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BOOK REVIEWS

Civil Procedure. By Fleming James Jr. Boston: Little, Brown and Company. 1965. Pp. xx, 747. $10.00.

Since the adoption of the Federal Rules of Civil Procedure, an increasing number of law schools have offered a basic course in civil procedure, a composite of the courses in pleading and parties, trial and appellate practice and jurisdiction and judgment. The subject matter of these courses has always perplexed law students. It is statutory, unusually technical and analytical and requires an understanding of three basic procedural systems: the common law, the code and the Federal Rules. The combination of these difficulties into a single course, given usually in the first year of law school, has hardly eased the student's burdens. For other first-year courses, he could seek the assistance of a number of excellent student texts and the Restatements. But in this area the only such text available heretofore was Judge Clark's excellent, but now partially dated, "hornbook" on *Code Pleading*,[1] which, as its title suggests, covers only part of this subject matter. Now Professor James has successfully filled this need with his excellent treatise on civil procedure.

Professor James gives substantial historical and conceptual treatment to the common law and the code. His attention, however, is focused on modern procedural reform, as exemplified by the Federal Rules, and particularly, he states in the preface, on such developing problems of procedure as the class suit, interpleader, impleader, right to a jury trial and the decision in *Erie R.R. v. Tompkins*.[2] This promise is handsomely fulfilled with respect to the right to a jury trial,[3] a subject about which the author has previously written extensively. On the other hand, the essays on *Erie* and the enumerated party problems are only perfunctory exercises. In fact, the former is essentially an historical narrative of the leading decisions in the Supreme Court. This narrative, made incomplete by

[1] CLARK, CODE PLEADING (2d ed. 1947). The latter half of WRIGHT, FEDERAL COURTS (1963), concisely covers much of the same material as Professor James' work, but only with respect to the Federal Rules of Civil Procedure.

[2] JAMES, CIVIL PROCEDURE at v (1965) [hereinafter cited at JAMES].

[3] *Id.* §§ 8.1-.11.

the recent decision in *Hanna v. Plumer*,[4] terminates with the balancing test advanced in *Byrd v. Blue Ridge Rural Elec. Co-op*,[5] but regrettably it gives almost no guidelines in applying the test. *Byrd* involved an allocation of function between judge and jury, and its effect on the outcome of the case was possible but not certain.[6] But in door-closing cases like *Guaranty Trust Co. v. York*,[7] the required weighing of competing state and federal policies will surely have less impact. Conversely, it will have much more impact when one of the Federal Rules is specifically involved.[8] And certainly substantial outcome effects that are ascertainable before suit is filed, as in *Byrd*, and necessarily encourage forum shopping are to be distinguished from outcome effects that arise only after suit is filed.[9] Minimally such basic guidelines should have been set forth.

The *Erie* discussion concludes with the observation that "there are those who believe that no solution is adequate that fails to return to the original concept of *Erie* with its simple dichotomy between substance and procedure."[10] The location of this statement suggests it commands the author's sympathy.[11] But its rejection by the Supreme Court in *Guaranty Trust*[12] and subsequent decisions necessitates in its advocation something more than a commendation of its simplicity.

Professor James closes his introduction with "The Life History of a Lawsuit."[13] Regrettably it is too short to give a neophyte law student the flavor of litigation and compares unfavorably with the

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[4] 380 U.S. 460 (1965).

[5] 356 U.S. 525 (1958). For a discussion of this test, see Note, 44 N.C.L. REV. 180 (1965).

[6] Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525, 537 (1958).

[7] 326 U.S. 99 (1945).

[8] See Arrowsmith v. UPI, 320 F.2d 219 (2d Cir. 1963).

[9] Hanna v. Plumer, 380 U.S. 460, 469 (1965). On the basis of this distinction, most of the "housekeeping" rules of the Federal Rules of Civil Procedure have long been thought immune from the reach of the outcome determination test. Note, 66 HARV. L. REV. 1516, 1517 (1953).

[10] JAMES § 1.15, at 45.

[11] Professor James' dissatisfaction with the contrary view is best illustrated in his discussion of *Erie* and the long-arm statutes in diversity cases. JAMES § 12.12, at 654. In the text of his discussion he cites and discusses with approval the majority opinion in Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960); only in a footnote does he suggest indirectly that *Jaftex* has been overruled by the Second Circuit, sitting en banc, in Arrowsmith v. UPI, 320 F.2d 219 (2d Cir. 1963).

[12] Although *Byrd* and *Hanna* establish limits to the outcome determination test, they clearly do not herald a return to a test based on the distinction between primary rights and manner and means.

[13] JAMES § 1.16, at 46-53.

excellent garden tour conducted by Professors Louisell and Hazard in their casebook.[14] Since there are few such descriptions of quality in existence and available in quantity in most law school libraries, this effort is especially disappointing.

More disturbing is the author's discussion of "The Functions of Pleading."[15] Under the common law and the Code, the pre-trial stage of litigation was essentially pleading, and thus it was appropriate to speak of the theory and function of pleadings. Under the Federal Rules and similar systems, however, where discovery and the pre-trial conference have assumed some of these functions, it is now more meaningful, I believe, to speak of a theory of the pre-trial stage of litigation,[16] in which these three devices and motion practice work together to accomplish the four principal goals formerly assumed by the pleadings; namely, notice, discovery of facts, issue formulation and interception of insufficient claims and defenses.[17] From this broader conception comes a resultant specialization of function and the underlying principle that the various goals of pre-trial need only be met efficiently at some time during pre-trial rather than incompletely by the pleadings.

Professor James seemingly concurs, for he posits a more limited function for the pleadings and warns that it may be affected by the expansion of discovery and other pre-trial devices.[18] This, however, is exactly what has happened, but nowhere does he restructure his theory accordingly. Only in the final discussion of the complaint under the Federal Rules are the relationships briefly tied together.[19] It is doubtful that at this point the student will connect up everything. By contrast the point is made quickly and clearly by Professor Wright in his treatment of the "Theory of Modern Pleading."[20]

It is also not clear that Professor James is in complete sympathy with "notice" pleading. After quoting the familiar statement in *Conley v. Gibson* "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

[14] LOUISELL & HAZARD, PLEADING AND PROCEDURE 1-14 (1962).
[15] JAMES §§ 2.1-.2.
[16] See Hickman v. Taylor, 329 U.S. 495, 500 (1947).
[17] WRIGHT, FEDERAL COURTS § 68, at 247 (1963).
[18] JAMES § 2.1, at 56.
[19] *Id.* § 2.11, at 86.
[20] WRIGHT, FEDERAL COURTS § 68, at 247 (1963).

entitle him to relief,"[21] he suggests that a literal application of this test "would be sufficient to uphold a complaint which simply recited that defendant had wronged plaintiff."[22] He concludes, therefore, that the Supreme Court did not mean to sanction such a complaint, but only to remind trial judges that plaintiff should be given leave to amend. The Court had before it, however, no such situation and in the same opinion acknowledged, in any event, the existence of certain minimal requirements.[23] Furthermore, it is not clear that it would permit a dismissal, even with leave to amend, of complaints falling short of these minimal requirements. It could just as well treat the motion to dismiss as one for a more definite statement,[24] which clearly would be granted. Thus the Court may well have said that no complaint not clearly deficient on the merits should be dismissed and subjected to the possibility that leave to amend will be denied or otherwise lost.

In short, Professor James does not make it clear that notice pleading requires only enough facts to identify plaintiff's claim and distinguish it from any others he might have. Instead he leaves the reader to speculate, I think incorrectly, whether such a complaint is merely an abbreviated code complaint, potentially subject to some of the requirements of specificity of code pleading.

It would be impossible not to find points of disagreement in any such treatise, and, therefore, the foregoing should not detract from its general excellence. It seems destined to join *Prosser on Torts*, the student editions of Williston and Corbin on *Contracts* and Wright, *Federal Courts,* as the constant companion and teacher of students. Many will wisely continue to refer to it in practice.

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[21] 355 U.S. 41, 45-6 (1957).

[22] JAMES § 2.11, at 86.

[23] The Court said: "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this." Conley v. Gibson, 355 U.S. 41, 47 (1947).

[24] In Garcia v. Hilton Hotels Int'l, Inc., 97 F. Supp. 5 (D.P.R. 1951), a case noted by Professor James with disapproval, JAMES § 2.11, at 88, the court refused to dismiss a complaint setting forth a claim for defamation because the publication of the slanderous statement was not specifically alleged. It did, however, grant defendant's alternative motion for a more definite statement of the facts relied upon to establish a publication.

Mr. Justice Murphy and The Bill of Rights. By Harold Norris. Dobbs Ferry, N.Y.: Oceana-Publications, Inc., 1965. Pp. xxiii, 568. $7.50.

One of the unique characteristics of the United States Supreme Court is its capacity to ferret out basic constitutional problems in litigation on review. In recent years this powerful and sensitive function has been most noticeable in the civil rights field. Time and again the Court has sensed the racial discriminations lurking beneath seemingly innocent procedural or technical rulings of lower courts and has proceeded to discuss and resolve the constitutional implications.

This power to probe to the constitutional bare bones of a case is at once both difficult to execute and delicate in operation. It lends itself to criticism and dissent and by nature is subject to easy abuse. Yet the power is one that must attach to a creative and effective judicial institution. To permit all the issues of federal and constitutional law to be formulated and confined by the oft-glib rulings of lower courts would soon stultify the Constitution and reduce the Supreme Court to the role of another step in the appellate routine. More than any other tribunal, the Supreme Court must reserve to itself the task of uncovering, within the framework of the cases brought before it, those matters which are critical to the maintenance of a living Constitution.

The Court itself, of course, can perform this function only within the limitations imposed by its own jurisdictional and procedural rules and by the necessity of obtaining the consent of at least a majority of the participating Justices. Such limitations, as respects self-imposed rules, are frequently fluid in nature. But by the nature of things individual Justices are less inhibited than the Court itself in their search for the constitutional solar plexus of a case; in their concurring and dissenting opinions they can frequently give effective voice to the constitutional equities which the majority refuses to consider. And that voice can sometimes be heard in later years when a new majority gives heed to the constitutional insight of the one-time dissenter.

Such a Justice was Frank Murphy, a controversial and often maligned individual. Within the classic tradition of Justices Holmes, Brandeis, Black, Rutledge and Douglas, he gave frequent and elo-

quent testimony to constitutional concepts that are today becoming the law of the land. And the Murphy technique of probing to underlying constitutional considerations is one, as indicated, that is being utilized with growing frequency by the present Court majorities.

Intensely devoted to the Bill of Rights, Murphy was often intolerant of the procedural niceties that marked the outer limits of rulings of lower courts or of the Supreme Court itself. As he said on one occasion,

> The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be. . . . Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.[1]

Precisely that approach to the underlying constitutional problems of a case earned for Murphy the undying enmity of the judicial traditionists.

But Murphy's approach was more than that of simple constitutional condemnation. It was premised upon a thorough review and analysis of the facts of record and other considerations legitimately subject to judicial notice which justified, in his mind, the invocation of constitutional principles. His opinions in *Bridges v. Wixon*,[2] exposing the relentless crusade to deport one man, in *Korematsu v. United States*,[3] revealing the racial motivations for the wartime exclusion of Japanese-Americans from the West Coast, and in *In re Yamashita*,[4] discussing the details of the military situation which led to the trial of a conquered Japanese commander, testify fully to the responsible care with which he treated his constitutional denunciations.

While Murphy's place in the story of the Supreme Court is by no means limited to that of a prophetic dissenter or of a lonely worker in the constitutional vineyard, there seems little doubt that he will be best remembered for his passionate capacity for reach-

[1] Steele v. Louisville & N. R.R., 323 U.S. 192, 208-09 (1944).
[2] 326 U.S. 135, 157 (1945) (concurring opinion).
[3] 323 U.S. 214, 233 (1944) (dissenting opinion).
[4] 327 U.S. 1, 26 (1946) (dissenting opinion).

ing and invoking the constitutional condemnation of governmental intrusion on individual liberties. He had an innate empathy, rare enough even among Supreme Court Justices, for the strivings and the rights of the individual in the never-ending conflict with governmental authority. Yet he was aware of and sympathetic to the necessities of government; his own long career as a public executive gave him a balanced viewpoint. The result was a series of concurrences and dissents, and sometimes opinions for the Court, which cut through "formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution."[5] The opinions that he wrote in this area were indeed Frank Murphy's finest hour on the Court.

Professor Norris has compiled and produced in full all of Justice Murphy's opinions dealing with the Bill of Rights. They are subdivided under the headings of "freedom of speech," "freedom of religion," "racial discrimination," "fair criminal procedures," and "governmental regulation." There is appended a listing of the 217 opinions, covering all subjects, written by Justice Murphy during the nine and a half years he was on the bench. About seventy of those opinions related in some fashion to the Bill of Rights.

Some attempt is made by Professor Norris, though not in a particularly critical or penetrating vein, to evaluate Murphy's contributions to the development of the Bill of Rights. Murphy was a much more complex, controversial and indeed important Justice than appears from the unalloyed praise heaped upon him by Professor Norris. And interspersed among the collected opinions and comments are several speeches delivered by Frank Murphy as Attorney General and various articles that appeared in the *Michigan Law Review* concerning Murphy's civil rights and labor law opinions, as well as the author's own previously published article on the Civil Rights Act of 1964. To these are added the biographical tribute paid Murphy soon after his death by his close friend, Edward G. Kemp, whose name is unfortunately misspelled in this volume. The resulting potpourri only bespeaks the need for a more critical and independent evaluation of the Murphy tenure on the Court.

But this book, merely by providing a compendium of the civil rights opinions of Justice Murphy, constitutes a valuable reminder and starting point for those who are interested in the history of

[5] Falbo v. United States, 320 U.S. 549, 561 (1944).

the Supreme Court during the turbulent era in which Murphy served. That era was the essential predicate of the present Court's approach to the Bill of Rights. Much of what Murphy said and wrote, and much of what he agreed with in that era, foreshadowed the current views of the Court. An enigmatic yet enlightened man, a believer in the simple yet basic rights of the individual, Frank Murphy wrote a courageous and significant chapter in the annals of the Court. Much of the raw material of that chapter is reproduced in this volume, thereby making the publication worthwhile.

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