

The Powers of the New York Court of Appeals (Book Review)

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subject on page 111. Of course, that subject has very little to do with what Mr. Corwin is writing about, but since he did mention political questions and footnote *Luther v. Borden*,¹ it would have been graceful to add a reference to my articles. But perhaps he never saw them.

Mr. Corwin's book is highly recommended to students, lawyers and laymen.

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THE POWERS OF THE NEW YORK COURT OF APPEALS. By Henry Cohen. New York: Baker, Voorhis & Co., 1934, pp. lxxii, 551.

In 1902 a studious and scholarly young lawyer felt that the important changes in the jurisdiction of the Court of Appeals in 1894 and in 1896 were not fully apprehended by the Bar. He believed, also, that the large body of the law defining the jurisdiction of the Court of Appeals should be made available in ready form and would be helpful in many ways. Therefore, he wrote a book, published by Banks & Co., in 1903, entitled "The Jurisdiction of the Court of Appeals of the State of New York." His name was Benjamin N. Cardozo. He now graces the Supreme Court of the United States. Previous to that, as everyone knows, he had been a great judge, later a great chief judge of the Court of Appeals of this state. Cardozo's book was a gold mine on the subject concerning which he wrote. My own copy is so tattered and threadbare that I am quite ashamed of its condition.

Of course, every lawyer should know the powers of the Court of Appeals, particularly because failure to comprehend them frequently has resulted in fatal damage to the interests of a client. The pitfalls of practice in that court are numerous. The law on the subject should be clear. It is the exact opposite. The jurisdictional limitations, stated so tersely in the Constitution and in the Civil Practice Act, are so complex and abstruse in their application in everyday practice, that even the lawyer most familiar with the law on the subject, oftentimes feels a doubt. Thus, recently in a case a motion for leave to appeal was denied because it was unnecessary.² Yet, counsel deemed it wise to advise the making of the motion in order to be perfectly safe. Since there was some doubt whether the decision of the Appellate Division would be regarded as a judgment of modification, from which there is the privilege to appeal as matter of right, to play safe was better than to weep afterwards.

In 1928 Mr. J. Alvin Van Bergh of the New York Bar wrote a book on the same subject, published by Baker, Voorhis & Co. He attempted in this book to incorporate the statutory and judicial changes in the quarter century which had elapsed since the publication of Judge Cardozo's work. I recall

¹ 7 How. 1 (U. S. 1849).

² Baker v. Polygraphic Co., 264 N. Y. 457, 191 N. E. 512 (1934).

reviewing the book in the *New York Law Journal* in the late spring of that year, and I stated that I found it useful, particularly because it made available the many recent decisions on this highly technical subject.

Now, we have a new book on the subject, published after a lapse of six years. The author, Mr. Henry Cohen, is a member of the New York Bar and secretary to Judge Irving Lehman of the Court of Appeals, to whom the book is dedicated. It is a first-rate piece of work, distinctly worth while and should be of much practical value to every lawyer who is interested in the scope of review vested in the Court of Appeals,—and what lawyer or judge is not so interested?

In the Preface, Mr. Cohen emphasizes that while the actual principles of jurisdiction cover only a few paragraphs of the constitution of the state, they "attain amazing complexity in operation."² To this statement anyone who has practiced in the Court of Appeals will utter a fervent "Amen." And Mr. Cohen points out that difficult and intricate as is a study of these problems, it is nevertheless important to do so because "the consequences of errors in practice, or of failure to comprehend what is the scope of review in the Court of Appeals, are only too frequently fatal to the fortunes of an appeal."³

The Preface further indicates that another great difficulty in the way of understanding the powers of the court is because of the frequent changes in its jurisdiction during the eighty-five years of its existence. Thus, decisions referred to in Judge Cardozo's book are often of no value today because of the kaleidoscopic changes.

One of the most valuable features of Mr. Cohen's book is his frequent reference to the decisions of motions decided *without opinion*. These so-called "memorandum opinions" often are of the utmost value.

Such topics as what constitutes a modification, what is a "final order," when is a constitutional question really involved, and many similar questions of the deepest practical importance, are thoroughly analyzed and discussed.

A particularly practical discussion is found in Chapter 3, entitled "Appeals by Permission," in which the author indicates that the requirements of "substantial justice" are carefully borne in mind in connection with the allowance of an appeal. "One may conceive of a case where the disposition by the courts below is technically erroneous and yet substantially just, and where leave to appeal will be denied on the strength of this provision."⁴

Another feature which I recently found helpful is the discussion of when there is evidence supporting findings.⁵ Thus, in disbarment cases, if there is some evidence to support the charges against the attorney, the Court of Appeals must affirm because of its jurisdictional limitations. But compare *Matter of Schwarz*,⁶ especially the powerful dissenting opinion of Pound, J., with whom Hiscock, Ch. J. and Cardozo, J., concurred.

² P. vii.

³ *Ibid.*

⁴ P. 226, referring to C. P. A. §588 (5).

⁵ Pp. 311-314.

⁶ 231 N. Y. 642, 132 N. E. 921 (1921).

As Mr. Cohen aptly says,⁷ there are cases where although evidence actually has been given to support a finding, it has been held that it would be error of law to make a finding on such evidence, as, for example, in *Bank of United States v. Manheim*,⁸ where O'Brien, J. referred to the fact that there was "no credible evidence,"⁹ even though technically there may have been a scintilla of evidence. Says Mr. Cohen, "The court is not required to find that the moon is made of green cheese because a witness says that this is so. Where the line is to be drawn * * * is obviously a matter of degree,—but it does not follow that no line exists."¹⁰

Here and there are statements with which I do not agree. That fact is quite natural because the topic is one which permits of many differences of opinion. And here and there I find statements which I regard as too broad or wide. But, on the whole, this is an excellent piece of work and I can recommend it without hesitation, for it refers in a practical way to all of the recent authorities, both those rendered with opinion and without opinion.

It is not a mere practice Horn-book. It is a distinctly thought-stimulating piece of work and exhibits industry, scholarship and knowledge of the law, and merits commendation.

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PRINCIPLES OF THE LAW OF AGENCY. Sixth edition. By George W. Matheson. Brooklyn: St. John's University School of Law, 1934, pp. x, 138.

CASES ON LAW OF AGENCY. Second edition. By George W. Matheson. Brooklyn: St. John's University School of Law, 1934, pp. 321.

"A Concise Statement of the Most Important Principles of the Law of Agency"¹ is the characteristically modest fashion with which Dean George W. Matheson of St. John's University prefaces his new edition of "Principles of the Law of Agency."

The text, "Principles of the Law of Agency," just issued, is a real pedagogical contribution. To have fashioned an outline on an important legal topic, such as Agency, in such simple, clear, orderly, lawyer-like manner, is a distinct accomplishment; a treat for teacher and student alike. The wealth of carefully culled material in the "Outline" is sufficiently varied to illustrate broadly the underlying principles, and the cases have been selected with such judicious restraint as to illuminate, yet not encumber essentials. The achievement is singularly a double one, for with the text appears a companion volume,

⁷ P. 312, footnote.

⁸ 264 N. Y. 45, 189 N. E. 776 (1934).

⁹ *Id.* at 51, 189 N. E. at 778.

¹⁰ P. 313.

¹ P. iii.