

CASES ON PROCEDURE.

THE SERIES.

The present volume, on Code Pleading, is the second of a series of case-books which the editor hopes to prepare for the use of law students, covering the broad subject of Procedure. The plan contemplates separate volumes on the following special topics:—Trial Practice, Code Pleading, Common Law Pleading, Equity Pleading and Practice, Criminal Procedure, Evidence, and Appellate Practice.

These books are to be prepared as separate and independent treatments of the subjects to which they relate. Each branch of procedure has its own subject-matter and its independent problems, and no advantage would result from erasing the lines which mark its boundaries. But while this is so, it is nevertheless important to observe that an adequate conception of any one of these branches can be formed only by keeping constantly in mind the scope and function of procedure as a whole. In a very true and fundamental sense procedure is single and indivisible. Its aim is to furnish a mechanism for litigation, to supply a means and method for applying the law in the solution of legal controversies. One purpose runs through it all. Pleadings are drawn to present issues for trial; trials are had to determine issues raised by the pleadings. What the trial demands the pleadings must give. One is the counterpart of the other. Only in view of the trial are the pleadings intelligible; only by reference to the pleadings can the scope and course of the trial be determined. And as for the relation between procedure in *nisi prius* and in appellate courts, the former is moulded to meet the requirements of the latter and the latter is based strictly upon the foundation laid by the former. Thus pleading, in its various forms, trial practice, and appellate practice may be correctly viewed as component parts of a highly developed system designed to enable parties to successfully resort to courts of-law for the redress of grievances. Together they

furnish a complete mechanism for the administration of the law.

In the present series of case-books upon procedure it is proposed to develop the subject, so far as possible, in this broad and comprehensive way. Each branch will be treated separately, and its technical details will be fully and carefully exhibited, but at the same time it will be the definite aim to make each volume disclose its place and purpose as an integral part of an articulated system. In this way, if at all, may procedure be shown in its true character, as a logically developed and practically efficient means for accomplishing a very important end, instead of a mass of arbitrary and technical rules. No method will work well in the hands of those who lack an adequate perspective and who fail to take a comprehensive view of its scope and purpose. If the law schools are to turn out men able to meet the exacting demands of a critical and sorely-tried public, they must spare no effort to develop in their students a thorough, rational and enlightened appreciation of the true function and the basic principles of procedure. The series here proposed is an effort to supply material to meet this need.

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P R E F A C E

In the present volume on Code Pleading, the editor has aimed to present the subject, in all of its more important features, as a complete working system of pleading. The code has frequently been treated as the mere "antithesis" of common law pleading, and this has resulted in throwing the subject completely out of balance by unreasonably extending the discussion of those elements which are "characteristic" of the code, while unduly restricting or entirely ignoring those principles which the code shares with the common law. Such a method of treatment is appropriate for a purely critical and historical study of the code, but it does not seem adequate for a study which aims to analyze the code system as a well rounded body of principles suited to the accurate and convenient presentation of legal controversies.

The student should be able to obtain a clear conception of the system as a currently used method of procedure, adapted to the complex demands of modern litigation. He should understand both the theory upon which it is based and the practice which has developed in its use. This requires an analytical study of the code in all its important aspects and a synthetic appreciation of the true function of each part in producing a completely developed method.

A true historical perspective is of course essential to a successful study of any subject, and it is believed that this has been sufficiently exhibited in connection with the examination of the various problems of pleading, but it has been purposely made incidental rather than primary.

Annotations have been freely made for the purpose not only of disclosing divergent views and amplifying the matter under discussion, but of furnishing a convenient body of references to the more important decisions in the various code states.

The editor has also gathered up and presented in an accessible form the exact statutory provisions found in all the codes upon the principal branches of the subject as an aid to the student in making a close study of the procedure in the particular jurisdiction in which he may be interested, and to serve as a basis for the comparison of cases from different states.

That there is more litigation over questions of pleading in the code states than in those adhering to the common law, is evident from an inspection and comparison of the current reports. This is due partly to the comparative newness of the code and partly to its inherent difficulties, notwithstanding that the system was expected by its founders and generally believed by its adherents to be particularly free from technicalities. The notion of simplicity which tradition has associated with the code has tended to disarm the student and to discourage the close and painstaking study which was always conceded to be necessary for an adequate comprehension of the older systems of pleading. The editor has endeavored in this book to treat the code as it is actually employed, to disclose both the logic of its theory and the difficulties of its practice, for the purpose of giving the student a thorough and intimate understanding of code pleading as both a science and an art.

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