Volume 45 | Issue 2 Article 16

February 1939

Cases and Other Materials on Judicial Remedies

Leo Carlin
West Virginia University College of Law

texts wisely discriminate in their selection.[30] It was probably too much to expect, however, that an index would be furnished.

A true disciple of Holmes, Judge Hutcheson has portrayed fairly in these writings the famous advice Pliny is said to have once received:

> "To be engaged in the service of the public, to hear and determine causes, to explain the laws and administer justice, is a part and the noblest part of philosophy, as it is reducing to practice what the professors teach in speculation."[31]

C. C. WILLIAMS, JR.

College of Law,
Morgantown, West Virginia.

CASES AND OTHER MATERIALS ON JUDICIAL REMEDIES. By Austin Wakeman Scott and Sidney Post Simpson. Published by the Editors, Harvard Law School, Cambridge, Massachusetts, 1938. Pp. xi, 1309.

This book is designed for use in a new first-year course instituted in the Harvard Law School at the beginning of the current academic year. It is one of the results of the recent intensive study and reorganization of the Harvard Law School curriculum. The purpose which shaped its design is revealed in the introductory chapter, where the authors explain the object of the course which it is intended to serve:

> "It is the purpose of this course to give the basis for an understanding of the procedural law of the various jurisdictions in the common-law world — the United States, England, and the English-speaking dominions of the British Empire, all of which derive the main outlines of their legal systems from a common source, England. This course is concerned with fundamental procedural conceptions and methods, and their history; it is not a course in the practice of any particular state or jurisdiction. But it is designed to afford

[30] P. 71: ". . . . a conversation which I had had once with one whom I regard as the most really learned judge and jurist of his day.

> 'What do you read beside law books, Hutcheson? Do you read much philosophy? I have read about all of it, and it is nearly all buncombe.' "

One may speculate as to who this "most really learned judge and jurist" could have been. It would scarcely have been Holmes, for he believed that "philosophy widely understood is the greatest interest there is." SHRIVER, *op. cit. supra* n. 19, at 164.

[31] Quoted to Holmes by Brandeis, SHRIVER, *op. cit. supra* n. 19, at 195.

the basis necessary for learning particular procedural systems."

One who is interested in a book designed primarily as a teaching mechanism will be interested in its quantitative as well as its qualitative analysis. Consequently, it is proposed to summarize the contents by reference to pages, rather than to chapter and section divisions. Lack of space will prohibit any but the most sparing attempt at sub-analysis of the great variety of topics involved.

Part One deals with The Judicial System: Introductory, 1 - 4; Judicial Organization, 5 - 15.

Part Two deals with Actions at Law: Outline of the Proceedings in an Action at Law (including sample records, one in a famous old case, *Slade's Case* and one in a famous modern case, the *Palsgraf Case*), 16 - 72; The Forms of Action, 73 - 146; Abolition of the Forms of Action, 146 - 167; Pleading in Actions at Law, subdivided into The Function of Pleadings, 168 - 172; Demurrers, 172 - 206; Demurrers and Substitutes Therefor Under Modern Statutes and Rules of Court, 206 - 220; Frivolous and Sham Pleadings: Herein of Summary Judgment, 221 - 234; Pleas in Bar, 235 - 268; Dilatory Pleas, 268 - 274; Recoupment, Set-Off and Counterclaim, 274 - 286; Replication and Later Pleadings, 286 - 297; Amendments to Pleadings, 297 - 310; Trial and Adjudication at Law, subdivided into Right to Trial by Jury, 311 - 323; Selection of the Jury, 323 - 340; Demurrer to the Evidence, 340 - 347; Nonsuit, 348 - 359; Directed Verdict, 359 - 385; Instructions to the Jury, 385 - 397; Verdict, 397 - 418; Motion for New Trial, 418 - 464; Motion in Arrest of Judgment, 464 - 474; Motion for Judgment Notwithstanding the Verdict: Herein of Judgment on the Pleadings, 474 - 479; Trial Without a Jury, 479 - 495; Default, 495 - 500; Judgment, 501 - 508; Appellate Review at Common law, 509 - 518; Validity and Effect of Judgments, subdivided into Jurisdiction of the Person, 519 - 550; Res Judicata, 550 - 565; Proceedings Against Property, subdivided into Proceedings in Rem, 566 - 570; Attachment and Garnishment, 571 - 588; Enforcement of Judgments, 589 - 609; Extraordinary Legal Remedies, subdivided into Common-Law Certiorari, 610 - 618; Prohibition, 619 - 628; Mandamus, 629 - 657; Habeas Corpus, 658 - 673; Quo Warranto, 673 - 688; Statutory Fusion of Extraordinary Remedies, 688 - 692.

Part Three deals with Suits in Equity: History of Equity, 693 - 719; Outline of Proceedings in a Suit in Equity, with forms and a record, 720 - 748; The Exclusive Jurisdiction, subdivided into

Uses and Trusts, 749 - 756; Fraud, Mistake and Accident, 756 - 769; Mortgages and Relief Against Forfeitures, 769 - 774; The Concurrent Jurisdiction subdivided into Specific Performance of Contracts (also subdivided), 775 - 873; Equitable Relief Against Torts (subdivided), 873 - 921; Equity and the Criminal Law, 921 - 952; The Auxiliary Jurisdiction, 953 - 961; Equity Procedure, subdivided into The Bill, 962 - 969; Demurrers, 969 - 980; Pleas, Answers and Replications, 981 - 994; Cross-Bills and Counterclaims, 994 - 1006; Hearing, 1006 - 1017; Decrees (subdivided), 1017 - 1032; Appellate Review, 1033 - 1049; Enforcement of Decrees, 1050 - 1113; Effect of Decrees, 1114 - 1128; Equitable Execution, 1129 - 1144.

Part Four deals with Unified Civil Procedure: Procedural Merger of Law and Equity, 1145 - 1210; Aspects of Modern Civil Procedure, subdivided into Pleading, 1211 - 1213; Parties, 1214 - 1218; Discovery and Pre-Trial Procedure, 1219 - 1230; Trial, 1231 - 1235; Judgment, 1235 - 1238; Appellate Review, 1239 - 1251; Enforcement of Judgments, 1252 - 1269; The Future of Civil Procedure, 1269 - 1273.

A glance at this topical outline would seem to be a sufficient substitute for any comment suggesting how comprehensively the fields of pleading and procedure, both at law and in equity, have been covered; but an examination of the material under each topic will reveal more. For example, the subject of process in common-law actions is dealt with specifically as such only in two pages of commentary at the beginning of Chapter III, but the different modes of service and their procedural effect receive detailed attention at the beginning of Chapter VIII, Validity and Effect of Judgments, under the sub-topic Jurisdiction of the Person. Perhaps in a somewhat similar manner the student is expected to glean a knowledge of the essentials of the initial pleading (declaration, complaint or petition) and the general rules of pleading exemplified therein, since there is no topic dealing specifically with such a pleading, as there is in the part dealing with equity pleading. Although one can sympathize with an attitude seeking curtailment in a volume which, due to the nature of its subject matter, must necessarily have a tendency toward obesity, it may seem that a book which gives so much space to demurrers, pleas and replications in specific topics should have found some space at least for a topic dealing with the common-law declaration, particularly since the

general rules of pleading exemplified therein are particularly pertinent as a background for the structure of code pleading.

The cases are well selected. Many of them will be recognized as cases which have been used in most prior books dealing with the subject. Particularly is this true with reference to the earlier common-law fundamentals, *e. g.*, the forms of action. There seems to be no particular effort to seek originality by way of avoiding use of a case merely because it has been used heretofore for a similar purpose in some other case book, which is commendable. Nobody should be treated as having a copyright or right of priority on the basis of comity or otherwise, with reference to any case, ancient or modern, *Scott v. Shepherd* or *Pennoyer v. Neff*, or the lesser fry.

The topics as a whole are well balanced. If the materials allotted to some topics should appeal to an instructor as being, comparatively, excessive, it should be remembered that the authors announce that the materials have been furnished with the idea of permitting and requiring selective adaptation to suit the purposes of the individual instructor.

Cases form the backbone and the frame of the materials. However, the cases are liberally supplemented with text material from various sources, admirable general prefatory commentaries by the authors, and statutes.

The footnotes are particularly copious and helpful. Supplementary cases are cited in profusion. References to notes and articles in legal periodicals and to standard texts are numerous. Since the whole subject is treated in the light of its historical background, references to, and quotations from, sources of legal history are frequent. Not a few problems (but not enough to discourage the student's industry) are stated in the footnotes, with cases cited in which solutions may be found.

In the preface, the authors say that the course for which this book is intended to furnish materials "is not intended to be a definitive and complete course on civil procedure, such more detailed study being reserved for the third year." They further say "The object of the course for which this book has been prepared is not training for bar examinations or for practice in any jurisdiction — even the federal courts — ". These and other statements by the authors, in addition to the fact that the course is intended to be given to entering students (three hours a week the first semester and two hours a week the second semester, or, preferably, three hours a week throughout the year), indicate that the materials are

intended to be used for purposes of a background course, to furnish a background not only for acquiring an understanding of the substantive law, but also for a future more comprehensive and intensive study of the adjective law. In fact, the book contains a background for a background. Chapter III, An Outline of the Proceedings in an Action at Law (pages 16 - 72), is intended to furnish a background for the materials in the residue of the book. That the background which the whole book is intended to furnish is, so far as future study of pleading and procedure is concerned, a background for the study of so-called code pleading, or modern statutory pleading and procedure structures and processes, seems fairly obvious. This purpose it should well serve (1) in those schools which make no effort to teach "a definitive and complete course on civil procedure", leaving the acquisition of such knowledge to experience in practice, the principal object being to provide a procedural background for a study of the substantive law; and (2) in those schools which provide for an additional comprehensive and intensive subsequent course in statutory pleading and procedure.

It is a little difficult to contemplate the use of the materials for purposes of a prefatory course in a school which caters to the needs of students who must practice in a common-law jurisdiction, and hence whose "definitive and complete course" given later deals with common-law pleading and procedure, or equity pleading and practice. There does not seem to be much opportunity for qualitative abridgment of study of the law, particularly as presented through the medium of cases. The abridgment must be primarily quantitative. It is difficult to conceive "elementary" law in the sense in which we conceive elementary algebra or elementary physics. To the extent that the materials in this large and scholarly volume may be considered as abridged, they certainly must be considered as abridged quantitatively rather than qualitatively. So far as the materials dealing with modern statutory procedure are concerned, the abridgment has been so great as to leave plenty of room for a future more comprehensive course in the same field. However, if a student has in his first year spent (adequately) five or six semester-hours on the materials in this book, it would seem a little embarrassing for either students or instructor to face the duplication that would be involved in future courses in the common-law remedies, common-law pleading, common-law practice and procedure, and equity pleading and practice. It would seem that the students must be stale when they undertake these courses and that

the instructor would be at a loss to determine where to draw the line on duplication and where the "definitive and complete course" should begin and end.

LEO CARLIN.

College of Law,
Morgantown, West Virginia.

ITALY AT THE PARIS PEACE CONFERENCE. By René Albrecht Carrié. New York, N. Y. Columbia University Press, 1938. Pp. xv, 575, maps.

This volume is one of a series, THE PARIS PEACE CONFERENCE: HISTORY AND DOCUMENTS, that is being published by the Carnegie Endowment for International Peace. Although the great detail with which this volume is written makes it of primary interest to the scholar the work cannot be ignored by anyone who is attempting to understand the present confused relations of Italy, Germany, France, and Great Britain. Italian foreign policy for nearly twenty years has been largely determined by the failure of Italy to get from the Versailles Peace Conference and succeeding treaties what she felt rightly belonged to her both as a result of the provisions of the Treaty of London of 1915 and the fact that Italy came out of the war as one of the victorious states.

This book is divided into four parts. The first deals briefly with the war and Italy's entrance in 1915; the second covers the period of the Orlando-Sonnino Ministry from November 1918 to June 1919; the third treats the Nitti Ministry from June 1919 to June 1920; and the fourth gives us the final settlement, as it affected Italy, both on the continent and in Africa.

For the first time since the Versailles Conference Italy's case is here set forth to the world. There was nothing natural in Italy's alliance with Austria-Hungary except her desire to counteract French influence in northern Africa and she did not enter the war on the side of the central powers in 1914 primarily because she had little to gain even in victory. Strict neutrality was the best policy until the Allies made an attractive offer for her services, an offer which promised much more for Italy than the Central Powers had to give. Under these circumstances Italy, as an opportunist, joined the Allies in 1915 under the provisions of the "secret" Treaty of London. Before the end of the war Woodrow Wilson announced his Fourteen Points which were later accepted as a basis for peace and