

HANDBOOK
OF
COMMON LAW PLEADING

By

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and

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To
LYNNE KOFFLER
and
VIRGINIA REPPY RUSSACK

PREFACE

Almost half a century has elapsed since the publication of the third, and final, edition of Shipman's standard text on Common Law Pleading. The late Dean Alison Reppy, with whom I was associated in teaching the subject of Common Law Pleading, and who devoted much of his life to study in the field, commenced this work in an effort to meet the need for a new comprehensive work on the subject, but an untimely death cut his efforts short. I was at the time in a position to assume this undertaking, and have worked over the many succeeding years upon the preparation of this work. The responsibility for what appears in these pages is therefore mine.

It is my hope that this work will be of assistance to members of the bench, bar, and students of the law, in their professional and scholarly pursuits. I will briefly describe some of the principal features of this work, which are directed towards this end.

First: Substantial new materials have been introduced into this work, in addition to the retention of the basic materials included in the Shipman text. This results in the presentation of a wider area of coverage in terms of topics dealt with than is generally found in previous works on Common Law Pleading. A reference to the detailed table of contents will indicate the topics covered with some particularity.

Second: In discussions of many of the topics, more has been included in the way of historical background and development than generally appears in previous comprehensive works on Common Law Pleading.

Third: Many of the topics have been more extensively treated than is generally the case in comprehensive works on Common Law Pleading. It has always been my view that significant emphasis should be placed upon materials dealing with the forms of action. Certainly most members of the bench, bar, and students of the law, carry with them the memory of Professor F. W. Maitland's incisive and perceptive observation that, "The forms of action we have buried, but they still rule us from their graves." This fact has remained too clearly in focus to be blurred from vision by the Codes, and it is considered at some length in the pages of this work.

The apportionment of additional space and emphasis is not limited to the forms of action, but is found in the treatment of many of the other topics throughout this work. This is done with a recognition of the validity of Justice Oliver Wendell Holmes' statement that, "whenever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source." And to this we may add that whenever we deal with a modern procedural rule, we are likely to gain a better understanding of it, and a utility for its application, by virtue of a knowledge of Common Law Pleading.

Fourth: The status under Modern Codes, Practice Acts and Rules of Court of most of the principal procedural devices, including all of the forms of action, is considered in the discussion of each of these topics. The vi-

PREFACE

tality and usefulness of a knowledge of Common Law Pleading may be readily appreciated when we find that its concepts are still present, and underlie the various aspects of Modern Pleading and Practice.

Fifth: Extensive bibliographies of treatises and articles appear at substantially all of the points where the principal topics are discussed. Citations of treatises generally include edition and place and date of publication, so as to make the sources more readily available. Such extensive bibliographies have not been included in the earlier comprehensive works on Common Law Pleading, and it is hoped that this may have the effect of making research considerably less taxing, and substantially more productive.

Sixth: For the English cases, in addition to citations in the original reports, parallel citations in the English Reports, a reprint series, are also generally included. Previous comprehensive works on Common Law Pleadings do not contain these citations, as indeed the English Reports were not yet published when most of them were written. Since law libraries frequently do not contain the original reports, but do contain the English Reports, research may be pursued with these citations without the use of conversion tables and digests, which might otherwise be necessary. This, too, should make research easier and more productive for members of the bench, bar, and students of the law.

The decisions, both English and American, have been extensively cited in order to convey an understanding of Common Law Pleading in its early, middle, and later stages, its development, and its effect in Modern Pleading and Practice.

I can, of course, do no more than to record my indebtedness to the late Dean Alison Reppy, who commenced this work with such enthusiasm and dedication during his lifetime. I am also indebted to Shipman's work, and to the works of the many other outstanding authors who have contributed so much in the field of Common Law Pleading. Any attempt to recite all of their names at this point would result in the inevitable risk of omission, and I will therefore ask the reader to take notice of their respective contributions as he makes use of this work. I also wish to express my appreciation to my colleague, Professor John R. Dugan, for generously giving of his time to discuss with me certain of the topics included in this work. And for the secretarial services so faithfully performed by Mrs. Amy Smith in working upon the manuscript, I express my appreciation.

I have attempted to set out some of the characteristics of this work in the succinct form required of prefatory remarks, and sincerely hope that this work will serve the purposes for which it is intended.

JOSEPH H. KOFFLER

New York, New York
October, 1969

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