REVIEWS

CIVIL PROCEDURE. By *Fleming James, Jr.** Boston and Toronto: Little, Brown & Co., 1965. 672 pp. $12.

Professor James remarks in his preface[1] that he has many times been asked by his students in civil procedure to recommend a textbook that covers the subject of the course. This is an experience doubtless shared by every teacher in the field. Hitherto the answer has had to be that there was no such book. Professor James has now provided a ringing affirmative answer to the old question; there definitely is such a book. Moreover, it is a very good book indeed.

Professor James has undertaken the prodigious task of writing a one-volume text for students which spans the coverage of procedure in the usual law school curriculum. He keeps in steady focus the fact that it is the law student for whom he is writing, and his long years of teaching the subject have given him an unusual sensitivity to the problems that beset beginning students. Praise of the book as a student text carries with it no implication of disparagement. The law teacher tackling a procedure course for the first time should consider Professor James required reading, and the experienced teacher will gain fresh insights into old problems. I confess that the preparation of this review was inordinately prolonged by the frequency with which the text pushed me into the searching re-examination of matters which I had for years been taking for granted in my teaching.

Professor James has not hesitated to interrupt his exegesis and analysis to present his own views of what the law ought to be. One would scarcely expect otherwise from a co-author of Harper & James, *The Law of Torts*. As in the earlier work, however, opinion is clearly identified as opinion. Indeed, the author's convictions are frequently introduced by the advocate's phrase, "It is submitted that. . . ." Furthermore, there is no distortion of the holdings of cases to conform them to the author's thesis. This practice adds to the interest and usefulness of the book.

Endorsement of this technique does not, of course, imply agreement with all of the views espoused by Professor James. I do not, for instance, wholeheartedly join in his love affair with the civil jury, although I think it is in general a satisfactory, albeit expensive, mechanism for resolving issues of fact. I am troubled by the favor with which he looks upon the compromise verdict as a reflection of "the community sense of

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1. P. v.

over-all fairness"[2] and his belief that a trial judge should be free to let a patent compromise verdict stand as against either party's motion for a new trial. If I correctly understand Professor James, he would give the trial court discretion to leave undisturbed a verdict for $500 where liability was closely contested and the only rational possibilities were a $1000 verdict for the plaintiff or a verdict for the defendant.[3] I would not. I do not, however, propose to belabor these points of difference, which are far fewer than those of agreement.

Decisions as to order and arrangement of a text on procedure are similar to those which have to be made in planning to teach the course, and one is forced to the conclusion that there is no perfect solution for either the writer or the teacher. The writer has the advantage, fully utilized by Professor James, of being able to make footnote cross-references to relevant discussions elsewhere in the text. Although Professor Gilmore has in these pages spoken disparagingly of the reader's "shuttling back and forth as he runs down the elusive *supras* and the enigmatic *infras*,"[4] these cross-references add measurably to the utility of the work.

Professor James appropriately leads off his introductory chapter with a discussion of the distinction between substance and procedure.[5] He follows with a useful section on the adversary system.[6] Assuming a cover-to-cover reader starting with no legal background, this early exposure to the relative roles of the parties and the court is an excellent idea. On the same assumption, the first part of the next section, dealing with the rise of the king's courts and the growth of the formulary system[7] is, I fear, so condensed that it will leave the beginner confused. The same criticism is applicable to a lesser degree to the treatment of the rise of equity,[8] and the struggle for supremacy between the law and equity courts.[9] An exposition of the procedural reform in this country and England, culminating in the Federal Rules of Civil Procedure,[10] is succeeded by a general analysis of the types of relief which the courts may give.[11]

2. P. 321.

3. There is authority for both positions. *Compare, e.g.*, Martin Realty Co. v. Garver, 116 Kan. 689, 229 P. 70 (1924) (verdict vacated on appeal) *with* Johns v. League, Duvall & Powell, 202 Ga. 868, 45 S.E.2d 211 (1947) (affirmed on appeal).

4. Gilmore, COOGAN, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, 73 YALE L.J. 1303 (1964).

5. Pp. 1-3.

6. Pp. 3-8.

7. Pp. 8-11.

8. Pp. 11-13.

9. Pp. 13-16.

10. Pp. 16-21.

11. Pp. 21-31.

Professor James next turns to a description of the American dual system of courts and the allocation of business between them.[12] He then plunges into the murky waters of *Erie*[13] and gives ten pages to a penetrating and closely written analysis of the problem of the law to be applied in diversity cases.[14] He shares with many scholars disapproval of the *Klaxon*[15] doctrine, binding federal courts to follow the choice-of-law rules of the state in which the court sits. Perhaps it is the fact that I disagree with him on the merits that makes me a bit aggrieved by a footnote[16] which, while disclosing that the matter is controversial, seems to stack the deck of citations on the contra-*Klaxon* side. The impact of the *Byrd*[17] case on the outcome-determinative test of *Guaranty Trust Co. v. York*[18] is well handled. It is a pity that *Hanna v. Plumer*[19] was decided after the book went to press, thus depriving the student of Professor James' analysis of what is likely to be the most significant discussion in the field since *Erie* itself.

Following a thumb-nail sketch of the life history of a lawsuit from its inception through appeal,[20] Professor James devotes several chapters to taking up in chronological order the plaintiff's pleadings, the defendant's responses and later pleadings, the relation of pleadings to proof (variance and amendment), discovery and other pre-trial devices, and trial itself. As he explains in his preface,[21] in dealing with each of these subjects he uses the historical approach of taking up the pre-merger development in law and equity, the early codes and later code developments, and finally the modern solutions to the problems, of course including the federal rules. In general, I think it fair to say that the sections devoted to the common law suffer by compression and oversimplification. But the objective is simply to sketch in the background from which the codes sprang, and it is hard to quarrel with a decision that a one-volume treatise of such broad scope should not give more space to this background material. Furthermore, as is the case through-

12. Pp. 31-36.
13. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
14. Pp. 36-45.
15. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
16. P. 42, n.16. A better balance would have been achieved by citing, *e.g.*, Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 732 (1963).
17. Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958).
18. 326 U.S. 99 (1945).
19. 380 U.S. 460 (1965).
20. Pp. 46-53.
21. P. vi.

out the book, Professor James gives copious citations to the leading secondary sources so as to light the pathway for the student who wants to delve more deeply into a problem.[22]

The chapters on the plaintiff's and defendant's initial pleadings,[23] covering what in my opinion is the most difficult part of the first-year procedure course to teach effectively, are a laudable effort at exposition and clarification. Perhaps it is my own peculiar difficulties in teaching in this area that make me believe that this portion of the book does not quite measure up to its general high standard. On the other hand, the chapter on amendment[24] is superb, and the discovery chapter[25] combines effective exposition and incisive commentary. At the risk of appearing captious about small points, I take issue with Professor James in his discussion of the necessity of the defendant in a diversity case pleading contributory negligence where the state court makes the plaintiff's due care an essential element of his case, to be alleged and proved by him.[26] He not only, in my judgment, comes out with the wrong conclusion, but in disagreeing with his colleague, Professor Moore, he states the latter's views in a way that does less than justice to them.[27] In taking the position that a party should not be compelled on discovery to state his claims or contentions of fact,[28] he again differs from Professor Moore,[29] and again, as I have stated elsewhere,[30] I disagree with his conclusion.

The chapter on trial[31] is excellent throughout. Of especial merit is Professor James' treatment of the sufficiency of the evidence to establish a proposition, a problem of perennial difficulty for students. He wisely points out[32] that most of the seeming contradictions among the courts equating the standards for a directed verdict with those for setting aside a verdict and granting a new trial occur because of variations in the new-trial test rather than in the directed-verdict test. His discussion of the merits and demerits of the special verdict and the general verdict

22. The use of secondary sources in lieu of case authority seems to me to have been somewhat excessive.

23. Chs. 2-4.

24. Ch. 5.

25. Ch. 6.

26. P. 106.

27. See 2 MOORE, FEDERAL PRACTICE, ¶ 8.27[2] (2d ed. 1964).

28. P. 215.

29. 4 MOORE, FEDERAL PRACTICE, ¶ 33.17 (2d ed. 1963).

30. FIELD & MCKUSICK, MAINE CIVIL PRACTICE § 26.18 (1959).

31. Ch. 7.

32. P. 286.

accompanied by answers to interrogatories[33] is full and fair. Predictably, Professor James makes clear his own preference for the general verdict, at least in personal injury accident litigation,[34] but he gives the reader a solid basis for coming to a judgment of his own.

In writing this review I have attempted to husband my superlatives so as to make it clear that the chapter of the right to jury trial[35] rates the highest accolade. In organization, in case analysis, and especially in the criticism of the Supreme Court opinions in *Beacon Theatres v. Westover*[36] and *Dairy Queen, Inc. v. Wood*,[37] it is Professor James at his very best. His predilection for jury trial, it should be noted, does not obtrude upon his analysis and criticism of these decisions which, he concludes, represent an extension of the historical right to a jury.[38] When the article on which the chapter is based appeared in this Journal,[39] I recommended it to my students as the most useful writing on the subject that I had seen. I remain of the same opinion.

The chapter on parties[40] includes much that is not, and probably cannot be, given adequate time and attention in the usual introductory course in procedure. The student to whom the problems of the real party in interest are an unexplored mystery will find enlightenment here,[41] and the same may be said of the intricacies of necessary and indispensable parties,[42] where Professor James has borrowed heavily, as he scrupulously acknowledges,[43] from the article by Professor Reed[44] which has speedily established itself as a classic and has become everyone's starting point for study in this field.

In dealing with permissive joinder of claims and parties,[45] Professor James is back in more familiar territory for the beginning student. Here his handling of historical development is particularly felicitous.

33. § 7.15.
34. P. 299.
35. Ch. 8.
36. 359 U.S. 500 (1959).
37. 369 U.S. 469 (1962).
38. Pp. 372-77.
39. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).
40. Ch. 9.
41. Pp. 383-401.
42. Pp. 413-44.
43. P. 414, n.1.
44. Reed, *Compulsory Joinder of Parties in Civil Actions* (Pts. 1 and 2), 55 MICH. L. REV. 327, 483 (1957). Professor James also acknowledges his debt to the outstanding historical study by Professor Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).
45. Ch. 10.

Counterclaims are covered in considerable depth,[46] but the treatment of class actions,[47] intervention,[48] and interpleader[49] is rather cursory.

The chapter on judgments[50] is devoted primarily to res judicata and collateral estoppel, but there is at the outset a lucid exposition of appellate review and the limitations thereon and a discussion of collateral attack.[51] The treatment largely follows conventional lines. In discussing the applicability of res judicata in situations where there are alternative grounds of recovery for a single injury, Professor James argues, with logic on his side, that a plaintiff should be compelled to combine all possible theories of recovery in a single action, with the consequence of barring a second action on a different theory when the first fails.[52] He is critical of The New York Court of Appeals in *Smith v. Kirkpatrick*[53] for adopting "an excessively narrow view" of the limits of a cause of action.[54] I have always used that case to illustrate how a court may come to the sticking point and scrap logic to avoid patent injustice in the case before it. It is, in the words of Judge Clark's often quoted aphorism, a prime example of the proposition that "the defense of *res judicata* is universally respected but actually not very well liked."[55] Professor James fails to give recognition to the practical realities which put a court under pressure to reach a "just result" at the expense of doctrinal firmness. To me the case is akin to decisions cited by Professor James in the section entitled "Rules ameliorating the rigors of res judicata"[56] such as *White v. Adler*,[57] *Spilker v. Hankin*,[58] and *Adams v. Pearson*.[59] In *Smith* the technique is to stretch the principles to fit the facts; in the other cases the court avowedly departs from the principle. But both devices carry the warning to the student and the lawyer that they cannot invariably count upon the rule against splitting a cause of action being applied with its full harshness.

46. Pp. 472-94.
47. Pp. 494-501.
48. Pp. 501-05.
49. Pp. 510-15.
50. Ch. 11.
51. Pp. 519-49.
52. Pp. 565-66.
53. 305 N.Y. 66, 111 N.E.2d 209 (1953).
54. P. 566.
55. Riordan v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945) (dissenting opinion).
56. § 11.35.
57. 289 N.Y. 34, 43 N.E.2d 798 (1942).
58. 188 F.2d 35 (D.C. Cir. 1951).
59. 411 Ill. 431, 104 N.E.2d 267 (1952).

The material on persons affected by res judicata[60] reflects modern developments and is critical of the Restatement of Judgments in its adherence, with but limited exceptions, to the requirement of mutuality of estoppel.[61] In dealing with "the retreat of mutuality,"[62] Professor James considers at length the landmark opinion of Judge Traynor in *Bernhard v. Bank of America*[63] and the late Professor Currie's influential article on the subject.[64] He might well have included a discussion of *Zdanok v. Glidden Co.*,[65] a decision destined to be a leading case in the field, in which Judge Friendly builds upon both *Bernhard* and the Currie article and allows, under the peculiar circumstances involved, the affirmative use of collateral estoppel against a prior defendant by one not a party to the earlier action.

Professor James reserves for his final chapter, entitled "Place of Trial of Civil Actions,"[66] his treatment of jurisdiction and venue. Although it is more elliptical than one might wish on some points,[67] it nevertheless crowds into sixty-two pages a vast amount of useful learning. My criticisms here are minor. He makes it appear, for instance,[68] that the $10,000 amount-in-controversy requirement is an important limitation on federal question jurisdiction. The fact is that its impact is very slight, since almost all of the cases under this head come within specific grants of jurisdiction which require no particular amount and need not be based on the general grant in 28 U.S.C. § 1331, with its $10,000 requirement.[69] He also failed to pick up *Van Dusen v. Barrack*,[70] which settles the question he refers to as "not yet finally resolved" concerning the law which should be applied by the transferee court after a transfer under 28 U.S.C. § 1404(a).

I have a more serious quarrel with Professor James concerning the

60. Pp. 584-610.

61. P. 597.

62. Pp. 599-603.

63. 19 Cal. 2d 807, 122 P.2d 892 (1942).

64. Currie, *Mutuality of Collateral Estoppel: Limits on the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

65. 327 F.2d 944 (2d Cir. 1964).

66. Ch. 12.

67. E.g., the single sentence on venue in local actions in the federal courts, p. 618. See Note, 70 HARV. L. REV. 708 (1957) (cited by Professor James).

68. P. 615.

69. ALI, Study of the Division of Jurisdiction between State and Federal Courts 94-96 (Tent. Draft No. 3, 1965).

70. 376 U.S. 612 (1964). This case was decided March 30, 1964, and Professor James dates his preface January, 1965; but this is hardly to be taken as a representation that the text is current as of that date.

section captioned "*Erie* and the long arm in diversity cases."[71] On the question whether the jurisdiction of a federal court in a diversity action is limited by the scope of process of the state in which it sits, he states his own preference for the view that the only limit on the reach of process is the federal constitutional test. I agree with him that federal courts should be given diversity jurisdiction in multistate multiparty suits in which no state court has the power to render adequate justice.[72] I believe, however, that ordinarily the federal court's reach of process should not extend beyond that of the state, and that the exceptional situations where the rule should be otherwise ought to be left to specific grant by statute or rule.[73] As to the state of existing authority, Professor James seems to me rather to overstate the extent to which the question is an open one. He cites with obvious approval "the leading opinion favoring application of the federal test," *Jaftex Corp. v. Randolph Mills, Inc.*,[74] and it is only in a footnote that he reveals, and even then not too clearly, that *Jaftex* has been specifically overruled by *Arrowsmith v. United Press International*.[75] In fact *Arrowsmith*, an en banc decision of the Second Circuit with only Judge Clark dissenting, and cases from other circuits[76] within a few days thereafter, suggest that the tide of authority is running strongly in favor of making amenability to process in a diversity case coextensive with amenability to state process unless otherwise provided by law.

I have been by no means certain that I was sorry for the lack of a student text on civil procedure, as I could readily visualize a type of hornbook which would do the student more harm than good. Happily, Professor James has removed all such uncertainty. This book will deservedly be blessed by generations of law students, and its publication is a cause for rejoicing by procedure teachers.

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71. § 12.12.

72. See ALI, Study of the Division of Jurisdiction between State and Federal Courts, 38-41, 120-31, 148-49 (Official Draft No. 1, 1965) for just such a proposal.

73. See ALI, Study of the Division of Jurisdiction between State and Federal Courts 77-78 (Tent. Draft No. 2, 1964).

74. 282 F.2d 508 (2d Cir. 1960).

75. 320 F.2d 219 (2d Cir. 1963).

76. Jennings v. McCall Corp., 320 F.2d 64 (8th Cir. 1963); Walker v. General Features Corp., 319 F.2d 583 (10th Cir. 1963); Smartt v. Coca-Cola Bottling Corp., 318 F.2d 447 (6th Cir. 1963).

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