YEAZELL

CIVIL PROCEDURE

Fifth Edition

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PREFACE

Process lies at the core of our legal system: 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. We root for underdogs and insist that 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 commonly signifying that a procedural rule has come into operation.

A similar ambivalence pervades debate about the behavior of courts and lawyers. As a society we demonstrate a strong belief in the efficacy of lawsuits to solve social, business, and personal problems, and we extol the rule of law as a distinguishing virtue of our culture. But at the same time we worry about what many believe is an excessive willingness to seek legal solutions. The ensuing debate ranges from the role of courts in restructuring social institutions to the question of whether lawyers exacerbate disputes and waste social resources by reflexively behaving in competitive, adversarial ways.

All 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 debate about social values. Yet civil procedure is, by most accounts, a difficult and frustrating first-year course. Students come to law school with little experience in thinking explicitly about procedure and with an impression that cases simply arrive at the point of decision. Moreover, students sense that procedure may be the area in which lawyers' skill counts most; the notion that meritorious cases can be lost because of bad lawyering outrages their sense of justice even as it creates anxiety.

This book seeks to show procedure as an essential mechanism for presenting substantive questions and as a system that itself often raises fundamental issues regarding social values. I hope that students will begin to appreciate that lawyers move the system and that, to a large extent, clients' fates depend 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 debate quickly arises when one

tries to distinguish rules that merely direct traffic from those that guard the boundaries of fairness.

In addition to considering such theoretical issues, the book has some practical goals. It seeks to give students a working knowledge of the procedural system and its sometimes arcane terminology. The course also introduces the techniques of statutory analysis. It should give students a better understanding of the procedural context of the decisions they read in other courses. To these ends I have tried to select cases that are factually interesting and do not involve substantive matters beyond the experience of first-year students. The problems following the cases are intended to be answerable by first-year students and to present real-life issues. Finally, the book incorporates a number of dissenting opinions to dispel the notion that most procedural disputes present clear-cut issues.

The organization of the book adapts it to the most common sequences in contemporary procedure courses. After a brief overview of the procedural system in Chapter I, some courses will initially consider the materials in Part A, which covers jurisdiction and choice of law. Other courses will begin with discussion of remedies, pleading, discovery, resolution without trial, identifying the trier, trial, appeal, and former adjudication which are addressed in Part B. Part C, on joinder and complex litigation, recapitulates much of the material in Parts A and B and can be used either as a culmination of the course or as an insertion that follows pleading.

Cases have been severely edited to eliminate citations (without indicating their omission), and they read somewhat differently from real case reports; I hope they err in the direction of smoothness. Citations are retained only when they seem significant. Footnotes have been eliminated without indication. Those that survive retain their original numbers, while the editor's footnotes employ symbols. We have used several special citation forms: F. James, G. Hazard, and J. Leubsdorf, Civil Procedure (4th ed. 1992), is cited as James, Hazard, and Leubsdorf; C. Wright, Federal Courts (5th ed. 1994), is cited as Wright, Federal Courts; J. Moore, Federal Practice and Procedure (1969), is cited as Moore; C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure (1969), is cited as Wright and Miller.

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Those whose assistance was acknowledged in the preface of earlier editions built the foundations on which this book rests. This revision has incurred additional debts of its own, including the suggestions received from teachers and students using the book. This edition has benefited greatly from the perceptive comments of Allen M. Katz, Esq. A distinguished litigator, Mr. Katz has shared his insights about the way in which doctrine matters in the shaping of a lawsuit and has offered many valuable suggestions, particularly about pleading, discovery, and trial. Without giving him any responsibility for the errors that doubtless still remain, I also want to thank him for having read and commented on the draft of each chapter. I want also to thank Professors Richard D. Friedman, Lawrence W. Moore, and Philip Schrag for their detailed, thoughtful, and constructive comments. This edition has also benefited from the help of Heather Deetjen and Richard Kim, who tracked down citations, indexed, and improved the book's comprehensibility.

This edition bears the name of only one author. In many respects, however, it continues to be the work of Jonathan Landers and the late James Martin, on whose intellectual framework and approach I have continued to build; though neither bears any responsibility for errors of judgment or detail, both should get credit for much that is right and helpful about the book.

Stephen C. Yeazell

January 2000

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