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Recent Case Books in Civil Procedure

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REVIEWS

RECENT CASE BOOKS IN CIVIL PROCEDURE*

In the course of 1926-27 three elaborate casebooks on Civil Procedure were published for use in our Law Schools. The first to reach the reviewer's desk was Keigwin's "Cases in Code Pleading." A little later, but under the same preface date, May, 1926, Throckmorton's "Cases on Code Pleading" appeared. Magill's "Cases on Civil Procedure" followed before the opening of the law schools in 1927. All three books come from University Law Schools in the eastward section of the United States—from Western Reserve University, from Georgetown University, from Columbia University. Each shows the care and skill of a professor of law engaged in the actual work of teaching civil procedure.

Naturally these casebooks have much in common. Two of them deal chiefly with the widespread American system of pleading which is based on the revolutionary principle of the one form of action. But they all differ in their main points of view and in their methods of treating the subject. Professor Keigwin's book is distinctively a code pleading work but with its cases in a quasi-treatise setting—a scholarly, interesting, and suggestive setting, especially for the teacher. These treatise features appear in the form of a 29 page "Introductory" to the whole volume and in a series of "Summaries of Doctrine," for eight of ten main heads—The Merger of Law and Equity, The Abolition of Actions, Parties to Actions, The Joinder of Actions, The Complaint, The Demurrer, The Answer, The Reply. The general purpose of the Summaries "is to put the student in possession of so much historical matter as will enable him to understand the genesis of the system which he is about to acquire, and also to indicate by comparison with the older method the reasons for the reform and the extent of the departure from pre-existing institutions." Manifestly, so the learned editor tells us in his preface, "if the merits of the reform are to be adequately appreciated, the characteristic features of Code pleading must be intelligently compared with the institutions which those features have displaced. Such comparison requires a certain historical retrospect and certain restatements of common law methods, which must be understood in any useful estimate of the superseding prescriptions."

With most of the Summaries there are given also very briefly stated cases in illustration of the Summary or as ancillary to

**Cases in Code Pleading.* By Charles A. Keigwin. Lawyers Co-operative Publishing Co.: Rochester. Pages xxii, 856. 1926. Price \$5.00.

Cases on Code Pleading. By Archibald H. Throckmorton. St. Paul, West Publishing Co. Pages xiii, 899. 1926. Price \$5.50.

Cases on Civil Procedure. By Roswell Magill. St. Paul: West Publishing Co. Pages viii, 578. 1927. Price \$5.00.

more fully stated principal cases under the same heading. Compared with the latter, these ancillary cases, well selected and valuable to the doctrine, sometimes make a considerable proportion of all the cases under the head in question. Their aggregate for the whole casebook runs to some 70 cases as against about 300 principal cases.

The primary purpose of the work, as stated by its editor, "has been to develop the distinctive features of the Code method and to put the principal stress upon those matters wherein the statutes establish variation from the modes of the common law. The reader will therefore find his attention frequently invited to certain of the original institutions, with which his acquaintance is presumed, and in respect of which the statute has adopted a different doctrine and prescribed a diverse procedure." And the editor's endeavor "has been to represent practice under the codes as it actually and generally is" with local diversities disregarded.

It is noteworthy in the principal cases that the statements of facts as given in the official reports are often cut very closely, if not perilously, in our casebook. An illustration appears in the case of *City of Syracuse v. Hogan* (1923), 234 N. Y. 457, as given on page 98 of Keigwin's cases. In the official report Judge McLaughlin states the allegations of the complaint and of the answer, the steps in the trial, and the question certified to the Court of Appeals. The judge's statement covers about two pages of the official report. It affords the student an unusually attractive opportunity to show his skill and command of the case in an attempt for himself, after he reads and rereads all the case, to make an even more plain and concise statement of material facts, all the material facts, and none but the material facts, before the court in the case at bar. It is a worth while effort for a student of a case, as distinguished from a reader of it. But this work our casebook does for the student, in a statement of half a page, including the result reached in the Court of Appeals. This statement of facts is well done. No doubt it has the merit of saving time and saving space. A reader of the casebook should be grateful; he can get through a larger number of cases in a morning than if he had to work out for himself a summary statement of the facts of each of them. But does not the casebook, in this method, take an important and profitable piece of work away from the student who is seeking a training in habits of legal thought, as distinguished from the reader who is seeking primarily information about the case?

Another illustration, taken somewhat at random, appears in *Bruheim v. Stratton* (1911), 145 Wisc. 271, as presented in Keigwin's cases, p. 315. In the official report Judge Kerwin, delivering the majority opinion, states, briefly enough, the allegations of the complaint and of the answer, the question before the court, the defendant's contention that *Dessert Lumber Co. v. Wadleigh*, (1899), 103 Wisc. 318, applies, the judge's reasons for holding that this case does not apply, and the distinction which he draws between it and the case at bar and that the judg-

ment below, which was for the defendant, must be reversed. In a dissenting opinion Judge Barnes states with fair fullness his reasons for holding that the Dessert Lumber Co. case is sound in principle and on authority that on its facts it cannot be distinguished from the case at bar and that the judgment should be for the plaintiff. Taken as a whole, with both its majority and its dissenting opinion, *Bruheim v. Stratton* is an unusually fine selection for a casebook on Code pleading. It affords an opportunity not only for an effort by the student to make a plain and concise statement of the material facts of the case, of the way it reached the court, of the question before the court, of the answer which the court gave to the question, but also for a reason whether the answer given by the majority or the answer given by the dissenting opinion is sound in law.

This opportunity our casebook takes away, in large part, from the student. The statement of facts, substituted for the court's statement, is given in a summary form which in itself is excellent but which leaves the student no opportunity to try his hand at it. The dissenting opinion, which is especially valuable in connection with the facts of this case and the reasoning of the majority opinion, is not given at all. The Dessert Lumber Co. case is, it is true, given elsewhere in the casebook. The instructor can start an inquiry on the part of his class whether the opinion in the Lumber Company case or the majority opinion in *Bruheim v. Stratton* is to be preferred but this affords no such stimulation or ground of inquiry as is afforded by the dissenting opinion in *Bruheim v. Stratton* itself.

Professor Throckmorton's volume is distinctively a Code pleading casebook. With the exception of an eight page introduction on the rise and spread of Code pleading, its effect in the Federal courts, its characteristics and its revisions, his 884 pages of text show no treatise features. The material facts of a case, the decisive question in it, how this question was reached, and with what final result, can be ascertained only from a careful reading of the whole case as given in the casebook. A student's search for possible distinctions between the case and other cases under the same head in the casebook, and their bearings on the doctrine in hand is without the aid of treatise summaries or short order ancillary cases. An analytical summary of the doctrine under consideration there should be, of course, but it is for the student to work it out. The process may be slow, the mistakes may be serious; but under the stress of class room discussion, and the questioning of a law teacher not given over to lecturing, the result for the earnest student will be worth the time and the effort. In the outcome he will have a mastery of the principle involved and a valuable experience in the thinking which goes into the making of a lawyer.

The text cases, running to the number of 331, are arranged under three main divisions, Parties, Joinder and Splitting of Causes of Action, The Pleadings. The last division is much the most extensive. It includes six chapters, three of which aggregate 19 distinct sections, with definite divisions of some of

these sections. One chapter is given to the subject of Motions. In Common Law pleading, the motion based on the pleading had a limited range; in these modern days, however, it is of wide and growing importance. Although some excellent casebooks on Code pleading give the Motion no separate treatment, its right to a distinct chapter seems to be very clear.

Two features are notable in the 331 text cases in Professor Throckmorton's book, their wide field of selection and the number of them which have appeared since 1900. Of the 28 states which have adopted the Code, 25 appear in the selected cases. The larger number comes from New York, with 101 cases from its courts. But the trans-Mississippi states are well represented. California has 14 cases, Minnesota 13, Missouri 18, South Dakota 11, Oregon and Oklahoma each 14. Possibly the spirit of Code pleading has had freer opportunity west of the Mississippi. The large number of cases this side of the year 1900 and the necessary limits of a casebook planned for about 72 hours of class room work have resulted in the exclusion from the text of a number of landmark cases. The teacher will miss more than one old friend.

Two other features of the book are deserving of notice. It gives at the opening of the more important chapters the text of the enactments in a representative number of the Codes, east and west. These enactments are selected both from some of the older Codes and from the recent New York Civil Practice Act, "not only for the purpose of portraying the present law of New York but also for the purpose of stimulating discussion as to possible improvements in the Codes of other states." Throughout the book there are valuable case notes referring to other cases and to articles in the late law periodicals which touch on the distinctions involved.

Professor Magill's book differs from the other two in its objective although it deals with a number of subjects which are of fundamental importance in Code pleading. Its aim is however to provide a scientific casebook for a first year procedure course. Its selections, including about 50 Code cases, are presented in the light of Common Law rules of pleading and the Forms of Action. It seeks in common law pleading the key "to an understanding of the requirements, the possibilities, and the limitations, both expressed in the statute and inherent in judicial experience, of modern Codes and Practice Acts."

The almost simultaneous appearance of these three carefully prepared books may be due to a commendable courage on the part of their law publishers or to a fortunate accident. But the event itself may be significant of coming good. We have 28 Code states. In all of them the courts are deciding, and have long been deciding, cases arising out of direct or inferred statutory provisions common, for the most part, to the different Codes of civil procedure. These decisions, in most Code states, now run through two generations. Apparently we have reached a time when a thorough study of these principles as thus worked out in many jurisdictions will give us the long desired and

greatly needed scientific Code of Procedure under the principle of One Form of Action. But this work cannot be done in the law offices. It can be done in the law schools if sufficient time and effort can be found there for the undertaking. It would serve a useful end if Professor Magill's book could be used as a first year book, to be followed by Professor Throckmorton's book in either the second or the third year.

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