PLEADING AND PROCEDURE

STATE AND FEDERAL

CASES AND MATERIALS

NINTH EDITION

GEOFFREY C. HAZARD, JR.

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STEPHEN MCG. BUNDY

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PREFACE TO THE NINTH EDITION

Welcome to the most important course of the first year. Procedure is important to lawyers and law students because it sets the terms on which civil disputes are resolved and substantive legal rights enforced. For the hundreds of thousands of American lawyers and judges who work on civil litigation the law of procedure is central, providing the language and tools that they use and refine every day of their working lives. Our students sometimes email us from their summer job after their first year saying, "Now I know why Civil Procedure is so important. It is at the center of everything."

The first year course in procedure, more than any other, exposes students to the world of practicing lawyers. In almost every case that you study in this course, you will find yourself thinking not just about legal rules, but also about a lawyer's (or judge's) strategic, tactical or ethical choices. Often those choices involve uncertainty, high stakes, and intense pressure. No other first-year course so consistently offers such a vivid participant's perspective on the legal system.

At the core of procedure lie difficult questions of policy. American civil procedure rests on traditional and characteristic American values of limited government, fair competition, individual initiative and federalism. But it also stands at the epicenter of some of the most important and intensely debated political issues in American law today. The use of civil litigation as a tool of substantive legal regulation has been the subject of continuing media attention, and has been a central issue in recent Presidential campaigns. When politicians, from the President of the United States on down, declaim against "frivolous lawsuits," "greedy trial lawyers," "judicial hell holes," or "runaway" juries, their complaint is often directly with the rules of procedure studied in this course, and their ultimate goal is usually procedural reform. This course aims to provide you with an understanding of real workings of the civil justice system and of the underlying policy choices that will allow you to participate knowledgeably and responsibly in those important public debates.

For all these reasons and more, we like teaching and writing about civil procedure. We hope our affection and enthusiasm for the subject is contagious. What is not to like about a subject that asks if you can file suit in any of several different courts, obtaining in each a different law, a different jury (and possibly a different result)? About a subject that asks whether you can be compelled to appear in an Arkansas court because you were served with

process while flying over Arkansas? About a subject that teaches you how to distinguish between questions of law and questions of fact, between contentions that are creative and those that are frivolous, between jurisdiction in rem and jurisdiction in personam?

Civil procedure can sometimes be a hard subject, but this is not a hard book. Or, rather, it is no harder than the subject matter demands. Many aspects of civil procedure are, at least on their face, non-intuitive, requiring patient attention to yield up their secrets. Others, such as the law of personal jurisdiction, subject matter jurisdiction, or class actions, are difficult even for experienced lawyers. A procedure book that hides or glosses over this complexity does you no favors. 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 also tried to convey a real understanding of how courts and lawyers actually work. The formal rules operate in a system of civil litigation with customs and practices that are unfamiliar, and sometimes baffling, to outsiders. This book contains a lot of information about the system, some of it historical, some economic, sociological and psychological, some practical. We have tried to take full advantage of the burgeoning empirical social science literature on the operation of the civil justice system to give a real picture of stakes, costs, and outcomes in typical cases. Rarely will any single piece of this information be critical to your understanding of a rule or case; but in the aggregate we believe that it will assist you greatly 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 remain not far from the center. In part, such rules are important for their own sake, but in equal part they provide a sense of present-day alternatives to federal rules. We have also paid attention to the historical development of rules of procedure and to comparative procedural perspectives, so that you can understand the past and present-day alternatives to modern American rules, both federal and state.

This book had its origins more than forty years ago at the University of California at Berkeley (Boalt Hall). It has changed in many ways over the years, but we like to think that it is still, in spirit, the same book as it was at the beginning, focusing on the hard perennial problems, and insisting on balancing both practical and critical perspectives on the material. (You may well 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. At Boalt, we want particularly to thank Professors Anne Joseph, Eleanor Swift and Jan Vetter, each of whom taught from and provided exceptionally helpful comments on a manuscript version of this edition. At other schools, we owe particular thanks to Professors Paul McKaskle, John Oakley and Catherine Struve. For excellent research help, we thank C. Scott Andrews, Christina Coll, Suzanne

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G.C.H., JR.
C.C.T.
W.A.F.
S.MCG.B.

April, 2005

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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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