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New York Practice (4th ed.)(Book Review)

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BOOK REVIEWS

NEW YORK PRACTICE (4th ed.). By Louis Prashker. New York: Law Book Press, Inc., 1959. Pp. 1100. $13.50.

This is a new edition of a book which has already attained a permanent place on the shelf of working tools of New York practitioners and judges. The new edition continues the high standard set by the earlier editions.

Louis Prashker died early in 1959, before the completion of the new edition, and the work was completed by one of his associates, Rose M. Trapani, professor of legal research at the St. John's University School of Law. Mrs. Prashker, also an attorney, collaborated on the fourth edition as she had done on the second and third editions.

Professor Prashker's book will stand as a permanent tribute to his memory. Throughout the work, there is evidence of the keenness of his intellect, the breadth of his vision and the thoroughness of his grasp upon the underlying principles of practice and procedure. The book will also serve as a tribute to Professor Prashker in another way, by reminding the profession of the great debt it owes him for the many outstanding procedural reforms which were the product of his study and recommendation, in his capacity as a research consultant of the Judicial Council and its successor, the Judicial Conference.

With the accumulation of precedents and with new points constantly arising to be dealt with, the successive editions have naturally grown in bulk. The fourth edition now runs to 1100 pages as contrasted with a mere 636 in the first edition of 1947. The original section numbering has been retained without change so that sections cited from the earlier editions can readily be located in the new edition, additional matter being covered by new sections designated by letters as well as numbers. There is a good index and a table of statutes and rules cited, as well as a complete table of cases.

The book, at least in the current edition, was apparently designed to serve both as a text for students and as a handbook for practitioners and judges. This dual purpose has unavoidably added to the length of the book. Some of the elementary points are discussed at length for the benefit of students in a manner which the author undoubtedly would have felt unnecessary if the book had been designed solely for the use of lawyers. Some of the hypothetical illustrations seem to have come directly from the classroom. On the other hand, the needs of the profession have been taken into account; the latest controlling cases are cited on every controversial point so

that the lawyer using the book will have a complete and up-to-date statement of the authorities. The text is written in a very lucid and attractive style which lends itself not only to ready research on specific points but also to pleasurable continuous reading of the whole text.

The book is a masterpiece of compression. All the essential rules, legislative and judicial, are set forth in a volume of only 1100 pages. Anyone who masters the contents of this book will have a thorough understanding of New York practice. In view of recent comments upon the length and complexity of the New York practice provisions, it is interesting to contrast the size of this volume with that of the Annual Practice of England, which runs over 3,800 pages, apart from the index.

A feature of the book which is especially valuable is the author's occasional interjection of his own evaluation of the practice provisions and of the decisions interpreting them. The author does not hesitate to say forthrightly that he believes certain provisions to be unwise or certain decisions to be unsound. A more extensive statement of the author's views would be welcome at many points but, of course, the limitations of a one-volume work designed primarily for the elucidation of the existing practice rendered this impossible. The author refers the reader to law review articles and to special studies for further discussion of controversial points.

If I were to single out any parts of the book for special commendation, I would choose the chapter on the statute of limitations, the section on res judicata and the sections on impleader or third-party practice. In the presentation of these difficult areas of the law, we find the best demonstration of the author's skill. There is an excellent statement of the problem of the choice of the period of limitation to be applied to an action for breach of contract which is associated with a claim for injury to person or property.[1] The difficulty goes back to Mr. Throop's attempt in 1876 to divide all common-law actions into three categories, injuries to property, injuries to person and breach of contract, and to formulate a separate statute of limitations for each category.[2] The difficulty grows out of the fact that the categories which Throop selected were disparate in character; the term "injuries to person or property" refers to the nature of the loss suffered while the term "breach of contract" refers to the ground of liability. At one time, it was thought that "not the origin of the liability but the character of the loss" was controlling,[3] but it now appears to be settled that the underlying

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[1] PRASHKER, NEW YORK PRACTICE §§ 27A, B (4th ed. 1959), hereinafter cited as PRASHKER.

[2] Laws of N.Y. 1876, c. 448; see Throop's notes to § 382, Temporary Act, Laws of N.Y. 1876, c. 449.

[3] Schiavone-Bonomo Corp. v. Buffalo Barge Towing Corp., 132 F.2d 766,

theory of liability is controlling. It seems that, if the contract imposed an absolute obligation, the six-year period of limitation is applicable to an action for breach of the contract, even though recovery is sought for consequential injury to person or property.[4] But if the contract imposed merely the obligation to exercise care, the three-year period of limitation for personal injuries resulting from negligence and, presumably, the three-year period of limitation for actions for damages to property generally will be applied.[5] So long as the Throop categories are used as the basis for different periods of limitation, the problem will continue to be troublesome. The simple solution would be to adopt a three-year period of limitation for all three categories and, in view of the current tendency to reduce the length of periods of limitation, that solution may soon be reached.

It is difficult, if not impossible, to reconcile all that the courts have said on the question of indemnity between tort-feasors. The subject should be dealt with as one of substantive tort law rather than as an aspect of impleader practice; the practice provisions merely provide the means by which the substantive rights, when they are determined to exist, are enforced. However, the author's discussion in connection with Section 193(a) of the Civil Practice Act, of the right of one tort-feasor to implead another on the theory of passive and active negligence or on the theory of primary and secondary liability is good and should help to illuminate this obscure area of the law. I would suggest, however, that in later editions the material dealing with the same subject under Section 264 of the Civil Practice Act should be brought forward and combined with the material under section 193(a). The underlying problem of the right to indemnity is the same whether it arises upon a third-party complaint under section 193(a) or upon a cross-claim under section 264 between persons who have already been joined in the action as defendants.

There is only one statement in the book with which I find myself in disagreement. The statement is made, in the discussion of physical examinations of plaintiffs in personal injury actions, at page 707, that "the dominant view in the departments is that the examining physician is not required to deliver a copy" of his report to the plaintiff. This statement was carried forward from the third

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768 (2d Cir. 1942) (L. Hand, J.), *cert. denied,* 320 U.S. 749 (1943); Buyers v. Buffalo Paint & Specialties, Inc., 199 Misc. 764, 99 N.Y.S.2d 713 (Sup. Ct. 1950).

[4] Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953). Great Am. Indem. Co. v. Lapp Insulator Co., 282 App. Div. 545, 125 N.Y.S.2d 147 (4th Dep't 1953), *motion for leave to appeal denied,* 306 N.Y. 851, 118 N.E.2d 910 (1954).

[5] Loehr v. East Side Omnibus Corp., 259 App. Div. 200, 18 N.Y.S.2d 529 (1st Dep't 1940), *aff'd,* 287 N.Y. 670, 39 N.E.2d 290 (1941); Atlas Assur. Co. v. Barry Tire & Serv. Co., 3 App. Div.2d 787, 160 N.Y.S.2d 547 (3d Dep't 1957).

edition and, while it was undoubtedly true at the time of the publication of that edition in 1954, it is, in my opinion, no longer true. The trend is now the other way and I believe that, at least in three of the four departments, the examining physician would be required to give a copy of the report to the plaintiff. The Advisory Committee on Practice and Procedure of the Temporary Commission on the Courts has recommended that the matter be settled by the adoption of a rule along the lines of the federal rule, requiring the defendant to give the plaintiff a copy of the examining physician's report if the plaintiff requests it but providing that, if such a request is made, the plaintiff must give the defendant a copy of his physician's reports.

In discussing the numerous changes in the practice which were adopted upon the recommendation of the Judicial Council, the Judicial Conference and the Law Revision Commission, the supporting studies made by these agencies are cited. The changes to come are foreshadowed by the references to the reports of the Advisory Committee on Practice and Procedure. While these proposals are not set forth in full, attention is directed to the prospect of change at appropriate points.

The repeated footnote references to the studies and recommendations by the Judicial Council and the other law reform agencies bring sharply into focus the fact, which has been often overlooked in recent discussion, that, for the past twenty-five years, the practice in this State has been subjected to a process of continuous review and revision. This process started with the Commission on the Administration of Justice, which recommended over twenty changes in the practice, which were subsequently adopted by the Legislature in the years 1934 and 1935. The Judicial Council and the Law Revision Commission, which were created in 1935 upon the recommendation of the Commission on the Administration of Justice, took over the task and they made invaluable contributions to the improvement of the practice during the succeeding twenty years. All of these are reflected in the Prashker text. They include the revision of provisions for service of the summons; the broadening of summary judgment; the revision of the practice as to joinder of parties; third-party practice; the improvement of motion practice generally; revision of interpleader; the broadening of examination before trial; provisions for joint trial; the clarification of motions upon the trial; judicial notice of matters of law; the merger of certiorari, mandamus and prohibition into Article 78 of the Civil Practice Act; and the revision of the practice with respect to appeals to the Court of Appeals. Hardly any part of the practice has gone unreviewed during the past twenty years. It is noteworthy that the Advisory Committee on Practice and Procedure, in its report, has proposed the retention of all but a few of the reforms adopted upon the recommendation of the Judicial Council and the Law Revision Commission. The process of continuous study and amendment was criticized at the outset as

"Amendment Instead of Revision" [6] but the product has vindicated the process. The question is one largely of semantics. "Piecemeal amendment" is the pejorative term used by those who do not like the process; "continuous re-examination" is the term used by those who favor it.

The time has probably come for a general revision such as that proposed by the Advisory Committee on Practice and Procedure. Once in every generation, there seems to be a need for a general revision, consolidating the gains which have been made and breaking through to new frontiers of reform. About thirty years elapsed between the Field Code of Procedure of 1848 and the Code of Civil Procedure of 1876 to 1880. Another forty years elapsed before the promulgation of the Civil Practice Act of 1920, so 1960 seems to be the time, under a forty-year cycle, for another general revision. However, in the drive for a general revision, the contribution made by the agencies which were responsible for the process of continuous re-examination and amendment in the past should not be overlooked. Anyone reading the book under review cannot fail to be impressed with the great value of their contribution. As has been noted, Professor Prashker himself was responsible for many of the major improvements, in his capacity as a research consultant of the Judicial Council and the Judicial Conference. He also formulated some of the proposals currently advocated by the Advisory Committee on Practice and Procedure as part of its general revision of the practice. Professor Prashker's career thus served as a connecting link between the process of continuous change and the process of periodic overhauling.

The fourth edition of Prashker's work has come out in a time of ferment, when an extensive revision of the practice is in prospect. The question naturally arises as to how much of the book will survive the change. If the current proposals are adopted, a new edition will undoubtedly be required in order to integrate the new rules and to deal with the specific changes, but the process of professional and legislative study and debate will probably consume several years so that a new edition would be due in normal course in any event. I am satisfied from an examination of the current proposals that only a comparatively small part of Professor Prashker's work will be rendered obsolete by the adoption of the proposed changes. While the Advisory Committee has shifted many of the practice provisions from the statute to the rules, the basic provisions of the New York practice have been retained and Professor Prashker's comments upon them will continue to be useful and illuminating. Notwithstanding the urging of distinguished leaders in the field, the Advisory Committee declined to substitute the federal rules *in toto* for the existing

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[6] Rothschild, *Amendment Instead of Revision—New York's New Method of Judicial Reform*, 4 BROOKLYN L. REV. 367 (1935).

New York practice. It decided instead to use, as the foundation of the new practice, the basic provisions of the existing practice. While many of its proposals may be considered by some lawyers to be radical, the work of the Committee is conservative in the best sense of the term, in that it conserves the values of the existing system and utilizes, so far as possible, the familiar concepts and terminology so that prolonged litigation will not needlessly be required to determine the content and interpretation of the new rules. As a result of the adoption of this approach, most of the historical materials which are so amply and expertly set forth in the Prashker text are assured of continued usefulness.

One of the great controversies of this generation in the field of procedural reform has been that produced by the proposal to vest the rule-making power in the courts. Professor Prashker cites the literature on both sides of the controversy and concludes with this observation: "The proposal has its merits though the claimed advantages of the proposal are frequently exaggerated." [7] The Advisory Committee has made a moderate proposal on this subject. It has not recommended that either the legislature or the people be asked to confer exclusive power upon the courts to regulate practice and to exclude the legislature from the field entirely, along the lines of the New Jersey constitutional amendment.[8] The Committee has not even proposed that the New York courts be given the power to supersede existing statutes dealing with practice and procedure, by the adoption of a statute or constitutional amendment similar to the federal statute. Without seeking any grant of this character, the Advisory Committee has proposed that an extension of the rule-making power be brought about simply by transferring the details of practice from the statute to the rules, thus bringing them automatically within the rule-making power of the courts (or of the Judicial Conference, if the rule-making power is vested in that body). A similar solution was proposed in 1933 by a committee of the Association of the Bar of the City of New York headed by Judge Dimock, but the forty-year cycle had not then run and apparently the time was not yet ripe for the proposal. The Advisory Committee's approach is a pragmatic one, which I believe Professor Prashker would have approved.

I agree with the view, implicit in Professor Prashker's comment, that the vesting of rule-making power in the courts will not be a panacea, although it undoubtedly will be of value. More important than the allocation of the power to adopt procedural changes, as between the legislature and the courts, is the making of adequate

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[7] PRASHKER § 2.

[8] See Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951).

provision for a permanent professional staff for the continuous re-examination of the practice provisions and for the formulation of proposals for their improvement. If the product of the staff work has merit, it will readily win approval, whether the power of ultimate decision is vested in the legislature or in a body of judges. I am happy to see that the Advisory Committee's report contemplates a process of continuous re-examination by a professional staff. Professor Prashker's own career is a demonstration of the prime importance of continuous study by experts. He initiated many far-sighted and useful reforms which have been incorporated into our practice, in some instances by action of the legislature and in other instances by action of the courts.

A professional colleague of Professor Prashker has recently pronounced this judgment: "This book is undoubtedly the best short work in the field and a fitting tribute to the man who contributed so much to procedure and procedural reform in this state." [9] I concur.

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NEW YORK EVIDENCE. By Edith L. Fisch. New York: Lond Publications, 1959. Pp. 678. $15.00.

Anyone who undertakes to turn out a complete work on the law of evidence within the confines of a single volume assumes a monumental burden. The author of *Fisch on New York Evidence* has borne that burden remarkably well.

In 581 pages of text, the author has dealt with most of the rules of evidence and their exceptions normally found in more pretentious works on the subject. Nor is the work a mere cursory treatment of the subject matter in outline form. The author has presented the various rules of evidence as they apply in New York, has traced their growth and development and has analyzed and evaluated them.

The order of treatment of the various rules appears to be somewhat novel and unique, but this does not detract from the value of the work which contains a critical analysis of the basic problems posed by the law of evidence. Instead, it demonstrates that the author has exercised a high degree of discrimination in the choice of subject matter for discussion.

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[9] Peterfreund, *Civil Practice,* 34 N.Y.U.L. REV. 1563, 1564 (1959).

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