this material is obtained by a use of a type equal in size to that used in the principal cases, and by interspersing it among the principal cases, rather than by relating to the obscurity of footnotes. References to case notes and other invaluable law review material are supplied in generous measure.

The choice of cases is good. Besides exemplifying the applicable principles, they well reflect the types of criminality with which the courts are most frequently concerned today; thus helping to dispel the students' suspicion that criminal law as taught and criminal law as practiced, are rarely on checking terms. For example, the part that the automobile plays in modern crime is emphasized by the number of the principal cases involving automobiles! Again, adequate material for treatment of the currently common "felony murder" are to be found in the chapter "Parties" as well as in the chapter "Murder". Similarly, the prevalent practice of including a conspiracy count whenever remotely possible justifies the relatively large space devoted to conspiracy. Typical statutes, indicating the trend of the law and its attempt to keep abreast of the criminal, are referred to, or set forth *in extenso*.

Conventional categories omitted from the book include proximate cause, self

1. See, for example, State v. Weisingoff, 85 W. Va. 271, 101 S. E. 450 (1919) (murder); Busard v. State, 232 Wisc. 669, 288 N. W. 187 (1939) (manslaughter); State v. Bridge, 126 Me. 223, 137 Atl. 244 (1927) (manslaughter); West v. State, 119 Neb. 633, 230 N. W. 504 (1930) (taking under a claim of right); Schenectady Varnish Co., Inc. v. Automobile Ins. Co., 127 Misc. 751, 217 N. Y. Supp. 504 (1926) (using with intent to return); Commonwealth v. Hosman, 257 Mass. 379, 154 N. E. 76 (1926) (malicious mischief); Edwards v. State, 178 Miss. 696, 174 So. 57 (1937) (taking while intoxicated); and People v. Rizzo, 246 N. Y. 334, 158 N. E. 888 (1927) (searching for robbery victim by automobile, as an attempt).

defense and entrapment. The editors explain the first on the ground that the subject is largely governed by principles sufficiently dealt with in torts. Perhaps omission of self defense is similarly explainable. The total omission of entrapment is regretable, however. It is unlikely that this subject will be dealt with elsewhere, and the attention it focuses on the proper purpose of the criminal law, and on the limit to the justifiable functions of the police, makes it an especially appropriate subject for treatment. Even *Sorrells v. United States*[2] alone, with the divergent views expressed by the prevailing and dissenting opinions, would have served the purpose, as it has done in other casebooks.[3]

The treatment of the entrancing subject of attempts is, in this reviewer's opinion, too short. Only four principal cases are used and two of these concern the relatively simple problem of proximity. Only two remain for the treatment of the difficult problem of impossibility. A better cross-section of the subject seems desirable, although it is true that the popular *Commonwealth v. Johnson*,[4] which is included, offers ready access to many of the earlier cases, and that reference to the indispensible law review articles are provided.

This reviewer would even suggest that some of the space required for treatment of entrapment, and self defense, and enlargement of the material on attempts might have been obtained by omission of the Appendix, which consists of a 25 page social case history of a chronic offender. The latter appendage and the opening chapter are substantially the only extra-legal materials in the book, however.[5] The restraint evidenced by failure to follow the tendency to intersperse the sociological and criminological with the legal is especially noteworthy when it is recalled that Co-editor Glueck is a Professor of Criminology. The opening chapter, under the title "Criminals and Punishment" is largely a plea for individualization of criminal justice, based in part on a study of the factors causing or concurring with criminal delinquency, an analysis of present sentencing practices, and a discussion of the theories of punishment. Predicating at least a limited freedom of the will, albeit in somewhat grudging terms, the editors admit the utility of punishment, but only to the extent that it is a preventive or deterrent of crime.[6]

All in all, this new casebook provides a provocative, serviceable basis for a well-integrated short course in Criminal law.

PAUL B. CARROLL†

CASES ON CIVIL PROCEDURE. By James P. McBaine. St. Paul: West Publishing Co. 1941. pp. xxxii, 1031.

This is the second edition of Cases and Materials on Civil Procedure prepared by Professor McBaine. A first edition was published in 1934. Class room experience with

2. 287 U. S. 435 (1932).

3. For example, MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940) 619 and MIKELL, CASES ON CRIMINAL LAW (3d ed. 1933) 527.

4. 312 Pa. 140, 167 Atl. 344 (1933).

5. See Strahorn (book review) (1941) 54 HARV. L. REV. 1414, favoring the omission of extra-legal materials.

6. Pages 4 and 5.

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the earlier book has resulted in the elimination of certain material and in the addition of recent important decisions and new statutes and rules of court. The author divides the subject matter of the book into three parts. Part 1 is entitled "Forms of Action" and embraces nine chapters, each of which is given over to a consideration of one of the more important common law actions. In every instance the chapter commences with a form of original writ, peculiar to the particular action, followed by a form of declaration by the plaintiff. Cases are then set forth relating to the proceedings on the part of the defendant after service upon him of the writ and also cases which define and explain the nature of the plaintiff's right. The author cites a modern case in connection with each common law action so as to demonstrate to law students that the old system of pleading has left an imprint modern procedure. In keeping with modern case book technique, the author has prepared problems for the student, with citations of authorities where the answers may be found. The importance which the author attaches to a basic knowledge of the "forms of action", recalls to mind the advice given by Littleton to a law student of long ago when he said "Know, my son, that it is one of the most honourable, laudable, and profitable things in our law to have the science of well pleading in actions reals and personals; and therefore I counsel thee especially to employ thy courage and care to learn this".[1]

Part 2 is entitled "Pleading". The author introduces this part of the subject with a brief description of Common Law Pleading. This is followed by cases setting forth the principles governing the demurrer, the declaration, negative pleas in bar, the specific and special traverse, affirmative pleas in bar, pleas in abatement and replications. The underlying purpose behind this part of the book, to quote from the author's preface to the first edition, is twofold, namely: "(1) to acquaint the student with the functions of pleading; and (2) to acquaint him with the major aspects of the common law system of pleading in order that he may read understandingly cases decided under that system and also have a fair knowledge of the system upon which modern Code Pleading is for the most part based". In as much as in some jurisdictions where procedure is almost entirely statutory, as in New York, a complaint in the form of one of the common counts is still good pleading and the language of the orthodox common law form must be rigidly adhered to, this part of the book has something more than a mere theoretical value.

Part 3, the concluding part of the book, is entitled "Trial Practice". This is the most important part of the book, occupying more than two-thirds of the printed page. The use of the words "Trial Practice" is deceptive. It might be assumed that this part of the book dealt entirely with motions made while the case is actually on trial in the courtroom. This is not so however, for the author covers the entire course of the action, dealing with such varied subjects as Venue, Jurisdiction, Service of Process, Appearance, Default Judgments, Selecting the Jury, Trial by a Judge and a Jury, Argument of Counsel, Verdicts, Trials by the Court Alone, New Trials, and the Rendition, Entry and Sufficiency of Judgments.

It is interesting to note that in this part of the book the author draws frequently upon New York for material. The form of summons used in New York is printed in full, and in connection with service of process, the cases of *Rawstorne v. Maguire*,[2] *Geary v. Geary*[3] and *Kennedy v. Lamb*[4] are among those making up the text. De-

1. HOLDSWORTH'S HISTORY OF ENGLISH LAW, (1927) Vol. II, p. 521.

2. Rawstorne v. Maguire, 265 N. Y. 204, 192 N. E. 294 (1934).

3. Geary v. Geary, 272 N. Y. 390, 6 N. E. 2d 67 (1936); Kennedy v. Lamb, 182 N. Y. 228, 74 N. E. 834 (1905).

cisions in numerous New York cases are used as the basis for the problems in this part of the book and frequent reference to the New York Civil Practice Act is made in the footnotes. The author has also included as part of the text some of the Federal Rules of Civil Procedure and the notes prepared by the Advisory Committee appointed by the Supreme Court of the United States to frame these rules are printed in the footnotes.

It may be said of this book that the material is well chosen and the arrangement well conceived. It is intended as a book on Procedure for first year students in a three year law course, which includes separate courses in Code Pleading and Evidence.

It is also intended to cover Parts 1 and 2 in about thirty-two class periods and Part 3 in an additional forty-eight class room hours.

Given the requisite amount of time to apply to the subject and if one subscribes to the view of those who endorse the Case book as the better vehicle for the teaching of Civil Procedure rather than the Text book, then this book should prove entirely satisfactory.

EDWARD Q. CARR†

CONCERNING ENGLISH ADMINISTRATIVE LAW. By Sir Cecil Thomas Carr. New York: Columbia University Press. 1941. pp. ix, 189. $2.00.

Sir Cecil Thomas Carr, Editor of Statutory Rules and Orders and also of the Revised Statutes, delivered at Columbia University in the fall of 1940 six lectures under the James S. Carpentier Fund which have now been published under the title "Concerning English Administrative Law".

The circumstances under which these lectures reached printed form are a footnote to the times. While preparing them Sir Cecil lost his original notes when his London home was fired by a German incendiary bomb; he could not use important materials in his office because of damage to it resulting from a high explosive aerial bomb; and the blackouts of September, 1940, prevented his spending his evenings preparing the lectures as he had planned. Thus hampered he prepared the lectures, came to America and delivered them. When he was on his way back to England his ship was torpedoed and his set of proofs of the lectures was lost, but happily the author was not. Thus the fostering of scholarship under Hitler's New Order.

Not all being currently written about administrative law is worth reading; the writers have lacked the experience and judgment wanted for useful writing. Both of these inform the Carr lectures, which take their place among the best current legal writings. Through them runs a heartening faith in democratic processes of government and in the essential good faith of officials. There is apparently a readier acceptance of restraint and interference by government in England than there is here, perhaps because of a more deeply seated belief in the disinterestedness and ability of public officials. Example after example is given by the lecturer of the exercise of power by officials whom we would regard as subordinate in circumstances where comparable action in this country would be preceded by much pulling and hauling.

There is nothing new under the sun. It appears that everything critical now being said in America about careless delegation of legislative power, the desirability of full judicial review, and the wickedness of the bureaucrat was said in England in the 1830's

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when a spate of legislation on factory conditions, poor relief, public health, etc. brought great tasks to the administrators. The first of the Carr lectures describes that period of administrative growth and then passes to more modern material, including comment on the report of the Committee on Ministers' Powers. That Committee in 1932 undertook for England a review of quasi-judicial and quasi-legislative administration like those undertaken in 1939 by the United States Attorney General's Committee on Administrative Procedure and for New York State by Moreland Commissioner Robert M. Benjamin. A note is supplied entitled Statutory Results of the Report of the Committee on Ministers' Powers. It consists of two short pages. That may be comment enough on the legislative results of a notable inquiry. The lecturer wisely says: "The findings of the Committee on Ministers' Powers are not the framing of a constitution. They are merely a guide which the legislator and the draftsman can, but need not, follow."

Sir Cecil has much that is sensible to say about delegated legislation. His special experience as editor of Statutory Rules and Orders has brought him great familiarity with the problems in this field. One of his recommendations is that a regulation making body should be obliged to state in the caption to its regulations the exact statutory power which it purports to be exercising. He stresses, too, the necessity for consultation with interests especially affected, prior to the making of regulations.

One wise lecture was devoted to "Crisis Legislation". Two wars, and hard times in between, have accustomed the English to a considerable degree of governmental supervision. Sir Cecil holds the comforting belief that since great powers have been given to the executive by the *voluntary* act of Parliament some at least of these powers will come back when the crisis passes. He calls attention to the fact that there still arise cases in which the courts and the Parliament spank officials for excesses.

In a lecture upon administrative tribunals Sir Cecil discusses the English system of public local inquiries. These, he says, "somewhat resemble coroners' inquests, which, while reaching a definite or indefinite finding of fact, perform the useful social function of ventilating local opinions and averting any impression that vital matters have been ignored or suppressed. These inquiries, held under different statutes, may vary from small-scale meetings in the waiting room of a wayside railway station to full-dress assemblies in a big town hall with rows of barristers representing different interests." Apparently these inquiries are a preliminary to central government action on proposals for improvements in local government areas. The confident easy-going procedure of English officials is in interesting contrast to the implications of *New York Water Service Corp. v. Water Power and Control Commission.*[1]

In discussing "Bureaucracy", the lecturer touches lightly but wisely on such things as official language, the characteristics of civil servants, the vices of routine, etc. He goes back into the early writings of Mr. Robert Moses to find this description of the popular idea of a bureaucrat—"a stout fierce man in uniform who pries into your private business, insults you and threatens to report you to a fiercer man in a finer uniform who will put you to death." He touches too on the important office of the Parliamentary Counsel to the Treasury, the official legislative draftsmen of the English Parliament.

Anything published by Sir Cecil Thomas Carr would naturally be rich in scholarship and graceful in expression. He makes learning palatable. These lectures sparkle. The Carpentier lectures began with Bryce, and have been given at various times by

1. 283 N. Y. 23, 27 N. E. (2d) 221 (1940).

Hill, Pollock, Vinogradoff, Holdsworth and Cardozo. To that great company we can now add Carr.

FRANCIS H. HORAN†

TRUSTS IN THE CONFLICT OF LAWS. By Walter W. Land. New York: Baker, Voorhis and Co. 1940. pp. xxix, 440. $6.00.

The widespread use of the trust device today among Americans, so many of whom have property interests and family and social connections scattered over several states, has resulted in an increasing number of instances in what we might call decentralized trusts. And to the practitioner called upon to set up, or advise in regard to, a trust are presented more frequently the often times difficult questions, arising when its elements are to be found in two or more states, What is the more desirable law to govern?, or What law does govern? Mr. Land set out to render, and has in fact succeeded in giving, comfort and assistance to his brothers who might be thus perplexed. It may be noted in passing that his work does not purport to deal with resulting, constructive or business trusts, but " . . . is confined to a treatment of settlement trusts, *i.e.*, trusts set up by will or by deed of trust." (Page 3).

The author has divided his book into two main parts, the one (Part I, 267 pages) dealing with the questions of what law governs the validity, construction and administration of trusts having elements in two or more states; and the other (Part II, 150 pages) treating of state death, property, gift and income taxes, and their application to such trusts.

Part I is prefaced with a short introductory chapter (Chapter I) treating of the scope of the book and the importance of the subject, and opens with a brief chapter (Chapter II) setting forth the distinctions between validity, construction and administration, and the various types of property, together with a brief reference to the nature of the right of a *cestui que trust*. Mr. Land then proceeds to discuss problems of validity, construction and administration according to the type of property involved. Thus, Chapter III considers the law governing the validity of trusts of real estate, Chapter IV that of tangible personal property (which kind of trust, as is pointed out, is of relatively minor importance), and Chapter V the validity of trusts of intangible personalty. The governing law as to the construction of trusts of real and intangible personal property is taken up in Chapter VI, and that of the administration thereof in Chapter VII. The conclusion, Chapter VIII, of Part I deals with the existence and exercise of jurisdiction of courts over questions of validity, construction and administration.

Chapter IX opens Part II with a general discussion of the power of states to tax and the distinction between various types of taxes, and, in the three succeeding chapters, inheritance and property, gift, and income taxation, respectively, are considered. The work is completed by Chapter XII which presents the author's recommendations as to planning for the taxation of trusts.

The author appears to have made an original and exhaustive search of the authorities, which, incidentally, has led him to conclusions differing from those of other writers in the field. For example, he does not agree with the view of the Restatement

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of Conflict of Laws that as to the administration of testamentary trusts of personalty the governing law is necessarily that of the state of the testator's domicil at the time of death, in the absence of a manifestation of intention to the contrary (Page 203 *et. seq.*); nor with the position of the Restatement in regard to the factors to be considered by the court in determining what law governs the administration of *inter vivos* trusts of personal property (Page 229 *et. seq.*)

The method of presentation used consists, in substance, of the setting out of a critical and extended examination of the cases bearing upon the question at hand, and, on the basis thereof, the making of suggestions or recommendations as to how the trust may be planned, or the elements of an existing trust may be shifted, to the end that it will be governed by that state's law which is more favorable to the purpose sought to be attained. The work, therefore, offers not only a useful collection of authorities but also practical advice founded upon painstaking research and an obvious knowledge of the subject.

The book has a table of cases, statutes and other authorities referred to in the text, appears to have an adequate index, is well bound, and is printed in a clear, easily read type.

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