

# PLEADING AND PROCEDURE

STATE AND FEDERAL  
CASES AND MATERIALS

EIGHTH EDITION

GEOFFREY C. HAZARD, JR.

COLIN C. TAIT

WILLIAM A. FLETCHER

UNIVERSITY CASEBOOK SERIES

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EIGHTH EDITION

*by*

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## PREFACE TO THE EIGHTH EDITION

Welcome to the most important course of the first year. Procedure is at the heart of what civil litigators do every day. The substance of a case may be based on contract, tort, or statute, but the day-to-day life of a lawyer litigating the case is dominated by procedure. Our students often come back for their second year after working in a law office over the summer saying, “Now I know why Civil Procedure is so important. It is at the center of *everything*.”

This is not a hard book. Or, rather, it is not an unnecessarily hard book. Certain aspects of Civil Procedure are complex and, for that reason, somewhat difficult. You will discover that this is true, for example, of personal jurisdiction, subject matter jurisdiction, and *res judicata*. A procedure book that hides or glosses over their complexity does you no favors. We give you Civil Procedure as it actually exists. But we have tried not to make procedure any harder than it has to be. We do not hide the ball, and we hope that our sentences are understandable on the first, rather than the second (or third), reading.

We have chosen to teach and write about Civil Procedure because we like it. We hope our affection for the subject is contagious. What is not to like about a subject that asks if you can file suit in a different court, thereby getting a different law (and possibly a different result)? About a subject that asks if you can be compelled to appear in an Arkansas court because you were served with process while flying over Arkansas? About a subject that uses terms like *in rem*, *in personam*, *res judicata*, and collateral estoppel?

One of the challenges for a Civil Procedure teacher is to convey to her students an understanding of how courts and lawyers actually work. The rules of Civil Procedure operate in a system of civil litigation with customs and practices that are unfamiliar, and sometimes baffling, to outsiders. In this book we provide you with a great deal of information about the system, some of it historical and some of it practical. Rarely will any single piece of information be critical to your understanding of a rule or case; but, in the aggregate, the information will assist you enormously in understanding the operation of the rules and the behavior of the participants in the system.

Though the Federal Rules of Civil Procedure are at the center of the book, state rules of procedure are not far from the center. In part, state rules are important for their own sake, but in equal part they provide a sense of present-day alternatives to the federal rules. We also pay careful

attention to the development of rules of procedure so you may understand historical alternatives to the modern rules, both federal and state.

This book had its origins several decades ago at the University of California, Berkeley (Boalt Hall). It has changed in many ways over the years, but it is still, in spirit, the same book it was at the beginning. (You may wish to read the Preface to the First Edition, following this Preface.) This edition, like earlier editions, would not have been possible without the assistance of many people. Our academic colleagues have been indispensable sources of advice and insight. We wish particularly to thank Professors Stephen Bundy, Henry Hecht, John Oakley, Paul McKaskle, Eleanor Swift, and Jan Vetter. We thank Julia Fromholz and Kirk McInnis for their superb research assistance, and Ann Marie Bender, Kirk McInnis (again), Tamara Lange, and Eric Wolff for their excellent line-editing and proof-reading. Finally, we thank Uyen Koh for her excellent work on the table of contents and index.

G.C.H., JR.

C.C.T.

W.A.F.

June, 1999

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## PREFACE TO THE FIRST EDITION

The predecessors of these materials have been used for some years in mimeograph form, at the University of Minnesota and the University of California, Berkeley.

A principal goal we have sought to achieve in them is connoted by the title: "Pleading and Procedure: State and Federal." For in our treatment of all major problems we have tried to juxtapose State Code and Federal Rules doctrine. This we have done not only for practical purposes of coverage, though that is of course a significant end in itself. Despite the increasing acceptance of the Federal Rules of Civil Procedure a number of states, including California and New York, still pursue the "Code road." Students preparing for Code practice cannot be ignored; as Cleveland put it, "It is a condition, not a theory, that confronts us." Moreover some problems of procedure, by reason of the nature of our federal system, are primarily of concern in state courts. But beyond these pragmatic considerations, experience in teaching has dictated our method. For we have found that there is no other technique in procedural teaching as effective as comparison between the methods of the two on-going systems of American adjudication, Code practice and the Federal Rules. And profound though our admiration is for the achievements of the latter, we of course do not regard present federal practice as the last possible word. The continuing revision of the Federal Rules is perhaps the greatest vindication of the judicial statesmanship that engendered them in the first place; the Federal Rules, like all living institutions, constantly can profit by comparison. And surely the recommendations of the New York Temporary Commission on the Courts, retaining as they do many features of Code practice, caution against accepting the Federal Rules as a procedural monotype. Indeed, in pursuance of our conviction of the values of comparison we have not hesitated to invoke light also from non-common law sources.

But if the juxtaposition of State and Federal pleading and procedure is valuable for comparative purposes, perhaps it is even more meaningful to demonstrate the universality, continuity and persistency of the hard problems of procedure, whatever the forum. Perhaps it is simultaneous study of both systems that offers best the promise of a distillate that may yet provide a universal norm for American procedure—to the extent that one is feasible in a federal system.

We have selected our cases primarily as exemplars of the recurrent problems rather than as sources of doctrine. This necessitates more supple-

mentation by textual notes than perhaps has been customary in other pleading and procedure casebooks. Perhaps some may criticize this method on the ground that it attempts to make things too easy for the student, a bootless and deceptive effort with subject matter as tough as that of pleading and procedure. Such critics we would attempt to disarm by thorough agreement that this subject matter is tough; that superficial glances at hard problems can only be deceptive; that he who would master these problems, must first discipline himself to effort. If then we are asked, why so much textual explanation, our answer is that by clearing away some of the rubbish we hope to lead the students through the tailings to the mines that invite—indeed demand—deep digging. We rather expect the criticism that some of our cases and problems are just too tough, at least for first year students. But we have been teaching them to first year students with the satisfying conviction—unless we are deluded—that when really challenged, the student will respond with the necessary effort. Hence we have not hesitated to draw upon hard cases, provided they are good teaching tools, and to present the tough problems.

Naturally for the Code side of the picture we have drawn heavily upon California cases not only as the jurisdiction of our immediate contact but because the richness of its procedural law, compounded by an intermediate system of appellate review, produced an almost inexhaustible source for intelligent reflection on today's procedural problems. But the similarity of California's Code of Civil Procedure to the other Codes, e.g., New York's, reduces the problem of case selection largely to one of choosing the best teaching tool, regardless of the jurisdiction of origin of the case involved. Of course those using the book in states which have adopted the Federal Rules can for the most part pursue the Federal Rules materials herein. We teach Pleading and Procedure three hours a week for both semesters; but we think the book adaptable, according to need, to various combinations of semester hours. For example, it might be used for either two or three hour courses in (1) Pleading and Joinder, and (2) Jurisdiction and Trials.

This book reflects our attempts while teaching Pleading and Procedure to hold in focus the following different, if sometimes overlapping, viewpoints: (1) That of the law student, as he struggles to master, for example, the many-faceted concept of jurisdiction, or to balance in the scales the "rights" of a pleader with the tactical limitations implicit in the process of "educating" an opponent; (2) That of the lawyer as an advocate in an adversary system, whose objective is to win for his client and for whom outcome is largely the function of judgment and wisdom in marshalling the resources of his cause; (3) That of the judge, interested in effective, efficient, economical and fair determination of controversy, according to prescribed rules; (4) That of the intelligent legislature and lay public, who view procedure as a means of effectuating desired substantive objectives, and therefore as the handmaiden of justice; and (5) That of the jurisprudent, who sees today's procedure in the historical context of the continuum of human conflict. Our emphases shift from problem to problem—when we consider selecting the jury, it may be primarily tactical; when we deal with instructing the jury, it



may be principally that of judicial administration—but we hope that all of these viewpoints always remain at least implicit.

Lastly, this book reflects our philosophy, the product perhaps as much of our experience as practitioners as of our reflection as teachers, that procedure is but a phase in the process of settling human controversy, and that the most effective “pleader” and “trial lawyer” is often he who by wise negotiation obviates the necessity of pleading and going to trial. Because of this thinking we give perhaps unusual attention, for a book of this type, to the problem of settling cases.

For whatever success our efforts may achieve, we owe much to our colleagues because of their generosity in making available the learning of all of their disciplines with which pleading and procedure are so inextricably interwoven. In particular, we thank Edward L. Barrett, Jr., who by a scholarly and perceptive selection of California cases on pleading prior to our arrival on the scene at Berkeley paved the way for the assimilation of that phase into our integrated treatment, and who generously bequeathed his work to us; Albert Ehrenzweig, who has always made available his penetrating thinking in the area of jurisdiction; and our new colleague in procedure here, Preble Stolz, who has read much of the manuscript.

D.W.L.  
G.C.H., JR.

April, 1962

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