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Cound, Friedenthal & Miller: Civil Procedure, Cases and Materials

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CIVIL PROCEDURE, CASES AND MATERIALS. By *John J. Cound, Jack H. Friedenthal* and *Arthur R. Miller.* St. Paul, Minn.: West. 1968. Pp. xxxvii, 1075. $14.50.

It seems difficult to believe that less than fifteen years has passed since the presentation of the introductory course in civil procedure—covering all phases of the litigation process, from commencement of an action through appeal, and employing the vehicle of the single set of modern federal rules—was decried as "not practicable . . . unless the first year in law school is to be devoted solely to procedure."[1] Yet today we (both teachers and students) find this approach not only commonplace, but highly desirable; it has been accomplished without the dire consequences predicted by Professor Blume. Thus, the Cound, Friedenthal, and Miller book is not unique in its comprehensive scope, nor in its general federal orientation (although there is happily a wealth of state material), but it is outstanding in the manner in which the material is presented.

In the now "traditional manner," the federal rules and statutes serve as the only complete system of procedure presented to the students; and, of course, the federal cases are themselves of paramount importance in areas of personal jurisdiction and the determination of the applicable law and procedure. But the editors also view the federal law in these areas as a catalyst for giving first-year students

1. Blume, Book Review, 67 HARV. L. REV. 1489, 1490 (1954).

an introduction to techniques of case analysis and stare decisis. The editors have ordered their materials to include a bonus: they import principles of legal analysis in addition to those of civil procedure.

Their technique is amply demonstrated by the choice of topic for chapter 2, the first chapter devoted to an intensive view of one area of procedure. They have chosen *Selecting the Proper Court* (p. 58). The chapter begins with an examination of the traditional bases of jurisdiction over the person, employing the ever-popular *Pennoyer v. Neff*[2] and *Hess v. Pawloski*,[3] which raises the notion of implied consent and thus by necessity "contacts," and which might be viewed as the individual analogue and analytical precursor to *International Shoe Co. v. Washington*;[4] other significant cases are relegated to notes following these cases. Then, following what seems to be the natural course, *International Shoe* appears (p. 75), followed by some contemporary applications of that doctrine.[5] Issues which had been lurking in the wings since the presentation of *Pennoyer* are considered in the ensuing sections on *Jurisdiction Based Upon Power Over Property* (p. 98) and *The Requirement of Reasonable Notice* (p. 104). Then all of these themes are brought together in examinations of *Hanson v. Denckla*[6] (p. 113) and *Western Union Telegraph Co. v. Pennsylvania*[7] (p. 123). After reading about service of process (p. 133), methods of challenging jurisdiction (p. 150), subject matter jurisdiction (p. 157), and venue[8] (p. 202) (the latter three sections examining both state and federal aspects) the student has acquired an in-depth knowledge of jurisdiction and has taken an excellently structured excursion into case analysis.

Chapter 3, *Ascertaining the Applicable Law*, appears also to have the analytical completeness necessary to make it useful in teaching legal method. After the expected *Erie*[9] line of cases through *Hanna v. Plumer*[10] and an exercise in ascertaining state law, the editors turn to considerations of "federal common law," the *Clear-*

2. 95 U.S. 714 (1877).
3. 274 U.S. 352 (1927).
4. 326 U.S. 310 (1945).
5. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (p. 81); Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967) (p. 91). With regard to the latter case, it is gratifying to have the casebook contain such contemporary gems; my excitement perhaps may be due to the recent publication date, in addition to wise editing.
6. 357 U.S. 235 (1958).
7. 368 U.S. 71 (1961).
8. While not at all adversely commenting on the editor's selection of materials, for what it is worth I have found pedagogical success in using at this point the highly questionable case of Stephenson v. F.W. Woolworth Co., 277 Minn. 190, 152 N.W.2d 138 (1967), which denied plaintiff any amount above the $9,900 demanded although local rules presumably would have permitted the $14,000 jury verdict to stand, on the ground that the lower amount pleaded prevented removal to the federal district court.
9. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
10. 380 U.S. 460 (1965).

field Trust[11] doctrine (so often omitted from basic procedure study) (p. 261), and the "reverse-*Erie*" problem of federal law in the state courts[12] (p. 270).

Subsequent chapters appear to be less self-consciously structured —and this occurs as the student becomes more able to structure the materials himself. Chapter 4, *The Development of Modern Procedure,* is a terse, stimulating historical summary.[13] The same cannot be said of chapter 5, *Modern Pleading.* The 118 pages devoted to variances and the like should perhaps be taught only by those few teachers specially preparing their students for practice in the minority of states where practitioners must waste time quibbling over how to allege facts rather than how to get them. The rest of us would be wise to cover a few of the federal classics[14] and to spend more time on chapter 6, a very fine treatment of joinder of claims and parties. Only half of this material actually appears here; chapter 14, the last in the text, includes the materials on interpleader, class actions, and intervention. This is somewhat unfortunate; the last chapter is a very fine, incisive, and important one but its placement might tempt the teacher to cover it only if he finds time at the end of his course—and he never does. Its location may be justified in light of the treatment of the binding effect of decision in chapter 13. However it is accomplished, this reviewer urges that the material in chapter 14 be at least touched upon earlier, even if this results in taking the material out of order, a practice which delights teachers and confounds students.

Chapter 7 on discovery devices not only gives both scholarly and practical insight into the present federal system, but also, in the notes, discloses the contents of and gives insight into the proposed federal discovery rules amendments recently submitted for public comment.[15] The book is rounded out by chapters on *The Pretrial Conference* (chapter 8), *Adjudication Without Trial or by Special Proceeding* (chapter 9), *Trial* (chapter 10) (including jury trial), and *Appellate Review* (chapter 12), each executed with the care apparent in the earlier ones.

There are fine textual passages summarizing the trial (pp. 641-54) and evidence (pp. 705-14). The editors have apparently taken the position that first-year law students ought not to be shielded from the cold light of procedural reality; they have devoted chapter 11 to

11. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

12. The editors employ Dice v. Akron, C. & Y.R.R., 342 U.S. 359 (1952).

13. *See, e.g.,* the illuminating explanation of the early practice of oral pleading (pp. 275-76). Regrettably, casebook space limitations forbid an even more extensive treatment of the general state of the early legal process; *e.g.,* the description of Westminster Great Hall in C. BOWEN, THE LION AND THE THRONE 4-6 (1957).

14. *E.g.,* Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944) (p. 353).

15. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS RELATING TO DEPOSITION AND DISCOVERY (1967), reprinted in 43 F.R.D. 211-74 (1968).

the practical problems of securing and enforcing judgments. Nor is the student excluded from the debates he hears elsewhere concerning structural reform of procedural systems; the text discusses the handling of the "big case" (*e.g.*, pp. 362-63) and includes a well-balanced debate on the need for the jury (pp. 655-58).

Notes abound. Each main case is followed by a note designed to clarify and amplify it. These notes may contain brief descriptions of other relevant cases and materials, or merely challenging questions from the fertile minds of the editors. The temptation to list for supplementary reading all that the *Index to Legal Periodicals* would bear was avoided; the references have been limited to those few articles or case notes which give special insight. While these notes are designed for the student, not the researcher, the great care with which they have been prepared should give the reader, whoever he may be, cause to think a bit harder about the problem under discussion.

The main text is accompanied by a supplement. The last portion contains a sample state court litigation problem which should prove useful in demonstrating the application of much that the student has been taught. The first parts of the supplement are given over to the federal rules and to selected federal statutes "plus selected comparative state provisions." References to these provisions appear at appropriate places in the main text. It is laudable that the reader is given an opportunity to view and compare the operation of nonfederal provisions; the same can be said of the supplement section enumerating state provisions governing jurisdiction and appellate review. However, each comparative provision directly follows its corresponding federal provision. As a price for this excursion into comparative rule analysis, the editors sacrificed the unity of the federal rules. Although the tenor of the text affirms the importance of seeing the interrelationships among the various aspects of a complete procedural system, this task is made somewhat more difficult by depriving the student of the opportunity to skim through the federal rules without the intrusion of foreign provisions. While the alternative of forcing the student to "flip" between sections to compare provisions presents its own measure of difficulty, in my opinion it would have been preferable.

I have saved comment on the introductory chapter until last, as it seems to intone all that the editors seek to do. They meticulously avoid the "great mystery" approach; no inscrutable *Sibbach v. Wilson & Co., Inc.*[16] begins their text.[17] Instead, the first chapter contains a twenty-page textual introduction to the course, following a lawsuit

16. 312 U.S. 1 (1941).

17. *Cf.* R. FIELD & B. KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 6 (1954). As the editors have dedicated their work to Professors Field and Kaplan (p. ix), the temptation to compare directly the two works, even superficially, is irresistible.

from inception through appeal. While this first view appears overly detailed in spots (Does a student at this stage have the capacity to comprehend declaratory relief?), the editors apparently have proceeded on an assumption most assuredly valid: that the students will largely forget the details of what they read here, and that they will return to this section whenever they wish to put their more detailed work in context. The chapter concludes with eleven relatively short cases posing basic procedural problems in the order of the litigation process. After this brief excursus, the student has not only a firm grounding for his later procedural studies, but also a sufficient understanding of procedure more fully to appreciate the posture of the cases he must read for his other first-year courses. Thus, some of the "great mystery"—largely unnecessary confusion on procedural points often unrelated to the substantive issues—may disappear from his other courses as well. Procedure teachers in schools where no special effort is now made to teach legal analysis as such to first-year students[18] may want to give special attention to this chapter. It might be desirable to conclude the teaching of this material in advance of the beginning of all other classes.[19]

Cound, Friedenthal, and Miller issue two challenges. First, they challenge the student to share the joy they obviously derive from the study of the litigative process. They succeed far better than most. Their energy, thoughtfulness, and devotion to the pedagogy of their subject matter is evident throughout. But the more subtle challenge is to teachers of law. The editors, by their example, challenge us all to look beyond the confines of the particular courses we teach and to examine their interrelationships with those taught by our colleagues; the end result of such an approach would be more time spent on the relevant hard problems and less wasted on a haphazard approach to the analytical method. In this second challenge they also appear to have succeeded. And when you have pushed a law professor, you have done a lot.

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18. *See* P. MISHKIN & C. MORRIS, ON LAW IN COURTS (1965) for a casebook designed for such a course.

19. Mishkin and Morris employ this device in teaching from their book. *Id.* at xi.