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Book Reviews


An old lawyer I once knew thought he would write a book on practice. "On second thought," he said, "I don't think I should tell all of this until after I die." Maybe that is why that, except for treatises on trial tactics, there tend to be so few good books on practice, and, so many that are content merely to restate statutes, rules, and decided cases. Practical lawyers, it seems, either do not have the time or do not like to give up hardearned answers to their brethren on the pages of practice manuals. But for a change, here is a manual that is plentifully salted throughout with practical suggestions on how to get things done in federal courts. At the same time, there is a sufficient amount of accurate, traditional scholarship on the current state of the law to make this something more than the collected secrets of some trial attorneys. This nice mixture is certainly a reflection of the combined

1 R. Lavine & G. Horning, Jr., Manual of Federal Practice (1967) [hereinafter cited as Lavine & Horning]. The "how to do it" emphasis is reflected in frequent forms, checklists, appraisals of alternate courses, comments on typical judicial reaction to various moves, and comments on strategy. Some of the best contributions along these lines are contained in: a diversity jurisdiction checklist, Id. at § 1.22; the materials on remedies against the government, Id. at 125-26, 130, 171; evaluation of choice of venue, Id. at 182; removal and remand procedure, Id. at §§ 1.160-73; procedure on motions for transfer of venue, Id. at § 2.52; practice on making motions in general, Id. at §§ 1.109-12; discussion of pre-trial conference, Id. at §§ 6.1-18; and appraisal of differences in state-federal jury trials, Id. at § 7.1.

Of special value is a lengthy treatment of discovery, again with many practical suggestions, e.g. on the race of diligence, Id. at 424; calling a witness to avoid use of his deposition, Id. at 427; making objections even though they are not waived, Id. at 429; the use of state procedure as an alternate to Rule 27, Id. at 452; alternative mechanics in taking depositions, Id. at 456; the value of prompt notice in shutting off objections, Id. at 442; the proclivities of judges, Id. at 452; local rules on interrogatories, Id. at 463; reservation clauses in answers, Id. at 484; and the 1967 changes in the law of government privilege, Id. at 503.

Time-saver suggestions appear throughout the text, e.g., "The clerk of that court usually insists that the caption be replaced by a state court caption. . . . This can be stapled over. . . ." Id. at 165; "... [E]xperienced trial counsel are reluctant to make a motion to dismiss in a non-jury case at the conclusion of the plaintiff's evidence." Id. at 560; it is good to provide extra copies of the summons for the government, Id. at 306; the attorney before issuing execution must determine at his peril whether requirements for entry of judgment have been satisfied, Id. at 602.

2 The initial chapter synthesizing federal practice is an excellent short course on the subject, but occasionally, because of the pressure of compression, there are
practical experience and scholarship of the two authors and the list of people to whom they are indebted.

The book contains only 675 pages of combined text and forms, and it arrives on the market in the face of some thirteen volumes of Moore's Federal Practice, twelve volumes of Barron & Holtzoff's Federal Practice and Procedure and seven volumes of Nichol's

(Footnote continued from preceding page)
minor deviations which amount to under or overstatements. Examples of slight flaws are:

(1) It is asserted that the plaintiff may have a choice of state or federal court where the general set of facts involve: "In general, any type of case where plaintiff, by choosing the remedy he seeks and the theory of his complaint, can shift a federal law issue from the answer to the complaint or vice versa. See § 1.63." Id. at 34. But §§ 1.62-63 do not very adequately explain federal question jurisdiction, (as if it is really very explainable) or bear out the implication that this is an easy device.

(2) It is asserted that in many states it is standard practice for plaintiff to include a number of "Doe" defendants in the complaint, Id. at 61. But how standard is this practice outside California? See D. Louisell & G. Hazard, Cases on Pleading and Procedure 46C (1962).

(3) In discussing the problem of valuing the amount in controversy, Lavine & Horning at § 1.75, the book glosses over Judge Dobie's plaintiff-viewpoint rule as advocated in 1 J. Moore's Federal Practice § 0.91 (1960) and adopts the alternative-result rule advocated by C. Wright, Handbook on Federal Courts § 34 at 100 (1963), without citing any of these.

(4) In commenting extensively on the pendent jurisdiction doctrine of Hurn v. Oursler, Lavine & Horning at § 1.110, the book only casually notes, "see also United Mineworkers v. Gibbs (1966) 383 U.S. 715." Yet this latter case at least deserves a line for its expansion of the trial judge's discretion in deciding such issues.

(5) In the commentary on service of process under Rule 4(f) within a 100 mile radius of the court, Id. at § 8.93, no mention is made of the limitation relating the rule to the bringing in of additional parties.

(6) The treatment of the real party in interest under Rule 17, refers to the "exceptions" listed in the Rule, Id. at § 3.106, whereas the Advisory Committee Note to the 1966 amendment of Rule 17 says "The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule." Also, in § 3.109, the text scrambles together two separate problems; one is the problem of appropriate parties in a subrogation or assignment situation where diversity jurisdiction is not at issue. The second is the same situation where jurisdiction is also at issue and the present 28 U.S.C. § 1359 (1948), as successor of the assignee clause, now prohibits "improper or collusive" creation of jurisdiction.

(7) In discussing the motion for more definite statement, Id. at § 4.18, no mention is made of the possibility that it may be frowned upon, e.g., Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126 (5th Cir. 1959); nor, in advocating pleading denials as the safest course of action, Lavine & Horning at § 3.23, does the book mention the obligations of Rule 11.

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Professor Geoffrey C. Hazard of the University of Chicago Law School and the American Bar Foundation; Professor John Kaplan of Stanford Law School; Judge Richard F. C. Hayden, Jordan A. Dreifus, Tobias G. Klinger, Paul Fitting, Max F. Deutz, John P. Pollack, and Warren M. Christopher, all of Los Angeles.
Cyclopedia of Federal Procedure, not to mention a sizeable list of other federal practice aids. What then, has the Lavine and Hornig book to offer in the face of the other Goliaths? For one thing, quick, direct, and concrete answers. The other federal practice works, Moore's for example, have become so large and scholarly in depth, that a quick answer is rarely possible. One may wallow for an hour in the wrong section only to discover there is another, more extensive treatment elsewhere. However, this manual is not in derogation of the master works. Throughout, it cites to all the leading works, and many others as well, for more extensive treatment of the complex and debated issues. One of its best functions may be to serve as a comprehensive index to the Federal Rules, the Judicial Code and many of the current federal practice works.

Its brevity is not the key asset, however, for certainly there are other works of brevity. There is for example, Charles A. Wright's Handbook on Federal Courts. Although Professor Wright originally designed his book for students, it has already been used extensively by federal judges for its clarity in restating the law and its cogency in suggesting progressive resolutions to federal practice problems. Other short works are Moore's Rules Pamphlet and Commentary on the U.S. Judicial Code, published in current editions. The major difference is that the organizing principle of these works has been the Federal Rules and the Judicial Code, whereas the organizing principle of Lavine and Hornig's book is the chronological sequence of trial preparation with the Rules, the Code, and forms meshed in where most appropriate. Unlike the others, it is geared for functional use by the lawyer rather than for the explanation of doctrine. This manual's only major weakness appears to be that it will not be supplemented and thus will tend to become gradually obsolete.

Conceding that this book presents a concise, functional tour through federal practice, what are some of the messages it carries? The authors, familiar with federal problems, would have us believe that lawyers, accustomed to the state courthouse, should not be reluctant to cross over the street to the federal court. This, they say, is so because federal practice is simple now that we have the liberal notice-pleading of the Federal Rules—so long as the lawyer is very careful with jurisdictional problems at the outset. However, almost every paragraph in this manual belies the promised simplicity by ultimately referring

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6 See, e.g., proposals for change in discovery practice, note 8, infra, and in jurisdiction of federal courts, note 11 infra.
to some complex problems that are resolvable only by further lengthy research. True, the Federal Rules of 1938 may have accomplished a great revolution in simplification, but what they give, Erie v. Tompkins\(^7\) sometimes taketh away. Similarly, the great liberality of the multi-party, multi-claim Rules is often hamstrung by endless nice questions of jurisdiction, because here, as in other areas, jurisdictional fetishism persists.\(^8\) Again, the laudable innovations of federal discovery practice are now encrusted with thirty years of precedent, and in bad need of overhaul.\(^9\) While the admiralty rules have now been successfully merged, and unified appellate rules have recently arrived, nationwide service of process has not yet been accepted. A really rational system of venue has not fully evolved, nor have the vast complexities of government litigation been fully purged.\(^10\) Apart from these questions there are serious problems of court congestion and judicial administration. Sometimes it may be too easy to rest on the laurels of the 1938 revolution\(^11\) and to overlook fundamental inquiry into the system’s responsiveness to the needs of 1968’s people.

The American Law Institute is laboring with high scholarly purpose and constitutional theory to bring a new dawn to the federal courts, especially on jurisdictional questions.\(^12\) Meanwhile the Judicial Conference and the various Advisory Committees on the Rules of Civil Procedure continue their efforts.\(^13\) Perhaps the most hopeful light on the scene is the creation of the new Federal Judicial Center\(^14\) and the appointment of former Supreme Court Justice Tom Clark as its head. With some productive effort from the new Center, this excellent

\(^7\) 304 U.S. 64 (1938).
\(^8\) The authors apparently criticize the case of DiFrischia v. New York C. Ry., 279 F.2d 141 (3rd Cir. 1960) (rejecting attack on jurisdiction after it had been stipulated), Lavine & Horning at 16.
\(^10\) As one minor example, see situation where suits to review compensation awards must be brought within 30 days in the right district, Lavine & Horning at §2.46.
\(^11\) State practice does not always lag behind the Federal Rules. Illinois, for example, has already adopted discovery practice which may be more liberal in scope than even the proposed new federal rules. Compare note 8, supra, with III. Sup. Ct. Rule 201(b)\(^2\) (1967) and Monier v. Chamberlain, 35 Ill. 2d 351, 221 N.E.2d 410 (1966). As another example, New York has abolished its counterpart of Federal Rule 17, the real party in interest rule, as being needless and confusing. See N.Y. Civ. Prac. Act § 1004 (1963).
\(^13\) See, e.g., note 8, supra.
Manual, when in its second edition, may be able to thin down, or at least present more rationally, problems of federal practice.

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The heavy concentration of today’s urban population in outdated jurisdictional units often results in an inefficient allocation of authority and responsibility. Often a governmental unit is too small to effectively confront the problems it faces or too large to mobilize sufficient human and financial resources to eliminate them. Some suggest that since the basic problem stems from the incapacity of the individual to relate to the sprawling, amorphous environment in which he lives, existing conurbations must be physically broken up and relocated across the country. The urban existentialist asserts, “The city is to be ruralized and the country is to be industrialized but the industrialization of the country is aimed at preserving the balance between town and country and escaping forever the giant conurbations of our time.” More realistic urbanists reject this bucolic ideal and accept existing land use patterns but urge that political institutions be radically restructured to efficiently apply existing human and economic resources to the solution of our seemingly endless urban problems.

Any book which purports to make a contribution to the growing flood of urban literature must provide data and insights to help create optimum levels of power consistent with democratic values. Professor Gilbert’s book, Governing the Suburbs, began “in conversations with PENJERDEL (the Pennsylvania, New Jersey, Delaware Project, Inc.) in 1962 about a study of suburban governments which would complement work then in progress with the Fels Institute of Local and State Government and the Pennsylvania Economy League.” The conversations were successful and resulted in a 376 page study of government structure, government performance, and political competition in three suburban counties near Philadelphia. As the author notes in his in-

1 Winthrop, Modern Proposals for the Physical Decentralization of Community, 43 LAND ECONOMICS 17 (1967).
2 C. GILBERT, GOVERNING THE SUBURBS xiii (1967) [Hereinafter cited as GILBERT].