BOOK REVIEWS


The Connecticut Practice Act, effected January 1, 1880, has established what has generally been considered one of the most effective systems of civil procedure in existence. There were various reasons for this success. The Act was adopted after considerable experience in the various states with the Field code or reformed procedure inaugurated in New York in 1848 as well as with the reform in England accomplished by the Judicature Acts of 1871 and 1873. Profiting by the teachings of this experience it avoided some of the pitfalls met with elsewhere and developed a simple and effective union of law and equity. Fairly extensive rule-making power was continued in the courts, the benefits of which, while not fully realized, have become increasingly apparent since the creation a few years ago of a Judicial Council. But perhaps as important was the state publication of an official Practice Book, available to lawyers and law students, containing not merely the practice provisions, but official forms of pleadings for the guidance of bench and bar. Unfortunately even a fine practice system, like all orderly processes involving an increasing number of technical requirements, tends to petrifaction, and some danger may be discerned lest the originally excellent Connecticut system becomes overtechnical just at a time when a ferment of reform activity is remodeling the procedure of several states and of the federal trial courts. The publication of a new Practice Book compiled by a Committee of Superior Court Judges, containing over 300 forms of complaints and a total of 680 official forms, affords perhaps a fitting occasion to express some concern lest Connecticut lose its procedural preeminence.

The figures as to the numbers of forms in this official publication will indicate the nature of my criticism. Official forms should not be handy short cuts for the lawyers to avoid thought of their own. They should be the models which point the way to effective presentation of the case; or they should furnish the yardsticks by which good and bad pleadings can be measured. Unfortunately with each new issue of the Practice Book the pleading forms tend to become more and more prolix and involved. Instead of being models, they well might be presented as examples to be avoided.

When the last revision of the Practice Book, that of 1922, appeared, I commented upon this very point, criticizing specific forms and expressing regret at the subordination of some of the simple forms of the original edition taken over from the common law. Some of the forms whose validity I questioned have been retained; other


5. Cl. Conn. Prac. Br. (1934) Form 232, ibid. (1922) Form 208, “Negligence in Operation of an Airplane,” which, for reasons stated in (1923) 32 Yale L. J. 488, is believed to contain too many and too few allegations.
new and doubtful ones have been added; and perhaps more to be regretted, some of the simple forms have now been omitted. 6  Pleading in auto negligence actions perhaps best illustrates the point. There is a recurring similarity in the cases, and outside of indicating the few different types of accident (auto and pedestrian, auto and auto on open highway, the same at a street intersection) nothing is gained by requiring lengthy allegations of speed, lack of control, and so on. In fact the common law action on the case for driving so negligently that the defendant's carriage struck the plaintiff's, thereby causing the damage claimed—which is adapted to the automobile age in the admirable forms set forth in the Massachusetts statute—gives all that is necessary. 7  To attempt to procure more is to delay the case to secure theoretically better paper essays, but no more real information to any one; and a skillful pleader may actually convey less information than otherwise by piling detail on detail. This is well exemplified by the new form herein of model paragraphs of allegations of negligence in the operation of motor vehicles, containing fifteen detailed kinds of negligence, 8 as well as the other negligence complaints.

Even though an opportunity to instruct the profession in good pleading and to stimulate it into emulation thereof may thus have been lost, is it likely that the Connecticut system has been prejudiced by the suggestion of these forms? One cannot be sure, of course; and the foundations of the Connecticut system were so well laid that it is still most simple and effective. Nevertheless one senses a somewhat greater regard for pleading technicalities than formerly. There seems less of a tendency to hold that procedural rules are only a means to an end, where if the end is attained the means need not be stressed, and more of emphasis upon the rules as conditioning the contest itself. We may illustrate by pointing to the development of the rule that one may take upon himself a burden of proof not otherwise his by affirmative pleading. So far has this now gone that even the salutary statutory reform placing the burden of proof of contributory negligence in wrongful death actions upon the defendant, may be overturned by the plaintiff's careless explanation of his case in some detail. 9  Thus unfortunately that pleader is penalized who most nearly meets the pleading objective of stating his full case.

One dislikes to seem overcapacious, and the natural tendency of pleading rules to crystallize and harden must be recognized. But the Connecticut system is too fine a thing to allow it to fall into decay. An official practice book affords one important means of correction. It is obvious that much devoted time and effort has gone into the organization of this edition—perhaps overmuch if the views herein set forth are

6.  E. G., the common law forms of negligence in driving on the highway, CONN. PRAC. BOOK (1922) p. 452.
7.  MASS. GEN. LAWS (1932) c. 231, § 147, No. 13; Williams v. Holland, 10 Bing. 112 (C. P. 1833); 2 CHITTY, PLEADING (7th ed. 1844) 529.
8.  Compare 222, and compare a similar form as to allegations of damages, Form 238, and the negligence complaints generally, Nos. 217-238. For allegation of "last clear chance" contrary to Mezzi v. Taylor, 99 Conn. 1, 120 Atl. 871 (1923) see Nos. 223 and 227.
9.  Hatch v. Meringold, 119 Conn. 339, 176 Atl. 266 (1935) contra to GEN. STAT. COM. SUPP. (1933) § 1149, which had changed the rule of Kotler v. Lalley, 112 Conn. 86, 151 Atl. 433 (1930); (1931) 40 YALE L. J. 484. The earlier cases criticized in Comment, Effect of Unnecessary Affirmative Pleading Upon the Burden of Proof (1929) 39 YALE L. J. 117, are not, however, cited. For an apparent tendency to the "theory of the pleading" doctrine, see Rochon v. Preferred Accident Ins. Co. of N. Y., 118 Conn. 190, 171 Atl. 429 (1934).
sound. One may hope that the judges on their next editing of this official book will consider with care whether the objective of a pleading model, rather than a lawyer's handbook, is not the preferable one.10

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The book contains 283 pages of text, and differs from the lawyers' edition by devoting 163 instead of 512 pages to forms. Every part begins and ends with what is regarded as common to common law. Part one consists of three introductory chapters on the historical development of pleading, the formulary system and theory of the case, and the classification of actions. Conventional forms of action are treated in nine separate chapters, which also include "essential averments" in each action. The next fifteen chapters concern pleading miscellany. Attachment and garnishment and service of process, in two chapters, are treated last. Part two is devoted to forms for the District of Columbia, Maryland and Virginia.

The type is clear and readable. It is doubtful whether the reversion to a modified form of black marginal headings, reminiscent of the star page days, gives either the continuity or outline attained by the hornbook style. Footnotes, in the same type as the principal text, sometimes confuse, particularly as the note line is usually not extended across the page. The repetition of references to forms at the foot of each page in chapters 4 to 12, instead of at the beginning of each chapter, serves no useful purpose. The text and forms are separately indexed.

The text shows incomplete investigation, for example: the statement that detinue is not used in Maryland,1 that detinue will not lie where the bailee accidentally lost the bailed goods before demand,2 that a bailor cannot bring trespass,3 that the defense of title in a third person requires notice by the third person to the defendant,4 that a landlord out of possession must use an action on the case,5 that negligence in general is only sufficiently alleged in res ipsa loquitur cases,6 that the tort may be waived regardless of whether there has been a sale by the wrongdoer,7 that an assignee

10. May I express a preference for the older plan of making the Practice Book complete by including not merely the Rules of Practice, but those statutes going to make up the Practice Act. The present separation I find confusing. Still better would be a complete revision of both Practice Act and Rules to present a single modern unified system.

1. P. 43. Detinue was brought in Mylander et al. v. Page, 162 Md. 255, 260, 159 Atl. 770, 771 (1932).
4. P. 60, 148. For conflicting decisions, see Comment (1929) 27 Mich. L. Rev. 936.
5. P. 69. For conflicting decisions, see Ames, Lectures on Legal History (1913) 228, n. 13.
6. P. 75. Specific allegations of negligence were not always required by common law precedents. Clark, Pleading Negligence (1923) 32 Yale L. J. 483, 485.
7. P. 121. For conflicting decisions, see Thurston, Cases on QUASI-CONTRACT, (1916) 596, n. 21, 599, n. 25.