Vanderbilt Law Review

Volume 7
Issue 4 *Issue 4 - A Symposium on Federal Jurisdiction and Procedure*

Article 16

6-1954

Book Reviews

Walter P. Armstrong Jr.

Robert A. Pascal

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Agency Commons

Recommended Citation

Walter P. Armstrong Jr. and Robert A. Pascal, Book Reviews, 7 *Vanderbilt Law Review* 726 (1954)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol7/iss4/16

This Book Review is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

BOOK REVIEWS

BENDER'S FEDERAL PRACTICE FORMS. By Louis R. Frumer.
Albany: Matthew Bender & Company, 1951-53, 4 Vols.
(1 to follow), $85.00.

At the time of their adoption in 1938, great things were expected of the Federal Rules of Civil Procedure. On the whole, those expectations appear to have been justified. Of course, this statement can only be made if the underlying philosophy of the rules is accepted; that is, that procedural technicalities and trial tactics calculated to give one party an advantage over the other in the presentation of its case serve no useful purpose, and that the prime objective of any litigation is to bring as much information as possible out into the open where the trier of fact can pass upon it uninfluenced insofar as possible by the personal abilities of the advocates of the various parties. The purpose of the rules seems to be that if there is to be a race, at least everyone should start even.

A good argument can be made against this concept. Some claim that under the rules trials are largely deprived of their character of adversary proceedings, and are more in the nature of an arbitration. In fact, after indulgence in all of the preliminary motions, discovery procedures, interrogatories and motions to produce documents, pre-trial conferences and other innovations designed to eliminate completely the element of surprise, the actual trial itself often comes as an anticlimax. I do not know whether as a matter of statistics the adoption of the rules has resulted in a reduction in the number of jury trials, but I would suspect that it has; for after your opponent has rummaged through your files at his leisure, frequently there is little left with which to impress a jury. I would be even more certain that the number of settlements has materially increased; and in fact, if you postulate the perfect attorney who, knowing the strengths and weaknesses of his own case and having access to all available information regarding those of his opponents, can make an accurate estimate of the outcome, there is no reason why virtually every case should not be settled before trial. In view of this, the ancient adage that the best way to ascertain the truth is not by impartial investigation but by admittedly partisan presentation of the two sides of the question before an impartial tribunal, once considered basic to our system of the administration of justice, seems to have lost its validity, and lawyers, judges and juries, no doubt to their consternation, find themselves aligned together in a sort of

search for truth in the Sherlock Holmes manner. No wonder some of the older practitioners have disdained these new fangled ideas and retired to the state courts where at least a semblance of the old regime is retained.

And all of this has been done in the name of simplification. "To secure the just, speedy, and inexpensive determination of every action" is the avowed purpose of the rules. Justice we may assume, subject to the limitations already noted. But speedy and inexpensive? At least this is open to question. A conscienceless defendant with unlimited resources can, by utilizing all of the pre-trial procedures open to him, prevent an adjudication upon the merits for an almost indefinite period; and it is a recognized fact that litigation in the federal courts has become so expensive as to be the wealthy plaintiff's prerogative rather than the poor plaintiff's right. The misuse of the powers conferred by the rules gives rise to such uncontrolled (and, I may add on behalf of the vast majority of the bar, unmerited) outbursts as that of Mr. Westbrook Pegler, who once wrote for national syndication:

> "I refer to the practice known as the examination before trial, which . . . is a weapon for blackmail, blackguarding, harassment and intimidation and is wantonly abused every court day of the year."

Mr. Pegler's remarks are, of course, inspired by a thoroughly unjustified assumption that where the possibility of abuse is present the fact of abuse must exist. On the contrary, if most attorneys were not honest and conscientious, the profession would have fallen into disrepute long ago; and despite the relatively large number of pointless jokes about lawyers based on a contrary premise, on the whole the bar is accepted as being composed of honorable men. This being the case, the purpose for which its members utilize the Federal rules is not to slip one over on their opponents, but to attain justice; and the purposes and objectives of the rules being equally available to both sides, if used for that purpose they promote rather than discourage that end. So we have come full circle and arrived again at an adversary proceeding, but one conducted in a different manner. In other words, the same old game played according to new rules.

The difficulty here of course is that if your opponent knows the rules and you don't, you're going to get the worst of it. And this is why many lawyers stay out of federal court. Having learned certain practices and procedures in law school, a mental inertia sets in after graduation which prevents them from adapting themselves to changing conditions. The Federal Rules, being designed as a dynamic rather than a static approach to the problem, have been frequently

amended; being relatively recent in concept, they are still subject to constant interpretation and re-interpretation; and being in the nature of a radical approach, they cut across the lines carefully drawn by many a law school professor in procedure courses where the lecturer's notes have been handed down from generation to generation. Consequently the mentally lazy steer clear of them, and prefer the mechanical repetition of the hallowed practices of the state courts, where tradition reigns supreme and the Clerk can always tell you where to file your paper. These unadventurous spirits must look upon those who practice in the federal courts somewhat as the uninitiate regarded the alchemists of old; mysterious beings who by following secret processes could achieve results otherwise unobtainable.

My copy of the Federal Rules, complete with index and forms, contains one hundred and forty pages. It is written in relatively lucid English. One reading can dispel most of these mysteries and gain the reader entrance to the exalted land of federal practice. And yet it is amazing how often this simple solution is ignored.

So that there could be no misconstruction of their meaning, the authors of the rules appended some twenty-nine forms to them. Presumably they considered these sufficient to meet any contingency which might arise. Mr. Frumer has now enlarged this number to 1517, with one more volume of his formulary yet to come. The disparity between these two figures is somewhat overwhelming, and the reason for it is not entirely obvious. But perhaps Mr. Frumer gives a hint of it when he writes in his introduction:

> "These forms are not designed merely to enable the draftsman to 'get by' and to avoid procedural calamities. Obviously it would be absurd if they did not serve that purpose. Equally or perhaps even more important, these forms are designed to enable the practitioner to cooperate fully—in action—with all the objectives of the rules and to assist in the work of making the rules serve (as all procedure should) as the handmaiden of justice'."

This, then, is the philosopher's stone; the "open sesame" to the mysterious realm of federal practice. And it is all simplified to the state where the veriest neophyte can pronounce the magic incantation and cast the spell. Here are no eighteen forms of complaints (as in the appendix to the rules) but 258, including specific jurisdictional allegations under all of the major federal acts and concrete examples of complaints in various types of actions involving subjects from accounting through warranty. Discovery procedures give rise to 240 forms, and judgments almost a hundred. And, not content with the fertile field afforded by the Federal Rules of Civil Procedure, Mr. Frumer adds half a hundred extra forms for use in the Court

of Claims and forty for the United States Tax Court. No doubt many situations can and will arise for which no form is provided; but making due allowance for the limitations of human foresight, it is difficult to see how the collection could be more complete.

But those volumes are more than a mere collection of models to be slavishly imitated. Mr. Frumer's notes and textual material form a commentary upon the rules themselves and upon the forms provided which should make their adaption to any given situation a simple matter for anyone with even the minimum imagination. In fact, with Mr. Frumer's four volumes (and a future fifth) as a guide through the jungle of federal procedures, it is difficult to see how anyone could lose his way. Perhaps with help like this to a future generation of lawyers the Federal Rules of Civil Procedure and practice under them will no longer seem like a tight rope stretched over a chasm, where it is necessary to exercise extreme caution in order to preserve a precarious balance and where only the foolhardy ever venture at all, but will be a broad highway leading to the attainment of justice, along which all can travel with the minimum of difficulty and without dangers inherent in the pitfalls of outmoded technical requirements and procedural difficulties.

Walter P. Armstrong, Jr.*

PRINCIPLES OF AGENCY, By Merton Ferson. Brooklyn: The Foundation Press, 1954. Pp. xx, 490.

Good elementary textbooks on standard curriculum subjects are rare, but this is one of them. It has all the qualities which a book designed for the use of the uninitiated should have. It is first and foremost clear. There can be no mistaking the author's meaning. Secondly, it is easy to read. The style is crisp and decisive, reflecting certitude of information and judgment. Thirdly, it evidences great good common sense in being of a proper length even in the development of the most difficult topics. Elementary notions must be explained in sufficient fullness for completeness and accuracy, but yet with sufficient brevity to avoid losing sight of the central theme in a mass of details. Elaboration is for treatises and not for textbooks. Fourthly, there is no attempt to make the textbook double as an index-search book. The discussion and citation of authorities are such as to exemplify and illustrate the author's account, but no greater. Lastly, and most importantly, it is a systematic and a critical exposition of the foundations of the subject. It is not a mere collection

* Member of the firm of Armstrong, McCadden, Allen, Braden & Goodman, Memphis, Tennessee.

of so many sentences as will bear footnotes. The underlying principles and rules are sought out, explained, and appraised so that the text emerges as a reasoned statement and not opinion. No more should be asked of a textbook.

Dean Ferson adheres to the traditional content of agency, treating of both master and servant and principal and agent. But he gives by far the most emphasis to the "central problems" of agency, "how and why a master is affected by the acts of his servant; and how and why a principal is affected by the acts of his agents" (p. vi). The other "incidental problems" of the rights and obligations between the agent and the principal and the agent and the third party are given must less space, only twenty-four out of four hundred and nineteen pages. This he does because quite correctly he regards these aspects of the subject as no more than applications of elementary principles of contracts and torts (p. vi). On the other hand, the subject of representations and warranties by an "agent" is developed in considerable detail to demonstrate that it forms part of the law of master and servant, not of that of principal and agent.

The book should prove of special value in schools which have abandoned teaching agency as a separate course or which have reduced the hours of instruction devoted to it below the traditional number. A student of normal intelligence and industry should be able to acquire an adequate understanding of the elements of agency from a reading of the book without ever hearing a lecture. This being so, a lecturer with limited time very properly can concentrate on those topics which are of particular interest, difficulty, or importance and expect his students to get the rest on their own. In this way the book will be of very special utility to me, for the Louisiana legislation on agency is sufficiently different from the general Anglo-American law to require detailed separate presentation, and the Anglo-American law must be taught as well and compared and contrasted with it. Though few teachers of agency have my problem, many are faced with insufficient time to develop the subject as they would wish. They should find Dean Ferson's book a means of obtaining relief without prejudicing their students.

Besides, I should think that most good students would welcome a course which assumes their capacity to learn its less difficult aspects without classroom exercises. We might discover that law professors can impart much more to their students in the long run by concentrating their own attention on phases of a subject not adequately treated in good texts. I myself annually find it necessary to devote considerable time to the repreparation of lectures if I am to be effective. Yet the time so spent on essentials is largely lost so far as increasing my understanding of them is concerned, and it reduces

the opportunity I have for advancing in knowledge of other phases of the subject. I cannot but believe that both we and our students would be better off if we could do otherwise.

ROBERT A. PASCAL*

* Associate Professor of Law, Louisiana State University.

An Extra Measure Of Service

Since its earliest days, Shepard's Citations has been known for the care exercised in every detail of its construction.

And because craftsmen, devoted to an ideal of perfection, hand-build the citations of today just as they have hand-built them for 80 years, Shepard's Citations continues to be one of the most respected and envied in the field of fine law books.

Long ago we learned that nothing less than patient, skillful and painstaking methods could produce the service which good lawyers required. Perhaps it is true that we build better than a law book need be.

But in the pleasure, safety, prestige and satisfaction which every Shepard owner enjoys, we find the justification that this extra measure of service requires.

Tens of thousands of lawyers tell us you cannot afford to maintain a law practice without constant reliance upon Shepard's Citations.

Shepard's Citations
Colorado Springs
Colorado

Copyright, 1954 by Shepard's Citations, Inc.