CIVIL PROCEDURE

Second Edition

JONATHAN M. LANDERS
Gibson, Dunn, & Crutcher
San Francisco, California

JAMES A. MARTIN
Late Professor of Law
University of Michigan

STEPHEN C. YEAZELL
Professor of Law
University of California, Los Angeles

Little, Brown and Company
Boston Toronto

Library of Congress Catalog Card No. 87-82498

ISBN 0-316-51353-9

Second Edition

MV

Published simultaneously in Canada
by Little, Brown & Company (Canada) Limited

Printed in the United States of America

To the memory of James A. Martin

PREFACE

Process lies at the core of our system of law: It expresses many of our culture's basic ideas about the meaning of fairness; it determines the victor in close cases; and it further determines which cases will be close ones. Procedure is also the area of law least understood and most maligned by lay observers. As a culture, we root for underdogs and insist that the rules not be stacked against them. But we are equally quick to condemn a case for having been decided on a "legal technicality," a phrase that usually means that a procedural rule has come into operation.

One finds similar ambivalence pervading debate about the behavior of courts and lawyers. As a society we demonstrate a healthy belief in the efficacy of lawsuits to solve social, business, and personal problems. But at the same time we worry about what many believe is an excessive willingness to seek such solutions. The ensuing debate ranges from the role of courts in restructuring major social institutions to the question of whether lawyers exacerbate disputes by reflexively behaving in competitive, adversarial ways.

All of these issues are procedural. Lawyers thus need to understand process as a tool of their trade, as a constitutive element of the legal system, and as a focus of debates about social values. Yet civil procedure is, by most accounts, the most difficult and frustrating first-year course. Students come to law school with little experience with procedure and an impression that cases simply arrive at the point of decision. Moreover, first-year students sense that procedure may be the area in which lawyering counts most; the notion that meritorious cases may be lost because of bad lawyering outrages their sense of justice even as it creates anxiety.

Our goal is to show procedure as an essential mechanism for presenting substantive questions and as a system that itself often raises fundamental issues regarding social values and the allocation of costs. We hope that students will begin to appreciate that lawyers move the system and that, to a large extent, clients' fates are necessarily dependent on the wisdom, skill, and judgment of their lawyers. Moreover, although all would agree that cases should not be decided on the basis of "mere" technicalities, fierce dispute quickly arises when one tries to distinguish the rules of mere procedure from those that guard the boundaries of fairness.

In addition to considering such theoretical issues, we have some practical goals. We want students to have a working knowledge of the procedural system and its sometimes arcane terminology. We see the course as an introduction to the techniques of statutory analysis. We hope that

students will better understand the procedural context of the decisions that they read in other courses. To these ends we have tried to select cases that are factually interesting and that do not involve substantive matters beyond the experience of most first-year students. The problems following the cases are intended to be answerable by first-year students and to present real-life issues. Finally, we have incorporated a number of dissenting opinions to dispel the notion that most procedural disputes present clear-cut issues.

The organization of the book follows the sequence that most procedure courses use. After a brief overview of the entire procedural system, we consider jurisdiction, choice of law, remedies, pleading, parties and joinder, discovery, decision without trial, trial, appeal, and former adjudication. Although this organization has the advantage of being in sequential order, there is no particular magic about it. Thus, although one of the authors has followed these chapters in sequence in teaching the course, another first goes through the entire procedural system from pleading through trial and former adjudication and then considers jurisdictional and joinder issues.

Cases have been severely edited to eliminate citations, and they read somewhat differently than real case reports; we hope that they err in the direction of smoothness. Citations are retained when they refer to the writing of important scholars or otherwise seem significant. We have eschewed the temptation to list large numbers of cases or articles following the principal cases. Footnotes have been eliminated without indication. Those that survive retain their original numbers, while the editors' footnotes employ asterisks.

We have used several special citation forms: F. James and G. Hazard, Civil Procedure (3d ed. 1985), is cited as James and Hazard; C. Wright, Federal Courts (4th ed. 1983), is cited as Wright, Federal Courts; J. Moore, Federal Practice and Procedure (1969), is cited as Moore; C. Wright and A. Miller, Federal Practice and Procedure (1969), is cited as Wright and Miller.

We gratefully acknowledge the permissions granted to reproduce the following materials. The selection from Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5, 5-12 (1959), is reprinted by permission of the author and the Stanford Law Review (copyright 1959 by the Board of Trustees of Leland Stanford Junior University). The excerpts from Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295 (1978), are reprinted by permission of the Vanderbilt Law Review (copyright 1978 by the Vanderbilt Law Review).

Those whose assistance was acknowledged in the preface to the first edition built the foundation on which this book rests. This revision has incurred additional debts of its own, benefiting from the help of many persons, particularly Leslye Firestone at Little, Brown. Research for this

edition has been supported by the Dean's Fund of the UCLA School of Law and by the Stanford Legal Research Fund, made possible by a bequest from Ira S. Lillick and other friends of Stanford Law School.

But the greatest contribution, and the one that gives the greatest pain to remember, is the one acknowledged in the dedication. James A. Martin's death has deprived this book of one of its original conceivers. His involvement with the project extended over the several years of writing and editing but drew on a much longer and deeper commitment to law and to teaching. We — and his students — will miss his high intelligence and good cheer, his broad knowledge of procedure, and his dedication to the project. We are consoled by the knowledge that his intelligence and his scholarship survive.

Jonathan M. Landers
Stephen C. Yeazell

January 1988

CONTENTS