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## Cases and Materials on New York Practice (3rd ed.)(Book Review)

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## BOOK REVIEWS

CASES AND MATERIALS ON NEW YORK PRACTICE. 3rd Edition by Louis Prashker.<sup>1</sup> Brooklyn: St. John's University School of Law, 1948. Pp. x, 1031. \$10.00.

Professor Prashker's third edition, begot of a fine-looking sire, the second edition, has the advantage, over those animate, of matured good looks at birth. Any seeming defects in the progeny are superficial.

The maturation involved extensive revision. The author tells us in his preface that the edition is briefer than its predecessor. The abbreviations were accomplished by digesting many of the cases previously fully reported and omitting many text notes of the earlier edition, which now appear, carefully pruned and supplemented, in the Prashker text published recently.<sup>2</sup> Some text notes have been retained in the case book. The forms which were printed in the second edition now appear in the text book, and the elimination of such forms from the third edition case book seems wise. This reviewer has always had doubts of the value of forms in case book material.<sup>3</sup>

The author, with modesty, while stating that many of the cases in the case book were new, failed to mention the extent of his labors in the much-culling of the cases from his second edition.<sup>4</sup>

Selection of the cases is good. There are many of the old opinions under appropriate headings, but Professor Prashker by the inclusion of modern leading cases,<sup>5</sup> has given the case book that "new look" so highly desirable, at least in this limited field of practice dealing with New York Procedure, where the legal fashions, legislative and judicial, change so rapidly.<sup>6</sup>

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<sup>1</sup> Professor of Law, St. John's University School of Law.

<sup>2</sup> "Prashker on New York Practice" (1947).

<sup>3</sup> The review of the second edition indicates the value of forms. 11 *ST. JOHN'S L. REV.* 384, 387 (1937) (review by Jay Leo Rothschild).

<sup>4</sup> For example, a comparison of all of the cases where the plaintiff's name begins with the letters "a" through "e," reveals that of almost 600 cases, he eliminated over 300 from his second edition and his supplement of 1942, and added some 70-odd new cases to the remaining group.

<sup>5</sup> Among the recent cases added are: *Fleder v. Itkin*, 294 N. Y. 77, 60 N. E. 2d 753 (1945) at page 678; *Abrams v. Allen*, 297 N. Y. 52, 74 N. E. 2d 305 (1947) at page 303; *Amon v. Moreschi*, 296 N. Y. 395, 73 N. E. 2d 716 (1947) at page 275; *Smalley v. Hutcheon*, 296 N. Y. 68, 70 N. E. 2d 161 (1946) at page 133; *International Shoe Co. v. State of Washington*, 326 U. S. 310, 90 L. ed. 95 (1945) at page 211; *Morris Plan Industrial Bank of New York v. Gunning*, 295 N. Y. 324, 67 N. E. 2d 510 (1946) at page 765.

<sup>6</sup> The broader field is, of course, common law pleading and practice or judicial remedies, and a case book in that field ought to lay emphasis on the look at the old. See 53 *HARV. L. REV.* 345 (1939) (review by Herbert Wechsler of "Cases and Other Materials on Judicial Remedies" by Scott & Simpson).

Where statutory changes have made old leading cases obsolete, the author has indicated such to be the fact.<sup>7</sup>

The subject matters of "res judicata," "election of remedies" and "splitting causes of action" now appear in the chapter entitled "The Complaint" whereas they formerly were treated under the chapter entitled "The Answer." An earlier reviewer had suggested a shift in the placement of these subject matters and the author recognized, in part, the merit of the suggestion.<sup>8</sup> The "Statute of Limitations" was the first subject presented in the old second edition. Again the previous review had suggested a postponement of that subject<sup>9</sup> (and this reviewer agrees with the suggestion). Professor Prashker now delays the entire chapter on this subject to follow discussion of the Civil Courts and their Respective Jurisdiction.

The seeming defects in this third edition, adverted to at the outset of this review, are minimal. There have been deliberate omissions from the text of cases on at least two subjects which the author knew were to be considered by the legislature and judges at the time of the writing of the book. The reviewer of the second edition correctly referred to the Sword of Damocles over the author's head.<sup>10</sup> Professor Prashker correctly anticipated that the judges would remove the old abhorrent rule that parties must plead the language of Civil Practice Rule 92 *verbatim* or else plead, by full allegations, performance of all conditions precedent.<sup>11</sup> On the subject of depositions, discovery and admissions, Professor Prashker states that at the time of writing his book, there was good ground for assuming that the law governing depositions might be revised and case material on the subject is omitted from his volume.<sup>12</sup> Unfortunately, the proposed revision was not enacted into law in the 1948 session.

The space devoted to malpractice cases in relation to the Statute of Limitations is questionable.<sup>13</sup> In the time allowed, the vast amount of statutory

<sup>7</sup> *E.g.*, *Thomas v. Harmon*, 122 N. Y. 84, 25 N. E. 257 (1890), was formerly set out in the second edition in four pages of print at pages 143-146. In the new edition, the case is footnoted at page twelve with a summary statement to the effect that Section 67 of the Civil Practice Act was amended in 1946 giving the county court jurisdiction in a reformation action, a different conclusion having been reached in *Thomas v. Harmon*.

<sup>8</sup> See note 3 *supra*.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> See New Rule 92, N. Y. RULES OF CIV. PRAC. 92 is now referred to in two lines in the third edition, at page 320, whereas nine pages were devoted to the subject in the second edition at pages 362-370. Professor Prashker in 1939, suggested the repeal of the former Rule 92 of the Rules of Civil Practice. See Prashker, *Pleading Performance of Conditions Precedent: New York and Federal Rules*, 13 ST. JOHN'S L. REV. 242 (1939). He renewed his recommendation in 1947. See PRASHKER, *NEW YORK PRACTICE* § 121 (1947).

<sup>12</sup> "At present writing, December 8, 1947, there is good ground for assuming that the law of New York governing depositions may be revised in the near future on the basis of a bill proposed by the Law Reform Committee of the Association of the Bar of the City of New York. . . . Under the circumstances, case material on the subject is omitted from this volume. Students are advised to read the text treatment of the subject." p. 851, n. 1.

<sup>13</sup> Pp. 77-86.

material and cases covering the whole subject of practice scarcely permits that much emphasis on this now relatively well-settled phase of practice, and the same comment may be made with reference to the repeated printing of *Valz v. Sheephead Bay Bungalow Corporation*.<sup>14</sup>

It seems to this reviewer that the subject of Jurisdiction of the Courts, treated as the first chapter in the book, might well have been amplified by reference to early cases<sup>15</sup> which give the background for the distinction between "local" and "transitory" actions. An understanding of this distinction appears necessary before launching into *Burdick v. Freeman*,<sup>16</sup> and cases which follow dealing with the exercise of jurisdiction. Such background material would provide an easy water chute for the student who is otherwise, and necessarily, thrown into the subject of procedure to sink or swim.

The Prashker text<sup>17</sup> is virtually the hand maiden of the case book, but the text is complete in itself, and as appears in its preface, it is a summary of New York practice as well as a critical analysis of many of its principal features. The split into two separate but complementary volumes is a happy solution, albeit a bit more expensive, to suit the views of those who lean heavily on, or those who have been partly weaned from, the case system in the field of procedure.

The keyed references from the case book to the text book are, of course, time savers, and for those who would wish for more elaborate notes and references in the case book, all that is required is a flip of an extra book cover.

The prior endorsement of earlier editions<sup>18</sup> is herein incorporated by reference to the third edition, with the added personal commendation for the production of a finer, modern edition, the best to date in this limited field of procedure.

TRACY H. FERGUSON.\*

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<sup>14</sup> Pp. 256-262. 249 N. Y. 122, 163 N. E. 124 (1928). The holding that the service was merely irregular and the defects could be cured by a *nunc pro tunc* order reciting the newspaper, although not originally designated, as one for publication, scarcely seems to justify the number of words printed in the case book.

<sup>15</sup> As, *Cragin v. Lovell*, 88 N. Y. 258 (1882); *Brisbane v. Pennsylvania Railroad Co.*, 205 N. Y. 431, 98 N. E. 752 (1912); *Livingston v. Jefferson*, 15 Fed. Cas. 660, No. 8,411 (C. C. D. Va. 1811).

<sup>16</sup> P. 16. 120 N. Y. 420, 24 N. E. 949 (1890).

<sup>17</sup> Justice James B. McNally, Book Review, 22 ST. JOHN'S L. REV. 187 (1947); Jay Leo Rothschild, Book Review, 14 BROOKLYN L. REV. 141 (1947); John W. MacDonald, Book Review, 33 CORN. L. Q. 324 (1947); Justice Henry Clay Greenberg, Book Review, 118 N. Y. L. J. 1836 (Dec. 20, 1947).

<sup>18</sup> 3 ST. JOHN'S L. REV. 291 (1929) and see note 3 *supra*.

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