

may be found at the end of the volume. In locating the appropriate notes, however, the reader is handicapped because the notes are arranged by chapter number only, without referring to the various chapter headings which appear on each page. As a result, when the reader wishes to find the source of a quotation he must turn the pages back to find the number of the chapter he is reading before turning to the notes at the end of the book. This requires two excursions, where even a single one is often discouraging. After a few such experiences the reader dispenses with the valuable source material which the book contains. This fault, it seems, could be easily remedied in a subsequent edition, which the work certainly merits.

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PLEADING AND JOINDER, CASES AND STATUTES. By William Wirt Blume and John W. Reed. New York: Prentice-Hall, Inc., 1952. Pp. xviii, 684. \$8.00.

THIS book is designed for use in an introductory procedure course. I should find it hard to review such a book without trying to think through and state my notions of what the objectives of a beginning course in procedure should be. This ought to help the reader appraise the review and the reviewer as well as the book, and this is as it should be.

To my mind such a course should include a broad and fairly philosophical analysis and evaluation of the objectives of legal procedure itself—its relationship to the meting out of justice according to the rules of substantive law; the concept of procedural justice or fairness; the kinds of problems that have been injected into the quest for procedural and substantive justice by the shortness of life and practical limitations upon available resources; the kinds of solutions that have been found for these problems; the recurring patterns of reasoning about them; something of the history and the trends of these solutions; and an appraisal of them in terms of objectives. The teaching of the detailed procedural system of any one jurisdiction (even the federal system) as a crystallized set of rules, I should think unimportant. Yet I should give close attention to the details of the cases, statutes, and rules chosen by the authors for treatment, in order to equip students with the vocabulary; to train them in the use of close reasoning and attention to detail; and to teach them the argumentative techniques which every lawyer needs, whether his role be that of practitioner, judge, or reformer. This examination should include a study of the tactical considerations facing the parties in the various situations taken up in the course. Only thus, I think, can analysis and appraisal of the broader problems be made concrete and meaningful.

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This interplay between the broad and the specific should stimulate the student's thinking towards the most fruitful approach to procedural problems throughout his professional career. It should give his mind a tough resiliency that will stand him in better stead—in a world that is far from static—than either a given set of rules or the flabby habit of overfacile generalization.

With all this in mind, let us turn to a treatment of this particular casebook. Its coverage is fairly shown by its title. Part I deals with pleading. It starts with the relation of pleadings to judgment and goes on to the statement of claim, answer, and reply. Part II deals with the joinder of claims and parties and includes a treatment of the union of law and equity (with its inevitable problem of jury trial) and a section of 20 pages treating the prohibition against splitting a cause of action ("Required Joinder of Claims"). Part III takes up objections to pleading and joinder (demurrers, motions, and the like). Part IV is entitled "Reference Materials."

There is much in this book I like. On the whole, the individual cases are interesting and, I should think, teachable. There is an appropriate number of cases where decision on the merits is either thwarted or delayed because of failure to observe a procedural requirement even where it is clear that the parties have in fact received all the legitimate protection which the requirement is aimed at giving.¹ There are cases which turn a reasonable enough substantive result upon a harsh and quite unnecessary pleading point.² There are cases which contain an excellent analysis and statement of what may be called a liberal point of view towards procedural problems.³ Often these opinions are emphasized by the device of contrast.⁴ The cases dealing with the jury trial problem caused by the union of law and equity are particularly well-chosen though they are not all put together.⁵ Many of the cases represent the interplay of various procedural rules and concepts in such a way as to make real their actual incidence.⁶

Throughout the book the authors keep to their promise to edit cases "only to eliminate discussion of issues irrelevant on the procedural points."⁷ In

1. See, *e.g.*, *Rhodes v. Sewell*, 21 Ala. App. 441, 109 So. 179 (1926); *Powers v. Hardesty*, 250 Ky. 522, 63 S.W.2d 616 (1933); *Frogge v. Kansas City P.S. Co.*, 159 Kan. 687, 157 P.2d 537 (1945).

2. See, *e.g.*, *Whitmore v. Herrick*, 205 Iowa 621, 218 N.W. 334 (1928).

3. See, *e.g.*, *Binzel v. Viehmann*, 111 Mont. 6, 106 P.2d 187 (1940); *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947); *Byk v. Weber*, 186 Misc. 456, 60 N.Y.S.2d 426 (Sup. Ct. 1946); *Benson v. Export Equipment Co.*, 49 N.M. 356, 164 P.2d 389 (1945).

4. Compare, *e.g.*, case on p. 98, with that on p. 100; case on p. 224, with that on p. 226; case on p. 496, with that on p. 500.

5. See pp. 275-92, 335, 362.

6. See, *e.g.*, *Munro, Brice & Co. v. War Risks Association, Ltd.*, [1918] 2 K.B. 78; *Fitzpatrick v. Sun Life Assurance Co.*, 1 F.R.D. 713 (D.N.J. 1941); *Great Northern Telegraph Co. v. Yokohama Specie Bank*, 297 N.Y. 135, 76 N.E.2d 117 (1947).

7. P. vi (Preface).

doing so they have taken a broad and liberal view of what is thus relevant. This I applaud. In my view much of the pedagogical value of the case method may be lost by over-editing. Authors should, rather, go in the other direction and supplement opinions with material (from the record or elsewhere) which reveals, more clearly than opinions do, both the actual workings and the implications of procedural rules.

I very much like the idea of Part IV (Reference Materials). This has some 50 pages of cases dealing with the common law formulary system, some of the sections of the original Field (New York) Code interspersed with liberal quotations from the First Report of Commissioners (1848), and the relevant Federal Rules of Civil Procedure. The material on the forms of action gives the instructor a chance to bring out something of the nature and the incidents of the common-law system (at pretty much any point in the course he chooses) so as to show the kind of imprint it has left on the course of procedure's history and on professional habits of thought. It seems to me this is pretty necessary. History can teach mere antiquarianism and it can mould the student's thinking into vestigial and sterile channels, but it need not do either of these things, and the excess of zeal to avoid them may well have gone too far. After all, it is hard to see how a broad understanding of a system's characteristics, vagaries, and weaknesses can be had without some knowledge of its background.

I have no quarrel with the combination of pleading and joinder as material for an introductory course of the kind I have in mind. My main quarrel is with the treatment of pleading and objections to it. Even here the materials could be used to teach such a course, but the arrangement and selection do not encourage it. The Preface states that "[n]o attempt is made to distinguish among common law, equity, code or federal practices; the rules of pleading are dealt with as a single system." Part III is treated the same way.⁸ I do not know whether this statement suggests that the book is meant to give a still life picture of some imaginary composite "single system" of pleading existing in America today, but the material is steered too nearly in that direction to suit me. True, we do not have the different systems of pleading mentioned by the authors in their preface, and I certainly do not advocate a separate study of them. But it is also true that we are in the midst of transition—or at least of a great battle as to whether there shall be transition—in this matter of pleading. The common law stressed the issue-forming function of pleading and was marked by a formal rigidity that was perforce sired by human needs to spawn a host of inconsistencies and fictions. The Code was a revolt against much of this, and as part of the revolt it stressed the pleading of facts. This emphasis often came to mean an insistence on considerable detail in pleadings—an insistence frequently made harsher by motions for greater certainty or for particulars—but also meant to be

8. P. v (Preface).

tempered by freer use of amendments. All this was part of a procedural system which had virtually no device except pleadings to do certain necessary jobs: dispose of cases that should not be tried; narrow issues before trial; and afford disclosure to the adversary. The recent trend has been towards creating new—and it is hoped, better—devices to do these jobs and to de-emphasize pleading. This has meant striving for greater simplicity, brevity, and generality in pleadings, and the even more generous allowance of amendment. The Federal Rules exemplify this trend in marked degree. But the trend is resisted. The issue is not completely resolved.

Whatever view an instructor takes of it, he can scarcely ignore this struggle so central in the current scene of American legal procedure. Teaching materials should be geared to give some sense of the sequence of recent events, the trends, the competing considerations. Concrete example and the study of specific rules should be interwoven with this. Here I think the present book falls short. The authors present no cases vigorously championing the view reflected in the federal rules and so ably espoused by Judge Clark. There is little to point up the intentional departure in those rules from the stricter attitude developed by some courts under the Code requirement of fact pleading. The fullest discussion of that departure to be found in the present work is the unsympathetic treatment given it in *Gerber v. Schutte Investment Co.*,⁹ a case decided under the Missouri Code which adopted some features of the federal rules but retained the requirement of pleading "facts." The body of critical and analytical literature dealing with "fact pleading" receives scant reference,¹⁰ though there is an excellent opinion setting forth the liberal attitude towards the earlier Code requirement.¹¹

The book offers virtually no treatment of the newer types of discovery and other pre-trial devices.¹² I understand the authors themselves go into these devices fully in a later course on trials and appeals; whenever in the introductory course "they take up a case involving the pleading of details, they consider the desirability of putting the details in the pleading, the alternative being use of the rules of discovery."¹³ This is all very well, but I should prefer to give the students a little more background at this point so they could assay the alternative they are asked to weigh. Of course, since

9. 354 Mo. 1246, 194 S.W.2d 25 (1942).

10. Thus I find no reference to Cook's classic articles on the subject. Cook, *Statements of Fact in Pleading Under the Codes*, 21 COL. L. REV. 416 (1921); "Facts" and "Statements of Fact," 4 U. OF CHI. L. REV. 23 (1937); see collection of citations in CLARK, CASES ON MODERN PLEADING 75 (1952).

11. *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947).

12. The authors do, in a note on p. 105, refer to the 1948 amendment limiting the motion for more definite statement (FED. R. CIV. P. 12 (e)) and state that the "[i]nformation needed for preparation for trial must be obtained by discovery."

13. Communication to the reviewer from Thurman Morey, Executive Director, Law School Division, Prentice-Hall, Inc., dated April 14, 1952.

everything cannot be taken up at once in an introductory course, suspended knowledge and judgment must be asked of the student about many things. I am simply stating my value judgment that the kind of juxtaposition I suggest is more likely to stimulate inquiry into matters of significant relationship and essential function than is a merely chronological arrangement.

For the same reason I should prefer to take up the study of pleading requirements together with some treatment of the relationship between pleadings and proof, the notions of variance and surprise, the availability of amendment at various stages of the proceedings, and the more recent device of disregarding the pleadings where issues have been litigated by consent. Such a treatment is not invited, though it is permitted by the present materials. The very first case,¹⁴ for instance, involves a ruling that a plaintiff's judgment is void for want of a complaint even though issues were framed by an attachment affidavit and defendant's plea, were litigated at a trial, and were decided on the merits. It would be hard to find a better case to open up searching inquiry into the reason for existence of procedural rules, their relationship to substantive law, the functions that pleading may perform, and the question of what to do when there has been a slip in procedure but a substitute performance of its functions. Yet we find little if any suggestion of most of these problems at this point in the book, and not even a citation of the several cases that look distinctly the other way.¹⁵ To be sure, there are references to some of the possibly relevant ameliorating procedural rules and concepts tucked away in the course of later opinions;¹⁶ and perhaps the authors themselves use this first case as a horrible example which motivates students to quest after the better solutions which procedure has to offer and which the course gradually unfolds. But there is danger that a less experienced instructor may mistakenly take the case as simply stating "the rule" governing the relationship between pleadings and judgment in litigated cases under the "single system" of modern American pleading.

By way of contrast, Part II of the book does distinctly suggest the kind of treatment I have in mind. Here the materials are arranged, in respect to each problem, to show the transition from mechanical common-law and earlier

14. *Rhodes v. Sewell*, 21 Ala. App. 441, 109 So. 179 (1926).

15. Contrast treatment of the same case in CLARK, *CASES ON MODERN PLEADING* 4-17 (1952).

16. Thus, for instance, the notions that variance must be prejudicial to be fatal, that pleading defects may be waived by non-objection, that pleadings may be treated as amended where issues have been litigated by consent, are all introduced in the course of subsequent cases (see pp. 64, 82, 98), but in such a way as to suggest only rules of specific limited application (which would not reach the *Rhodes v. Sewell* problem) rather than as examples of an *attitude* towards the functions of procedure that well might be projected into that problem. See CLARK, *op. cit. supra* note 15. More pointed suggestion is, however, contained in some language in the opinion in *Reynolds v. Stockton*, 140 U.S. 254 (1891), to be found on p. 8 of the casebook.

Code tests for joinder to the considerations of trial convenience and the like, which govern modern procedures. This is only to be expected on the part of these authors, one of whom has written some of the most significant articles there are on the subject of joinder.

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THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND.

Collected, and with an Introduction and Notes, by Irving Dilliard. New York: Alfred A. Knopf, 1952. Pp. xxx, 262. \$3.50.

MR. Dilliard has made a judicious selection from among the many published utterances of Learned Hand. His volume contains some thirty-four of them—beginning with a Class Day Oration delivered in 1893 and ending with an address made in 1952, only a few days before the speaker qualified as an octogenarian. Although the utterances deal with a great variety of subjects each is a characteristic bit of self-expression. It is always the man himself who speaks. It is always the same literary style that charms. It is always the same philosophy of life that is proclaimed—and this gives an underlying unity to the addresses, which otherwise differ greatly from one another.

The two most remarkable facts which the volume brings to light are the maturity of the commencement orator and the youthfulness of the retired judge. The man is a perfect product of his early academic training. His philosophy of life at eighty accords so perfectly with that of the men who dominated Harvard thinking when he was young that the volume might aptly have been styled "The Spirit of Learned Hand."

To attempt a statement of his philosophy is a hazardous undertaking, for his expositions of it I find somewhat elusive. He himself suggests that his "views about ultimate values" may best be gathered from the latest of his addresses. There the reader will find the following passage:

"On what have we staked our hopes? Is it less than the thesis, as yet quite unverified, that the path toward the Good Life is to assure unimpeded utterance to every opinion, to be fearful of all orthodoxies and to face the discords of the Tower of Babel; all with the hope that in the end the dross will somehow be automatically strained out, and we shall be left with the golden nuggets of truth?"¹

If this were merely a commendation of tolerance of the opinions of others, it might readily be heeded by a convinced believer in (say) the teachings of Nicene Christianity. But if it is intended as a complete statement of a man's whole faith, one is left wondering how in practice it can prove itself to be an effective substitute for convictions and fixed beliefs. As a statement of judicial

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1. P. 257.