
This is the second edition of a popular casebook which made its initial appearance only in 1946. A new edition is not only justified, but has been made necessary, by the number of important cases which have since appeared and by the adoption by Congress of a new Title 28 of the United States Code in complete substitution for the old Judicial Code. That material on federal procedure becomes out of date thus rapidly is in itself a commentary on the present status of the American attempt to maintain two systems of courts, operating in the same territory at the same time, owing distinct and conflicting allegiances to different sovereigns. But that is the essence of federalism; and we, servitors of the system, can only give thanks that we are accorded tools thus apt for an understanding of the problems, even if their alleviation is apparently too much to be hoped for.

Basically, of course, this edition builds upon the firm foundation of the earlier edition. Since the reviewer has already expressed his warm approval of that work,¹ there is little occasion to add details of praise here. He has had the opportunity of making the final test of a casebook, that of classroom use, as afforded by a couple of summers of teaching by way of busman's holiday; and he has found the new edition even more stimulating than the old. Indeed, the more complex the subject becomes, the more interesting for the teacher; and the new cases, both those based on the new Code and those involving refinements of earlier difficulties, provide fruitful subjects for classroom discussion and analysis. However much one may decry the increasing conflicts of federal jurisdiction, they do provide at least that stimulus to the student and scholar.

In a subject such as this, there must always be a major problem how much sheer history should be presented as against a concentration upon the judicial trends of the moment. I have only admiration for the way in which the editors have met this issue. They have not skimmed history, but have always kept their sights upon the present law. What makes a course from this book exciting is that it is thus up to the minute. We see where we have come from and where we are; and we can pause for a moment before plunging into the abyss of the future. That surely makes for vital interest. Perhaps the only unsuccessful part is that devoted to Procedure in the District Court, an attempt to set forth the Federal Rules of Civil Procedure against the background of jurisdictional problems. The editors devoted extensive revision to this lengthy part; even so it gives only a sketchy view of the procedure while isolating such problems as venue—made even more important by the new Code—from the questions of jurisdiction proper with which they are intimately associated. Preferably it would seem that this material should have been rigorously restricted, since the pleading rules are not, and never have properly been, exclusively federal; and those parts still retained could well have been distributed among the jurisdictional topics proper. For federal jurisdiction is enough of a course by itself! And I could wish that the editors had followed their own advice to students and had made direct use of the admirable judicial statistics of the Administrative Office, to give proper perspective to an evaluation of the importance of various types of federal court business.² These

are, of course, but minor suggestions as to a work whose general success is obvious. I turn now to a matter of greater importance, one with which doubtless the editors have struggled. That has to do with the manifest deterioration of federal procedure to its present state of a collection of conflicting and indecisive retreats from judicial action, and the question whether a casebook or a law school course can do anything about it.

In the preface to their first edition the editors called for a bold and forthright attack upon the problem of simplification and rationalization of the federal practice. Even then this reviewer expressed some regret that the editors had not pushed their point somewhat more strongly in their textual materials. Perhaps this was a vain counsel; obviously casebook editors cannot go far in this regard at best, and teachers often object to any such attempts, particularly if the attempts are at variance with their own views. At any rate the editors have now retreated yet more to the calm peace of the scholar and do not now even express a hope of improvement for the future. One can sympathize with them; that so much of devoted effort by so many between the dates of the two editions should not even have matched the Red Queen’s success in running sufficiently hard to keep abreast of the status quo suggests a situation verging on the hopeless. For it must be admitted, as a comparison of the two volumes shows, that the inconsistencies and confusions of federal practice are on the increase.

There are two major grounds for this pessimism. One concerns the new Code of 1948. That has received high praise, partly induced by surprise at a code at all, partly stimulated by concentration upon a few definite reforms. True, the adoption of a code was an achievement, for all previous attempts at revision had failed since that of 1911. But now the time has come for a more objective judgment. An increasing number of cases has already disclosed difficulties which range all the way from definite errors\(^3\) (some, but by no means all, corrected or reprojected in the amendatory act of 1949) through not too well-conceived or executed reforms\(^4\) to some strange modesty or reluctance in the face of other substantial problems.\(^5\) True, some gains are to be noted; but

\(^3\)See, e.g., Mercado v. United States, 184 F. 2d 24 (2d Cir. 1950), dealing with the omission of acts still important in admiralty; or, e.g., the continuance of a statute such as 28 U. S. C. § 1693, notwithstanding Mississippi Pub. Corp. v. Murphree, 326 U. S. 438 (1946).

\(^4\)Cases such as American Fire & Casualty Co. v. Finn, 181 F. 2d 845 (5th Cir. 1950) (the “separate cause of action” in the removal statute, 28 U. S. C. § 1441), or Foster-Milburn Co. v. Knight, 181 F. 2d 949 (2d Cir. 1950) (“might have been brought” in the change-of-venue statute, 28 U. S. C. § 1404), if they do not suggest doubts whether the courts are correctly interpreting those reform purposes which the revisers did pursue, do disclose ambiguities of expression in the product. The first matter is discussed in Wills and Boyer, Proposed Changes in Federal Removal Jurisdiction and Procedure, 9 Ohio St. L. J. 257 (1948), several valuable law review comments, including 44 ILL. L. REV. 397 (1949), 33 MINN. L. REV. 738 (1949), 98 U. OF PA. L. REV. 80 (1949), and Moore’s Commentary on the U. S. Judicial Code 91, 248-252 (1949). The second matter is considered in district court cases reversed or overruled by the Foster-Milburn case, McCarley v. Foster-Milburn Co., 89 F. Supp. 43 (W. D. N. Y. 1950); Ferguson v. Ford Motor Co., 89 F. Supp. 45 (S. D. N. Y. 1950); and see also Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908, 934 (1947), and Wechsler, supra note 2, at 222, 235.

\(^5\)Perhaps it was too much to expect a thoroughgoing reconsideration of such major topics as federal-question and diversity-of-citizenship jurisdiction (compare Wechsler,
there must now be definite concern lest more problems have been created than solved. Most disconcerting of all is the obvious fact that a promising reform movement has completely exhausted itself in what at best is only tinkering with a creaking structure.

The other factor of concern is the increasing tempo of the movement which perhaps became inevitable with the announcement of the opinion in *Erie R. Co. v. Tompkins*. Before 1938 the federal courts were supposed to take most of their procedure from the states, together, however, with a goodly share of substantive law from the national government. Of course that year marks the great reversal; with the exciting reform of a new and uniform system of procedure came the mandate, applied with increasing rigidity, that all substantive "common law" must come from the states—except for that nebulous, but also strangely increasing, branch, "federal common law." There is not sharp enough dichotomy between substance and procedure so that these terms can be rigorously self-applying in any event. As it happened, however, the announcement of the rather natural conclusion from the adopted premise that any procedure which "significantly" affects the result of the litigation must be governed by the state practice has led directly—and particularly after the three cases in June 1949 enforcing the rule with drastic logic—to the present situation where hardly a one of the heralded Federal Rules can be considered safe from attack by shrewd lawyers and obedient lower tribunals. The remedies

supra note 2), though the developments of the Erie doctrine discussed below in the text may suggest the need of more than decisional attack on that problem. The matters referred to in footnotes 3-6 are samplings which indicate the unusual mixture of caution with even venturesome rashness to be found throughout the revision.

6 Even such a desirable reform as the change-of-venue provision, supra note 4, has raised extensive problems not only of meaning, but also of application, so much so that, as the reported cases show, much of the time of district judges in New York (and of appellate judges on some perhaps doubtful form of interlocutory appeal or mandamus) is now being taken up with lengthy consideration of whether or not they should hear the cases brought before them. So, too, such a desirable reform as that clarifying and extending "pendent jurisdiction" in patent, copyright, and trademark cases, 28 U. S. C. § 1338(b), is rendered confused by the Reviser's Note; compare reasoned discussion in Schreyer v. Casco Products Corp., 89 F. Supp. 177 (D. Conn. 1950), approved in a note in 36 Va. L. Rev. 545 (1950).

7 See, e.g., *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 Harv. L. Rev. 966 (1946), and Moore's *Commentary on the U. S. Judicial Code* 340-346 (1949), as well as the writer's article, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 267 (1946). As I there pointed out, there was a desirable middle ground between the rigid limits of either the pre- or post-*Erie* rule, which had been shown by the Supreme Court, notably in decisions by Mr. Justice Cardozo. 55 Yale L. J. 267, at 276, 295, 296.

now suggested seem fully as bad as the malady: state and apply the rule only in terms of “forum-shopping,” of course between state and federal courts, while overlooking that between federal districts; abolish the uniform Rules in diversity cases (but what about shopping, too, with federal question cases?); or possibly more sensible, merely hope for an inevitable reaction from the present low point.9

Is it not a reflection upon our legal genius that nearly two centuries of attempt to operate a federal system can give us only this? Particularly disappointing is the realization that what we are bound to is the worst part of the system, that by a sort of Gresham’s Law,10 judicial administration must adapt itself to the least effective state practice. For, as one commentator has pointed out, the present situation would seem to be that only where the federal procedure is more restrictive than that of a state can it be safely followed; wherever the state procedure is the more illiberal, it appears to be the one necessarily to be applied.11 There is irony in the fact that while states have been turning more and more to the federal system for their own use—witness, just lately, New Jersey, Delaware, Maryland, and Utah—the federal courts are being forced more and more back to a conformity more rigid, as well as more uncertain, than that required by the Conformity Act of 1872, of dubious memory. One may wonder whether there is all this fear of federal judicial aggression upon the part of our citizenry; one may perhaps harbor the thought that the judges, alone of all governmental agencies, are pursuing a quixotic gleam at terrible price in waste effort and confusion and delay which can hardly succeed over the years, so contrary is it to all other trends of the times. It does seem that a reaction is bound to come. But there is little sign that it is near at hand; rather within another four years the editors will doubtless need to produce a new edition setting forth yet more jurisdictional confusions to the edification of the teacher and the student and the distress of the procedural reformer, to say nothing of the litigants. When they come to comply with this reimpending need, I suggest to these scholars, recognized as men of ideas and vision, that they consider a warmer attack upon some of the preconceptions, nay illusions, which are here making the limbo of the past into the veritable law of the present.

New Haven, Connecticut

Charles E. Clark*

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9The first is stated in Horowitz, Eric R. R. v. Tompkins—A Test to Determine Those Rules of State Law to Which Its Doctrine Applies, 23 So. Calif. L. Rev. 204, 215 (1950); the second is that of Merrigan, supra note 8; while the third is that of the comment, 35 Cornell L. Q. 420 (1950), supra note 8. The views of Judge Parker in Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits, 35 A. B. A. J. 19 (1949), and of Professor Moore, Commentary on the U. S. Judicial Code 359 (1949), are opposed to those of the other commentators cited and seem overhopeful; thus Professor Moore’s limited list of still surviving federal rules, id. at 320, says more even than these commentators.

10 I have discussed this procedural phenomenon elsewhere, as in Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 498, 505 (1950).


* Circuit Judge, United States Court of Appeals for the Second Circuit.