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Book Reviews

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Book Review

CIVIL PROCEDURE, Second Edition. By Fleming James, Jr. and Geoffrey C. Hazard, Jr., Boston and Toronto; Little, Brown & Co., 1977. Pp. 711.

As a law student at the University of Chicago, the only horn-book I ever purchased was the Fleming James text on Civil Procedure.¹ The primary reason for this rash act was the fear in my heart and the knot in my stomach that was caused by Professor Geoffrey Hazard's aggressive and energetic teaching of the first year course in Civil Procedure. After having finished the new text on Civil Procedure by Professor James, now co-authored by Professor Hazard, I only wish that I had seen fit to have read the first edition.²

Professor Hazard, like most Civil Procedure teachers, was very much aware of the student's need for a supplementary outside source to augment the basic law school course in civil procedure. In 1963, he noted the "peculiar omission in doctrinal writing in procedure" of a "satisfactory up-to-date text designed for students."³ The James book, published two years later, was welcomed with almost unanimous professional acclaim.⁴ Professor James was praised for his "unusual sensitivity to the problems that beset beginning students,"⁵ and it was claimed

1. FLEMING JAMES, JR., CIVIL PROCEDURE, (1965).

2. Professor Hazard was at least partly responsible for my failure to use extensively the first edition of the James text. He advised my first year class not to read every outside source suggested by our professors. That seemed like such good advise that I never sought any appreciable return on my \$12.00 investment. His advise was predicated upon the valid notion that as students we would be better off thinking about problems and working them through ourselves without seeking high and low for some magic source which would eliminate our uncertainties, cure our frustrations, and make us wise in all matters of legal knowledge. (the advise of the apostle Paul in *Phillipians* 2:12.)

3. G. HAZARD, RESEARCH IN CIVIL PROCEDURE 52 (1963).

4. See Van Alstyne, BOOK REVIEW, 19 STAN. L. REV. 487 (1967); Walz, BOOK REVIEW, 64 MICH. L. REV. 1183 (1966); Sullivan, BOOK REVIEW, 18 J. LEGAL ED. 465 (1966); Jacoby, BOOK REVIEW, 54 GEO. L. J. 414 (1965); and Field, BOOK REVIEW, 75 YALE L. J. 166 (1965).

5. Field, *supra* at 166.

that the book would “deservedly be blessed by generations of law students and its publication . . . a cause for rejoicing by procedure teachers.”⁶

The need for an explanatory companion for the basic law school course in civil procedure is probably greater than any other course. Most students bring some common knowledge to first year courses which help them to understand the new concepts they are learning in torts, contracts, and even property. Students bring very little of this to a civil procedure course. They begin by mispronouncing “demurrer” and then things go progressively downhill. Learning the new language of the law seems particularly acute to students in the procedure course. Not only are they expected to learn the new procedural concepts, but it also appears as if they are expected to have already comprehended the material from their substantive courses. Some casebooks compound the student’s inherent difficulty by starting the course with such potentially confusing and difficult cases as *Pennoyer v. Neff*.⁷ Procedure is difficult enough to make comprehensible without such a start.⁸

Professors James and Hazard continue the basic organizational pattern of the first edition. The student is introduced to a general discussion of the difference between procedural and substantive law. A helpful attempt is made to describe the role of the adversary in the overall legal system. There is a boullion cube history of the use of the king’s courts and the growth of the more modern systems with ample references to more meaty discussion elsewhere. The general discussion of remedies is confusing, particularly with reference to the declaratory judgment.

The text then turns to a discussion of the allocation of responsibility between the state and federal courts. The *Erie*⁹ doctrine is discussed in a brief, but straightforward fashion. Recognizing the difficulties of that doctrine and related choice of law problems, the authors familiarize the beginning student with the problems without getting bogged down in unnecessary complications. The coverage of such advanced procedural problems in a summary fashion is consistent with the authors’ desire of providing a helpful book for the beginning student. There are, however, ample references to more advanced treatment of the

6. *Id.* at 173.

7. 95 U.S. 814 (1877). The otherwise excellent COUND, FRIEDENTHAL, and MILLER, *CIVIL PROCEDURE*, (1974) is an offender in this regard.

8. Compare the James and Hazard text where jurisdiction is discussed in the twelfth of thirteen chapters.

9. *Erie v. Tompkins*, 304 U.S. 64 (1938).

subject for the guidance of new law professors, practitioners and upper division students.¹⁰

The book's history of lawsuit is somewhat disappointing in that so little information is provided. The text follows with an extensive discussion in a chronological order of each of the stages of the lawsuit, but a more comprehensive initial treatment would have been of considerable help in allowing the student to get a grasp of the overall system. This shortcoming is a minor one for students whose assigned casebooks already contain an extended summary of the various stages of a lawsuit.¹¹

In discussing each stage of a lawsuit, the authors concentrate on the approach of the federal rules in resolving procedural problems. Common law pleading and code pleading approaches are also noted. One major difference between the first and second edition is the more limited treatment of historical matters. This is particularly noticeable with the absence in the second edition of the detailed textual materials that are found in the footnotes to the first edition. For the beginning student, the concentration on the federal rules and the deemphasis of historical material undoubtedly makes the new text more usable. For others, much intellectually interesting and stimulating information is lost unless reference is made back to the first edition.

The second edition's section on discovery has undergone substantial revision because of the 1970 changes to the federal rules.¹² Professors James and Hazard do an excellent job in describing the various kinds of discovery devices with helpful advise as to the tactical advantages and disadvantages of particular approaches. The inclusion of a more forceful statement of the importance of discovery in modern day litigation would

10. The summary approach even with its twin risks of oversimplification and confusion are certainly preferable to the almost total lack of any discussion of choice of law problems as in Professor Milton D. Green's student text on civil procedure. GREEN, *BASIC CIVIL PROCEDURE*, Foundation Press (1972). Nonetheless, the Green text has often been preferred by students to the earlier James work because of Green's concentration on the more basic black letter law needed in a first year civil procedure course.

11. Excellent in this regard is LOUISELL AND HAZARD, *PLEADING AND PROCEDURE*, 1-14 (1973).

12. See generally, *Advisory Committee's Explanatory Statement Concerning Amendment of the Discovery Rules*, 38 F.R.D. 487 (1970).

have been in the beginning law student's better interest. Too many young attorneys have inadequately served the interest of their clients because of a lack of appreciation of the full importance of pre-trial discovery.

The textual treatment of the trial itself is as clear and concise as any chapter in the book. Its explanations of the various aspects of burden of proof almost accomplished something of a miracle by making the concept comprehensible. Of particular merit is the book's treatment of the constitutional right to a jury trial.¹³ Coming under criticism is the Supreme Court's decision in *Colgrove v. Battin*¹⁴ which held that a jury of six was consistent with the requirements of the Seventh Amendment. In what they consider to be a duly reasoned opinion, the authors find a bright spot in that, in the long run, the less costly smaller jury may lead to more jury trials thus enhancing what the authors believe to be a crucial part of our civil justice system.

The last half of the book concentrates on the more difficult areas of civil procedure. Chapters on parties and joinder are both excellent although it is generally recognized that Professor Reed has written the landmark article on joinder of parties.¹⁵

The chapter on judgments and the concept of *res judicata* is substantially changed from the first edition necessitated in large part by the Supreme Court's 1971 decision in *Blonder-tongue Laboratories, Inc. v. University of Illinois*¹⁶ in which the Court rejected the "mutuality" doctrine. The authors are still not fully comfortable with that approach and are at pains to develop rationale for limiting the scope of the *Bernhard*¹⁷-*Israel*¹⁸-*Blonder-tongue* line of cases.

The chapter on jurisdiction is concentrated and difficult but is a must reading for anyone researching the field. The extensive footnotes make it possible to branch out to a more complete understanding of many subtle problems only briefly mentioned in the James and Hazard discussion. Appellate review which was discussed in the first edition as one section in the chapter on judgments has now been treated under a separate heading in

13. That is in keeping with Professor James' classic law review article in the field. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

14. 413 U.S. 149 (1973).

15. Reed, *Compulsory Joinder of Parties in Civil Actions (Parts 1 and 2)*, 55 MICH. L. REV. 327, 483 (1957). Also excellent is Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

16. 402 U.S. 313 (1971).

17. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

18. *Israel v. Wood Dolson Co.*, N.Y. 2d 116, 151 N.Y.S. 2d 1, 134 N.E. 2d 97 (1956).

the last chapter of the text. Despite the high quality of the discussion in the earlier edition, the new classification and expanded coverage of the appellate review material is a definite improvement.

The second edition is in many ways a better written book than the first edition. For example, the first edition states that "procedure should serve the cause of administration efficiency."¹⁹ The second edition states simply that "procedure should not be too costly in time and money."²⁰ Nonetheless, there is an extravagance in the first book that is not repeated in the new text. The old James text, in the same manner as his treatise on torts,²¹ discusses at length both in the text and in the footnotes issues which could correctly be called peripheral. Of course, a careful editing might eliminate such material but would also take away much of the fun and intellectual excitement.

With the exception of an inadequate index,²² the new James and Hazard text will no doubt be easier for the beginning student to read than the older edition.²³ Although both editions have roughly the same number of pages, the new text has fewer lines per page and larger print for the footnotes. Many researchers, however, will continue to use the first edition for its more extensive footnotes. An illustration of the different scope of the footnotes is revealed by looking at the number of pages in the two different tables of cases. The first edition contains 35 pages of listings while the second edition contains only six pages.²⁴ The limited number of cases cited in the second edition together with a shallow index will make it more difficult for students to be selective in reading this otherwise excellent up-date and revision. For those students who not only buy this book but actually read it, they will find no easy answers or magic resolutions of all procedural problems, but they will find that any investment of time and energy will be richly rewarded.

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19. James, *supra* at 2.

20. James, *supra* note 1 at 2.

21. HARPER AND JAMES, *THE LAW OF TORTS* (1956).

22. Five pages in the second edition versus 38 pages in the first edition.

23. See note 9 *supra*.

24. The some 2,500 cases in the James, first edition, outnumber the second edition by a 5 to 1 margin. The Green text on civil procedure (see note 9) contains close to 1,500 cases in its table of cases.

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THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE.
By Leon Jaworski. Reader's Digest Press, distributed by
Thomas Y. Crowell Company, 666 Fifth Avenue, New York,
New York, 10019. 1976. Pp. 306. \$9.95.

It may well be true that when all of the books about Watergate have been written and read, we will still have a persistent feeling that we do not have a very clear view of what happened or the meaning of it all. Because the essential nature of the crimes were conspiracy, coverup, obstruction of justice and illegal campaign practices, no one person seems to hold a complete view of Watergate. The best that one can hope for are perspectives. Since so much of what has already been written is the product of those who were involved in the improper activity, it is refreshing that we have the perspective of a person who, because of extensive investigation, is best able to give us a picture of known facts without having to exculpate himself.

Leon Jaworski came to the prosecution of Watergate at a critical point in our history. Ignoring his promise to cooperate fully in the investigation of Watergate by protecting the independence of then Special Prosecutor Archibald Cox, President Nixon had refused Cox's request for recordings of presidential conversations and had ordered Cox to refrain from seeking further tapes. When Cox announced that he would continue to press for the tapes, Nixon ordered Attorney General Elliot Richardson to fire Cox. When Richardson and Deputy Attorney General Ruckelshaus had both refused to fire Cox, precipitating their own resignations, Nixon finally succeeded through Solicitor General Robert Bork. The country was then without an Attorney General and without a Special Prosecutor, two positions in which the American people had substantial confidence at the time. The result was a tremendous crisis of confidence in the integrity of government and a furious response on the part of the Congress, the press and the public.

To restore the confidence of the public, General Alexander Haig, White House Chief of Staff, asked Leon Jaworski to become Special Prosecutor on October 30, 1973. Jaworski was not new to the role, having served as a war crimes prosecutor at Nuremberg and as a Special Prosecutor in the case of The United States against Governor Ross Barnett of Mississippi.

Although somewhat doubtful about the administration's willingness to guarantee the independence necessary for a special prosecutor, Jaworski was finally persuaded to accept the position by an agreement that he could not be fired without a "supporting consensus from the leadership of both parties in the House and Senate as well as the leadership of both parties in the House Judiciary Committee and the Senate Judiciary Committee."

The central drama of this book is the continuing effort by Jaworski to obtain the presidential tapes and other pertinent documentation by the White House. Detailing very carefully the need for and relevancy of the tapes, Jaworski describes the behind-the-scenes struggle with General Haig and Fred Buzhardt to obtain needed information. Much of the struggle centers around definitional problems of whether presidential activity is criminal when undertaken to correct or respond to activity deemed by the executive to be a threat to the national interest. The final line which is drawn in the controversy is the refusal of the President to submit to due process of law under the claim of executive privilege. For the lawyer reading this book, Jaworski does a masterful job of interweaving the historical and constitutional arguments with the ongoing struggle between the executive and legislative branches.

Also woven into the central drama are a number of other important events connected with the prosecution of Watergate. One of these is Jaworski's assessment of those lesser characters who were convicted. From Egil Krogh, whom Jaworski believed to have been overwhelmed by the corrupting influence of power, to Dwight Chapin who directed much of the dirty tricks during the 1972 campaign, the book details the criminal charges brought against each and the factual bases for the charges that resulted in guilty pleas or convictions. Another event is the decision as to whether or not to name the President in a criminal indictment. The author details the case against the President leading to a conclusion that a *prima facie* case against the President could be made on the charges of conspiracy to obstruct justice and to obstruct a criminal investigation. With the intervening resignation of the President, however, Jaworski faced much more difficult decisions which are at the very heart of American jurisprudence: What purposes will be served by the trial of a former President? Can any jurisdiction assure Mr. Nixon of a fair trial given the nationally televised Senate and House hearings on Watergate and the attendant press publicity? Jaworski quotes at length from a staff memorandum urging indictment on the basis that to refuse to indict would sanction a

different standard of conduct before the law for a President. Believing that a fair trial could not be assured, Jaworski obviously leaned toward refusing to indict although the pardon by President Ford obviated the need for a final decision.

In summary, this book is a well written perspective of Watergate from the prosecution standpoint. For lawyers it is especially interesting because of the excellent interweaving of factual background into the prosecutorial decisions which had to be made. For the person seeking some objectivity about Watergate this book is required reading.

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