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James: Civil Procedure

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CIVIL PROCEDURE. By *Fleming James, Jr.* Boston: Little, Brown & Co. 1965. Pp. 672. $12.00.

Not long ago I saw a letter written by a law teacher at an Eastern school. In it the writer explained why he had chosen not to review a certain new book: to have done so would have violated his personal precept against reviewing any book about which he could not be unreservedly critical. This so aggravated me that I determined to accept at once the invitation to review in these pages Fleming James' text on civil procedure. I knew that my opening sentence would have to be, at the very least, "Fleming James has compiled an admirable student text on civil procedure."

Professor Fleming James of the Yale Law School *has* prepared an admirable treatise for use by students in conjunction with a basic civil procedure course. It would not be a bad idea for many law teachers and practitioners to take a long look at it, too.

Procedure, along with the body of rules regulating the receipt of evidence, is what makes litigation exciting. However, procedure is difficult to make comprehensible, let alone exciting, in the law school classroom. One reason for this difficulty has been the absence of any student text on civil procedure that not only meshes with a civil procedure course of proper breadth but also imparts some sense of the flux of the field. Now there is such a text and, having been put together by Professor James, it is as good as would be anticipated, which is to say that it is very nearly unimpeachable.

In my view, the organization of James' book is almost perfect. Surely a chronological approach to the teaching of civil procedure makes sense, and it is this approach, for the most part, that James has adopted. First there is some general background, mostly historical. It is a pretty compact package: two pages on the distinction between "substance" and "procedure";[1] five pages to describe the adversary trial system;[2] fourteen pages of Anglo-American legal history;[3] a general analysis of remedies;[4] a brief rundown of the American judicial structure;[5] a lucid section on the federal diversity jurisdiction[6] that is marred only by the fact that *Hanna v. Plumer*[7] came along too late for inclusion; and an outline of a litigation's life history[8] that closes James' initial chapter.

No one need be perturbed by the brevity of James' far-ranging first chapter. It is merely preliminary; additional historical background is sketched in at appropriate junctures throughout the volume.[9] This, it seems to me, is as it should be. The opening chapter can easily be read by a law student in one sitting, and with profit, even before his civil procedure class meets for the first time. More detailed historical perspective can be picked up when the student consults subsequent topics as they are reached in the classroom.

Following his introductory material, James presents a series of chapters dealing in sequence with the bane of the law teacher in this field: the paperwork of litigation. In these chapters the student confronts the complaint,[10] responsive and subsequent pleadings,[11] variance and amendment,[12] and discovery and other pretrial devices.[13] These sections are preceded by a cogent general description of the functions of pleadings and motions.[14] Several sections are devoted to the pleading of specific claims—torts,[15] contracts,[16] and damages.[17]

1. Pp. 1-3.
2. Pp. 3-8.
3. Pp. 8-21.
4. Pp. 21-31.
5. Pp. 31-33.
6. Pp. 33-45.
7. 380 U.S. 460 (1965).
8. Pp. 46-53.
9. Professor James consistently employs in his text the pattern he has long followed in the Yale classroom: history, early and later code treatment, then modern procedure with emphasis on the federal rules. The principle of full disclosure probably dictates that I add here that I had most of my civil procedure from Fleming James and that I thought then, as I do now, that his classroom approach was the right one.
10. Pp. 61-99.
11. Ch. 4.
12. Ch. 5.
13. Ch. 6.
14. Pp. 54-61.
15. Pp. 100-14.
16. Pp. 114-22.
17. Pp. 122-25. I wish that James, in discussing "general" and "special" damages, had tackled the formulation of a test for distinguishing between the two categories;

A few of these sections are a bit thin; in the solitary page assigned to the pleading of *res ipsa loquitur*,[18] for example, James lightly tosses off the vexing question whether a plaintiff ought invariably to be permitted to summon the aid of *res ipsa* when he has pleaded specific acts of negligence. Quoting a source that he justifiably favors—Harper and James, *The Law of Torts*—James advocates the abandonment of any *pleading* rule foreclosing plaintiffs from having more than one string in their bows, but he fails to consider the harder problem: whether a plaintiff who has pleaded and sought to *prove* specific negligence should be required to elect before going to the jury.[19]

Moreover, James says not a word about the current and important question concerning the extent to which a plaintiff may rely on a *res ipsa loquitur* theory against multiple defendants.[20] This issue is far too significant in such active areas of litigation as medical malpractice, product liability, and construction-industry injuries to be kept from the student.

Professor James is at his most effective in outlining the uses of pretrial discovery devices to fill the gaps in knowledge left by notice pleading. Aside from an occasional slip (he advises the student, for example, that the oral deposition "is the only means of discovery addressed to the nonparty witness"[21]) and a tendency, to me jarring, to be somewhat flip in describing the legal profession to students (James labels a three-phase pleading gambit as "a trilogy known *in the trade* as the last refuge of the deatbeat"[22]), the author does a thoroughly helpful job of explaining the close combat that is pretrial discovery and of revealing what techniques have proved especially useful for particular purposes.

Next comes a long chapter on the trial itself;[23] this chapter is superb. Without wasting words, James illuminates the complete arsenal of jury-control concepts and devices. He does a much better job than has ever been done before in expounding, for student consumption, such conundrums as the double-barreled burden of proof concept,[24] the wavering distinction between "fact" and

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instead, he contents himself with a brief catalog of items held in the past to have fallen on one side of the line or the other.

18. Pp. 111-12.

19. See, *e.g.*, Erckman v. Northern Ill. Gas Co., 61 Ill. App. 2d 137, 210 N.E.2d 42 (1965).

20. *Compare* Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953), *with* Huggins v. John Morrell & Co., 176 Ohio St. 171, 198 N.E.2d 448 (1964).

21. P. 184. Compare James' discussion of deposition on written interrogatories a few pages later. Pp. 188-89. See FED. R. CIV. P. 26(a).

22. P. 230. (Emphasis added.)

23. Ch. 7.

24. Pp. 248-66.

"law,"[25] and the quantum of evidence sufficient to establish a material proposition.[26]

Fleming James holds the civil jury in high regard and makes no secret of the fact; he wears it on his sleeve. His is not a blind devotion, however. Professor James proposes a realistic view of the jury's contribution to the adjudicative apparatus. It is, of course, unsurprising that one associated with the Yale Law School, where men first began to question the more magical conceptions of our judicial mechanism, should suggest a frank reshaping of our thinking about juries. We ought, says James, to recognize the good in the fact that juries "reflect the community sense of over-all fairness."[27] This suggestion does not possess unlimited shock value; James simply is willing to say out loud what trial lawyers have known all along. It is the proposal born of this candid awareness that will bother some. James argues, with his usual vigor, that trial judges should be free to enter judgment on demonstrable compromise verdicts.[28] While some courts have spoken of the civil jury's "time-honored right . . . to render a compromise verdict,"[29] James' argument is not universally accepted.[30] His text is certain to be cited in strong support of such verdicts, which are so much a fact of life to the litigation specialist that the statement is often heard that *all* American jurisdictions follow the comparative negligence rule.

Having devoted 336 pages to what can be denominated the flow of litigation, James in the next 336 deals with the more rarefied reaches of civil procedure. It is from this point that his treatise may sometimes edge beyond the bounds of many initial procedure courses into areas often relegated in large measure to subsequent, "advanced" courses. In these pages James discusses problems that crop up somewhat less than frequently—at least in any really complex form—in the practice of even the most active litigators. His chapter on the right to jury trial,[31] which grew out of a significant article published several years ago,[32] is the finest thing that has ever been done with the subject. On the other hand, James' chapter on parties is no substitute for Professor Reed's landmark article;[33] nothing could be.

25. Pp. 266-71.
26. Pp. 271-80.
27. P. 321.
28. Pp. 320-22.
29. Karcesky v. Laria, 382 Pa. 227, 235, 114 A.2d 150, 154 (1955).
30. Thinking on the general subject of compromise was recently focussed by the important paper published by Professor John E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1964).
31. Ch. 8.
32. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).
33. Reed, *Compulsory Joinder of Parties in Civil Actions* (pts. 1 & 2), 55 MICH. L. REV. 327, 483 (1957). The historical background of this unwieldy topic can be found in Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

The chapter on joinder[34] is excellent, the section on counterclaims[35] being especially good. James gives class actions,[36] intervention,[37] and interpleader[38] a once-over-lightly treatment, which is perhaps about what they deserve in a text aimed at students.

A chapter on judgments[39] emphasizes those mysterious twins, res judicata[40] and collateral estoppel.[41] However, set in at the beginning of this chapter is a gem that deserves special mention. Here, in slightly over fifteen pages, is a clear-eyed account of the process of appellate review.[42] It is so good that all law students should be required to read it during their first week in law school; they should be asked to reread it before taking part in any moot court program, and they assuredly should give it a third reading before undertaking to assist in the preparation of the briefs in a genuine controversy.

Jurisdiction and venue are discussed in the concluding chapter of James' text.[43] Some may feel that this material should have been inserted at an earlier point. I doubt that it makes much difference, since students do not read this sort of book in sequence, front to back. They look up subjects about which their instructor has succeeded in confounding them; student hornbooks, so long as they come equipped with an index, could be written backward. Furthermore, the placing of this chapter is probably propitious even if it be assumed that the work will be read in the order of its table of contents. These two related subjects—jurisdiction and venue—are part of the esoterica of procedure. They are best digested after the more mechanical aspects of civil procedure have been considered. The chapter is tightly compressed and at times slightly out of focus, as when it deals with the reach of process in diversity cases,[44] but on the whole it is adequate for the purposes of a text. After all, it is fair to suggest that student texts are not intended to, and cannot, supplant the law teacher in the classroom.

As the foregoing outline attests, there is nothing revolutionary about the organization of James' work. One could wish for more material under some headings and less under others, especially if one believes, as do I, that pleadings, motions, discovery, and jury control devices are the heart and core of civil procedure. But Professor James did not compile his treatise for my edification or for that of any other specialist in the field; he wrote it for students, and

34. Ch. 10.
35. Pp. 472-94.
36. Pp. 494-501.
37. Pp. 501-05.
38. Pp. 510-15.
39. Ch. 11.
40. Pp. 584-610.
41. Pp. 575-84.
42. Pp. 516-32.
43. Ch. 12.
44. Pp. 653-55. See Field, Book Review, 75 YALE L.J. 166, 172-73 (1965).

its great advantages reside not in its potential for expanding the instructor's knowledge but in helping him to broaden the student's. James sweeps through the entire subject-matter and, because he does not write as though there were a premium on antique prose, makes civil procedure the living, absorbing subject that it in fact is.

He does not conceal the massive research on which his text rests; neither does he choke the reader with unnecessarily compendious footnotes. His notes rely heavily on secondary sources—primarily law review discussions; this may be a wise election, since the intrigued law student, on the principle of predigestion, is far more likely to go to a law review article than to a string of case reports.[45] James' footnotes are helpful, too, for their references to other worthwhile texts—Judge Clark,[46] Moore,[47] Wright,[48] *et al.*—and for their frequent keying to the leading casebooks.

My only broad-gauge criticism of James' approach is one that others may not share. It goes to his recurring efforts to become, through the medium of his text, a second teacher in every law class in the land, there to proselyte on behalf of pet theories. Professor James did not originate this maneuver, but he indulges in it to a degree that some may find excessive, despite the fact that he is scrupulous to distinguish appropriately between current dogma and Jamesian opinion. It is here that the volume may depart from its purpose: aiding the student in comprehending and pondering an area of his chosen field. If memory serves, "Jimmie" James did not stand before his classes at Yale and advocate particular positions, but he does precisely that in this book. There will be law teachers who, not being in full agreement with some of James' arguments, will from time to time find it necessary, or at least tempting, to demand equal time in their own classrooms.

A less significant criticism is one which, depending on James' publication deadline, may be below the belt. His text, published in 1965, fails to discuss a number of important cases decided in 1964.[49] One of the major problems in writing about any unfolding field is that the process of obsolescence begins on the day the page proofs are returned to the printer. It is unfortunate that with James' treatise

45. On the other hand, Professor Field of the Harvard Law School finds James' use of secondary sources "somewhat excessive." *Id.* at 169 n.22. He does not indicate what, in his view, would constitute a proper mixture for law students.

46. CLARK, CODE PLEADING (2d ed. 1947).

47. MOORE, FEDERAL PRACTICE (2d ed. 1964).

48. WRIGHT, FEDERAL COURTS (1963).

49. *E.g.*, Schlagenhauf v. Holder, 379 U.S. 104 (1964) (discovery by physical examination); Van Dusen v. Barrack, 376 U.S. 612 (1964) (transfer of venue); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964) (collateral estoppel). The omission of the *Van Dusen* case permits the student to consider open a question that is now closed: the law to be applied by the transferee court after a § 1404(a) venue transfer. See p. 671.

the process set in here and there during the year preceding its publication.

The truth of the matter is that James' text on civil procedure is immune to any really important criticism. It can be recommended to the attention of law students; it should be, and it will be.

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