

BOOK REVIEW

PROCEDURE BEFORE TRIAL. By Claude H. Brown,¹ Delmar Karlen,² Robert Meisenholder,³ George Neff Stevens,⁴ and Allan D. Vestal.⁵ St. Paul: West Publishing Co. 1968. Pp. xxii, 784. \$13.50.

I must not allow you to think that a lawyer can not do his client a great deal of harm by advising a bad or inappropriate course of procedure, though it is true that he can not bring about a total shipwreck of a good cause so easily as he might have done some years ago.

— F. Maitland⁶

Though Maitland was lecturing on nineteenth century English procedural reform, his remark wears well. Even after a full generation of the Federal Rules of Civil Procedure, and their substantial adoption in about half the states, "shipwreck" is still possible, and civil procedure remains viable law.

That viability may now be most graphically taught with *Procedure Before Trial*, a new and major casebook in the field, successor to the pioneer work published a decade and a half ago by Brown, Vestal and Ladd.⁷

One approaches a casebook without really looking for a "plot." Yet, perhaps because of the relative discreteness of the subject, and certainly because of some very effective teamwork by the five authors, this new work provides a teaching vehicle of unusual cohesiveness in presentation of its subject matter.

The thrust of the work, as the authors indicate in the preface, is toward the use of the federal rules in state courts. This approach facilitates the teaching of individual rules as integral parts of the larger system without encountering the sometimes substantial distractions which arise when federal and "code state" rules are mixed for study.

Procedure Before Trial is designed to be easily tailored for use in first or second-year courses varying in length from two to five hours. For instance, the materials in the first chapter, "Selection of a Proper Court," might arguably be left to another course; but inasmuch as the chapter includes basic study of the federal system (complete with a note

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⁶ F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 9 (A. Chaytor & W. Whittaker eds. 1936).

⁷ C. BROWN, A. VESTAL & M. LADD, *CASES AND MATERIALS ON PLEADING AND PROCEDURE* (1953).

on *Marbury v. Madison*⁸), venue, service, and notice problems, it certainly provides excellent orientation material, even for more advanced students. And, the case selection will keep classroom interest high; for example, to illustrate problems of an out-of-state witness's immunity to service of process, the authors select *Velkov v. Superior Court*,⁹ in which Mrs. Velkov, journeying to California to testify against her (former) lawyers in state bar disciplinary proceedings, was served by those lawyers with a lawsuit for their fees. The situation is ripe for poetic justice, and the decision is thus memorable — a good attribute in the teaching business.

At the other end of the book is a section on the effects of prior litigation — *res judicata*, bar, preclusion.¹⁰ While this material, too, is arguably outside the strict confines of "procedure before trial," the section presents problems which a lawyer may well seek to obviate at the pleading stage of his case.

Chapters two through seven contain the real meat of the procedure course, organized according to logic and chronology. Following a brief historical note about the federal rules, the book proceeds to the initial paper stages of "Pleadings Alleging Claims," responses (including motions), amendments and supplements (including a brief digression into amendments allowable during and after trial).

Discovery procedures are treated in chapter six; and chapter seven, "Scope of the Controversy," sets out problems of joinder, including "class action" litigation under the very recent amendments to Rule 23.

The book contains a good balance of cases, notes, comments, text, problems and even some representative pleadings. But the excellence of the case selection deserves special comment. Along with old friends like *Hickman v. Taylor*¹¹ and *Pennoyer v. Neff*¹² are new materials of quite current interest: *United States v. Mississippi*,¹³ involving joinder of defendants in voting rights cases; *Christman v. Pennsylvania*,¹⁴ in which a federal prisoner charged that a defective court-appointed lawyer was the device by which the state deprived him of his civil rights; and *Padovani v. Bruchhausen*,¹⁵ a case of cigarets and cancer. I think also notable is *Martin v. Reynolds Metals Corp.*,¹⁶ holding valid a pre-com-

⁸ 5 U.S. (1 Cranch) 137 (1803), noted at page 9 of the reviewed book. Hereinafter, cases cited which appear in the reviewed book are footnoted to the page of appearance in the book. Reporter citations are included as an additional reference.

⁹ At 57; 40 Cal. 2d 289, 253 P.2d 25 (1953).

¹⁰ Chapter eight, "Prior Litigation," at 683 *et seq.*

¹¹ At 427; 329 U.S. 495 (1947).

¹² At 65, 85 U.S. 714 (1878).

¹³ At 533; 380 U.S. 128 (1965).

¹⁴ At 164; 275 F. Supp. 434 (W.D. Penn. 1967).

¹⁵ At 486; 293 F.2d 546 (2d Cir. 1961).

¹⁶ At 448; 297 F.2d 49 (9th Cir. 1961).

plaint inspection order under a combination of Rules 27 and 34—a combination the court found to be required by “common sense” and consistent with the federal rules philosophy of removing the “sporting element” of justice.

We have advanced since the days when the law’s substance was “secreted in the interstices of procedure,”¹⁷ but even today a complaint may be a “bucketfull of steam,”¹⁸ and a lawyer who fails to show up for a pre-trial conference may yet shipwreck his case.¹⁹ *Procedure Before Trial* presents a lively subject in an adversary context valuable, essential to future lawyers — of both office and trial varieties — and to their teachers.

J. D. Howe^o

¹⁷ H. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883).

¹⁸ Arthur H. Richland Co. v. Harper, 302 F.2d 324 (5th Cir. 1962).

¹⁹ Link v. Wabash Railroad Co., 370 U.S. 626 (1962).

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