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Cases and Materials on New York Pleading and Practice (2nd Ed.)(Book Review)

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The cases grouped in the concluding chapter deal with questions of administrative procedure, of methods of review and of notice and hearing, topics often excluded from academic consideration. The subject of notice and hearing, however, deserves more prominent treatment than is accorded it. Significantly, the Johnson Act of 1934, which limits the original jurisdiction of the Federal District Courts in respect to administrative rate orders, has no application unless the challenged rate order "has been made after reasonable notice and hearing." But what constitutes an adequate administrative hearing within the meaning of the Johnson Act, or of other statutory enactments, or under the due process clause of State and Federal Constitutions, where the validity of administrative action is in question?

The Courts have yet to give an authoritative answer with respect to this provision of the Johnson Act. But they have given some indication of their views with respect to other statutory provisions and the judicial requirements under the due process clause.[5] These important cases are missing from the otherwise comprehensive list of cases and may well be grouped together under the heading of Notice and Hearing, with special emphasis on the requirements of the statute and of due process to render the hearing adequate and the resulting administrative action valid.

Considering the high scholarly attainments and previous contributions of the authors, a first-class piece of work was naturally to be expected from their joint authorship. The new edition fulfils this expectation.

PINCUS M. BERKSON.

CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE. Second edition. By Louis Prashker.[1] Brooklyn: St. John's University School of Law, 1937, pp. lviii, 1431.

The law of pleading and practice is ever in flux. Therefore, one who labors on a case book on this subject, ventures upon a task made doubly difficult by the uncertainty of his materials. Not only is he uncertain as to the permanency of his contribution, but he must have considerable doubt of his decisions as to what materials should be included, which should be emphasized, and how recent developments should be illustrated.

Thus, proper orientation, in a field governed by expediency, but expressed in terms of logic, is no mean attainment; and an author of a work on pleading and practice is, therefore, peculiarly in a position to appreciate the horrors of

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[5] Morgan v. United States, 298 U. S. 468, 56 Sup. Ct. 906 (1935) (reported after publication of new edition); West Ohio Gas Co. v. Public Utilities Commission of Ohio, 294 U. S. 63, 55 Sup. Ct. 316 (1934); Panama Refining Company v. Ryan, 293 U. S. 388, 55 Sup. Ct. 241 (1935); Atchison Ry. Co. v. United States, 284 U. S. 248, 52 Sup. Ct. 146 (1931); Northern Pacific Ry. Co. v. Dept. of Public Works, 268 U. S. 39, 45 Sup. Ct. 412 (1925); Pacific Gas & Electric Co. v. Railroad Commission, 13 F. Supp. 931 (N. D. Cal. 1936).

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a Damocles' sword hanging over his head—resulting from the very nature of the effort in which he is engaged—and the "stab under the fifth rib," which is the reward of all writers of books.

Unfortunately, the sword of Damocles cannot be cut down from over the author's head. He who writes on practice—while the Judicial Council, Law Revision Commission, Commission on Administration of Justice, and the Legislature grind their grist—must always remain under such a threat. Even while he writes, basic revisions of statutory law are being considered. But the author need have no fear of any stab thrust. Mr. Prashker's book reaches that state of excellence which makes it proof against any such attack. It is the finest piece of masterly scholarship, in the field of pleading and practice case books, which has, in many years, come to attention. It shows, not only untold industry and painstaking investigation, but, also, a scholarship which is profound, and an appreciation of the nuances of the subject, which is given only to those who are in tune with their task, enjoy it, and understand it.

Such being the conclusion, one may well appreciate that, as one reads the book, the critical approach becomes converted into admiration. So much so, that the temptation—to which most reviewers succumb—of using a book review as a vehicle for a commentary—is not even present. After all, what difference does it make that there may be dissent from one view or another? Yet, duty had to be and must be done. Therefore, of the succeeding comments, not all are favorable, but what there is of such comment weighs but little in the balance.

The book is entitled "Cases and Materials on New York Pleading and Practice." It is more than that. It is an experienced teacher's notebook of cases, statutory material, forms, essays of others, queries which have suggested themselves to the author, and his own commentaries on important topics.

The cases are selected with care, and in full deference to the lessons of experience. The author has taken advantage of all the assistance which he could obtain. For the most part, his treatment is progressive, rather than controversial. By that, is meant that he develops the principles involved, rather than poses problems to be solved. Yet, this procedure is followed with no undue devotion to a mere theory of compilation. Wherever the subject matter deserves or requires it, there is ample contrast, comparison, and thought-provoking presentation. Cases are selected for their aptitude in developing the basic principles involved, and not merely for their date of utterance; yet, important recent cases, which have the necessary content, appear in considerable number. Of these, *Schmidt* v. *Merchants Despatch Transportation Co.*, 270 N. Y. 287, 200 N. E. 824 (1936); *Prudential Insurance Company of America* v. *Stone*, 270 N. Y. 154, 200 N. E. 679 (1936); *Chase National Bank of City of New York* v. *Turner*, 269 N. Y. 397, 199 N. E. 636 (1936); *Rawstone* v. *Maguire*, 265 N. Y. 204, 192 N. E. 294 (1934); *Bannon* v. *Bannon*, 270 N. Y. 484, 1 N. E. (2d) 975 (1936); *Romano* v. *Metropolitan Life Ins. Co.*, 271 N. Y. 288, 2 N. E. (2d) 661 (1936); *Schaffer* v. *City Bank Farmers Trust Co.*, 269 N. Y. 336, 199 N. E. 503 (1936); *Cotnareanuu* v. *Chase National Bank*, 271 N. Y. 294, 2 N. E. (2d) 664 (1936); *McGowan* v. *Eastman*, 271 N. Y. 195, 2 N. E. (2d) 625 (1936), are convenient examples. Nor is the compilation too narrow for scholarly approach. Where a discussion, in a case of a court,

other than New York, is helpful, that appears as well. *Cf. Jellife* v. *Thaw*, 67 F. (2d) 880 (C. C. A. 2d, 1933).

There may be reasonable disagreement with the order of presentation in the development of the field. Thus it would seem that the subject of Statutes of Limitation, particularly in connection with the problems of the law and equity phases of the single civil action, should better have been postponed until after the treatment of that topic. Similarly, from the functional point of view, it would have been better to develop the topics of the "Courts and Their Jurisdiction"; "Parties to Actions"; "Election of Remedies"; "Splitting Causes of Action," and, then, the "Complaint," in that order, rather than as done by the author, because such is the order of thought which must be followed by the practicing lawyer, in formulating his complaint and determining his policy. To consider "Election of Remedies" and "Splitting Causes of Action," as a problem of defense—as is indicated by the author's grouping of them, under the general heading "The Answer"—seems to be a reversal of the ordinary routine of things, characteristic rather of the plaintiff's lawyer who first draws his complaint, and looks up his law afterwards, than of the attorney who faces his problems in proper sequence.

For the most part, the statutory material is set forth in the footnotes. In some instances, there are only references. It would have been better to have presented the statutes as part of the main text, and, in all cases, to have set them forth in full. The reason is twofold: First, ease of reading is an important consideration; second, the psychology of the student should be so directed that, as he studies the subject, it is forced into his consciousness that the statutes constitute, not merely auxiliary sources, but the basic foundation of procedural law.

An interesting feature of the book consists of its many references to essays and commentaries of writers on the law, and, in a large number of instances, its reproduction of portions of such legal studies. This procedure undoubtedly has the advantage of stimulating independent thinking, and of conditioning students to appreciation of legal contributions of academic nature. Thus, is opened up the field of abstract legal scholarship, which experience teaches is a valuable, and even indispensable, condition precedent to the so-called practical point of view.

At appropriate places throughout the book, the author has incorporated some of the features of a law-quizzer. This, he has accomplished by formulating questions arising out of the subject matter of the cases presented. The device seems to be well adapted towards stimulating thought in advance of classroom discussion, and organizing it so that the classroom work itself becomes more efficient. If such questions are used as a basis for discussion, they should produce better cooperation from that small portion of each class which is adequately prepared by complete familiarity with the reading matter available to it.

In his preface, the author states: "I have included introductory and expository notes in addition to selected and digested cases. For a number of years, I have increasingly felt that in a law course on practice, the use of cases exclusively is inexpedient. Many details must be noted—but sound educational principles do not require that students should labor through case material for

details." Therefore, the author has included extended notes on many topics, of which the following are illustrative: "Jurisdiction; Service by Publication; Service on Motorists; Federal Interpleader Legislation; Limitation of Actions." Quite uniformly, throughout the book, there are interspersed introductory notes and running comment. This is the feature of the work which gives it its character as a lecturer's notebook, for much of this material is not mere "detail," but comment, analysis, and exposition, which characterize the usual law school lecture. The material is valuable, but imparts a text-book character to much of the case book—which, at least, creates a doubt as to whether the student who has carefully studied his book, will not be deprived of something of that classroom stimulation which comes from first impressions, incident to classroom discussion, and whether the instructor has not, too early in the process, given the student the answer book to many of the problems which, for his own good, should perplex him for a considerable time.

On the subject of forms, the author has made contribution only to the extent of illustration of the usual and simple papers. As a means of aiding comprehension, they have been well selected and carefully presented.

Throughout the book, there is repeated evidence of authorship which is keenly alive to newer developments. The usual treatment of joinder of causes of action and interposition of counterclaims, is omitted, by reason of recent changes in our procedure. The treatment of the problems of vouching in parties, under Subdivision 2 of Section 193 of the Civil Practice Act, is impressively up to the minute. There is a presentation of the recent legislation on injunctions and labor disputes. In connection with the discussion of the summons, there is reference to the case of *People* v. *Globe Jewelers, Inc.*, 249 App. Div. 122, 291 N. Y. Supp. 362 (1936), holding that it is a violation of the Penal Law to use a summons for merely commercial purposes, which introduces an ethical element well worth impressing upon the student. There is an adequate treatment of the subject of declaratory judgments and proceedings supplementary to judgment, as well as of the special proceedings. While the discussion of appellate practice is very sketchy, nevertheless it is sufficient as an introduction to the beginner.

When everything is said and done, Mr. Prashker's work is so deserving of praise, that, what little criticism there may be, is of no material consequence. As far as the reviewer is concerned, if he were teaching pleading and practice, and faced with the necessity of selecting a case book, he would have no hesitation in choosing Mr. Prashker's book as the best current book now available on the subject.

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TAXABLE INCOME. By Roswell Magill. New York: The Ronald Press, 1936, pp. ix, 437.

The income tax law presents two fundamental problems. The first is concerned with the question, "What is income"; the second, with the determination of when income is taxable.

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