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Book Reviews

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BOOK REVIEWS

LAW AND TACTICS IN JURY TRIALS. By Francis X. Busch.* Indianapolis: The Bobbs-Merrill Company, Inc. 1949. Pp. xxvii, 1147. $17.50.

No one ever achieved success as a trial lawyer by reading a book. As the author modestly admits in his introduction, only extensive and varied experience in actual trial work, plus a sound knowledge of the legal principles and mechanics involved, can bring about this result.

No novice, however, should presume to enter a court room as an advocate without first absorbing as much of the experience of others as is possible through personal observation of the courtroom techniques of the better lawyers of his community and through the careful study of such an excellent guide as this.

No general practitioner with an occasional lawsuit should embark upon any trial of importance (and what trial is unimportant?) without refreshing his mind through the reading of the applicable chapters of such a book.

Even the expert, the specialist in trial practice, might well find, in an occasional re-reading of such a work as this, suggestions which he could put to practical use in his next lawsuit.

In this volume Dean Bush has set down in usable form the lessons he has gained in a half century of exceptional legal experience. He has combined a scholarly, yet readable, treatise on the law of jury trials, carefully cited to the authorities, with a well-illustrated and practical statement of the mechanics of the art of jury persuasion.

The chapters on the origin and development of the jury institution, the jury system in America, the nature and extent of the right of jury trial, the qualifications and the selection of jurors, the functions of court and jury, instructions to juries, etc., are strictly textbook — carefully written and authoritative.

The remaining chapters, dealing with the preparation of the case, jury challenges, opening statements, the examination and cross-examination of witnesses, rebuttal, opinion and ex-

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pert testimony, objections, offers of proof, argument, etc., combine a text discussion of the techniques of court practice with verbatim excerpts from actual cases to illustrate the text.

The arrangement of these latter chapters is unusual and effective. Instead of breaking the continuity of the text with illustrations, the author has divided each chapter into Parts A and B, with Part A consisting of a statement and explanation of proved tactics, followed by Part B, a carefully selected series of verbatim illustrations.

The chapters on opinion and expert testimony, with specimen examination and cross-examination of experts in various fields, are especially helpful. Step by step the author discusses what are the proper subjects of expert testimony, the careful pre-trial preparation necessary for a successful examination or cross-examination of an expert, the best methods of extracting the testimony from the expert, making scientific and technical evidence intelligible to the jury, etc., and follows this with a number of well chosen and instructive examples of the actual testimony given by various types of experts, and the way these experts were handled upon examination and cross-examination. Incidentally, the many scientific aids to proof which are today available may come as a surprise to many of us whose experience with experts has been confined largely to physicians and mechanics.

This book is recommended as a textbook for the student or novice, as a valuable reference work for the busy general practitioner, and as a refresher for the specialist in jury trials. For the lawyer who falls in none of these categories, it is recommended as interesting and stimulating reading. Even the lawyer's wife might well enjoy the examples of examination and cross-examination and the jury arguments selected by Dean Busch, for here are collected the classic specimens from the masters — Lord Erskine, Rufus Choate, Sir Edward Marshall Hall, Col. Robert Ingersoll, and many others — as well as many more modern examples of the art of advocacy at its best, not previously published.

HAROLD D. SHAFT†

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A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE. By William Cleary Sullivan.* The Michie Company, Charlottesville, Va., 1949. Pp. xlvi, 998.

The Federal Rules of Civil Procedure have now been in effect for approximately 12 years.[1] During that period a considerable body of legal commentary has developed about them designed to meet the need of the attorney for information as to the application of the new procedure they prescribe. Professor Sullivan's new work, *A Treatise on the Federal Rules of Civil Procedure,* is one of the recent additions to the literature on the subject. It presents a broad and comprehensive survey of the scope, extent and application of the rules, obviously designed to provide a quick and easy reference for the practitioner to the material needed for the solution of almost any problem which may arise under them.

The book begins with a series of preliminary chapters dealing with such topics as the authority for and the status of the rules, definitions of terms used in the rules and relevant statutes, and the scope and application of the rules. Following this material, the book continues with an analysis of such topics as service under the rules, parties, pleadings, declaratory judgments, injunctions, discovery, judgment, and trial and review in the appellate courts.

Particularly interesting is the discussion of such topics as pleading and discovery. Pleading occupies a distinctly secondary role under the rules,[2] the work of clearly defining the issues to be presented at the trial being accomplished primarily through the use of pre-trial and discovery procedures.

Discovery procedure under the rules presents several problems, which are fully discussed by the author. The enabling act which authorized the promulgation of the rules required that they relate solely to matters of procedure and should not abridge, enlarge, or modify the substantive rights of litigants. It is clear from the discussion in the text that in some sections

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[1] The rules actually took effect on September 16, 1938, but were not extended to Hawaii until 1939, or to Puerto Rico until 1940. A series of amendments took effect on October 26, 1947.

[2] See Lanier, *Should North Dakota Adopt the Federal Rules of Civil Procedure?* 26 N.D. Bar Briefs 153, 157 (1950), for an illustration of the simplicity of pleading prescribed by the rules.

the discovery rules come perilously close to the line which separates substantive from procedural rights.

Thus, the provisions of Fed. R. Civ. P. 35 declare that in actions wherein the mental or physical condition of a party is in controversy, the court may order the party to submit to an examination by a physician, and Fed. R. Civ. P. 35 (2) provides that by requesting and obtaining the report of such an examination or taking the deposition of the examiner, the party examined waives any privilege with respect to any other person who has previously or thereafter examined him with respect to the same condition. The author comments that professional privilege is ". . . undoubtedly a substantive right, and the Enabling Act certainly did not authorize the Supreme Court to provide for waiver . . ." [3] The provision for physical examination of a party, however, has been upheld by the Supreme Court in *Sibbach v. Wilson & Co.*,[4] a five-four decision, against the argument that it exceeded the power granted by the enabling act. This case, together with *Hickman v. Taylor*,[5] involving the committal of an attorney for contempt after he refused to summarize for an opposing party the contents of a series of statements taken from survivors of an accident, illustrates how clearly the policy of the rules is directed at securing the broadest disclosure of all material facts in a case before the cause comes to trial. It is of interest to note that following the decision of the *Hickman* case, the Advisory Committee recommended an amendment to the rules narrowing the scope of production and inspection procedures with respect to documents prepared in connection with litigation, so that they were not subject to production or inspection unless material prejudice resulted. This amendment, which the author describes as ". . . in the teeth of the policy . . ." [6] of the rules, was rejected by the Supreme Court. One may compare the provisions of the North Dakota code as to discovery and deposition with those of the federal rules to illustrate how far the federal procedure has gone in providing for effective discovery.

One feature of the book which should be noted is its careful organization. The book is divided into five parts, the

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[3] Sullivan, A Treatise on the Federal Rules of Civil Procedure §1097 f (1949).
[4] 312 U.S. 1 (1941).
[5] 329 U.S. 495 (1947).
[6] Sullivan, *op. cit. supra* note 3, §1093.

first three of which are devoted to an analysis of the status of the rules, their operation and effect in the light of other federal statutes, and the provisions for review in the appellate courts. The latter parts contain the full text of the rules, together with the notes of the Advisory Committee and the forms the committee has suggested as sufficient under the rules. Also inclined are the text of the Federal Equity Rules [7] and the Revised Rules of the Supreme Court of the United States. The text is carefully indexed and footnoted, and contains many cross-references, making it very easy to locate material. Room is also provided for the insertion of a pocket-part supplement in order to keep the work up to date.

CHARLES LIEBERT CRUM†

ZONING LAW AND PRACTICE. By E. C. Yokley.* The Michie Company, Charlottesville, Va., 1948. Pp. xviii, 514. $12.00.

Of primary import in city planning is that phase of police power known as zoning, the rapid growth of which in the past three decades has created a need for a text such as is here reviewed.

The United States experienced a late start in zoning due to the prevailing concept of individual property rights which are still partially in conflict with zoning law. Despite this late start there has quickly grown up a large corpus of regulatory measures especially designed for urban areas. As a result of the rapid growth, comparatively little has been written on this subject, an additional enhancement of this work.

Discussion is made of the growth of zoning with pertinent definitions and an historical analysis with full effect given to the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, which upheld comprehensive zoning, a decision quickly followed by the state courts.

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[7] The Federal Equity Rules occupy an anomalous situation. The first rule of the Rules of Civil Procedure provides that the rules govern ". . . the procedure . . . in all suits of a civil nature whether cognizable as cases at law or in equity . . ." However, the Federal Equity Rules were promulgated in compliance with congressional authority which has never been repealed. The result is that insofar as they do not conflict with the Federal Rules of Civil Procedure, the Federal Equity Rules are still in effect. Sullivan, *op. cit. supra* note 3, §§ 5, 6.

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The author of this practical text has formed a non-technical survey of zoning well fitted for municipal attorneys, officials and those interested in urban realty. Forms of ordinances, permits, appellate proceeding forms with other required forms are discussed and exemplified adequately.

The seriousness of proper enactment of zoning laws is stressed by the author, especially the requirements of reasonableness and statutory compliance. Warning is given against "spot" or "piecemeal" zoning which the author declares is always unconstitutional.

The text represents an easily readible survey of zoning law and practice, valuable in a period of mushrooming American cities.

DAVID R. LOWELL
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COMMENTARY ON THE UNITED STATES JUDICIAL CODE. By James William Moore. Matthew Bender & Co., Albany, New York, 1949. Pp. viii, 684. $12.00.

This book is an excellent piece of legal analysis which might be expected from a recognized authority in this field and a scholar who has played such a vital role in accomplishing the achievements attained by the Judicial Code of 1948. The familiar guiding hand of James William Moore, whose authoritative three volumes *Moore's Federal Practice of 1938* proved of invaluable assistance to the bench and bar, will be welcomed as an adviser under the new Code.

The first section of the book discusses the formulation and promulgation of the Federal Rules followed by brief comments concerning the amendments of 1939, 1946, and 1948 and the proposed Condemnation Rule. The commentary of the Judicial Code of 1948 is divided into ten chapters, the first of which contains a concise but informative history of the federal judicial system. Chapter Two describes the underlying purpose of the Code and has a resumé of changes that it effected. After a brief discussion of the organization of the courts of the United States in Chapter Three, the remaining well-balanced seven chapters are divided into an analysis of vital problems in the following areas: original jurisdiction of district courts, venue and *forum non conveniens*, removal jurisdiction, particular proceedings, jurisdiction of the Courts

of Appeals, Supreme Court jurisdiction, and the present rule making power.

Chapter Three in which the author treats the subject of original jurisdiction of the district courts will serve to illustrate the uniformly excellent quality of this work. Typical of the clarity of statement of principle is the section concerning federal question jurisdiction in which the developments and limitations are discussed, beginning with such landmark cases as *Osborn v. Bank of the United States* [1] and then emphasizing that ". . . the *Pacific Railroad Removal* [2] cases followed the doctrinal language of the *Osborn* case to hold that every suit by or against a corporation federally chartered involved a controversy arising under the laws of the United States, of which the federal courts had jurisdiction provided the jurisdictional amount required, if any, was satisfied." [3] Then the principle is traced through subsequent legislative changes to the latest important judicial pronouncements. Typical of the precision of analysis is the reference to the *Bell v. Hood* [4] doctrine that in federal question jurisdiction the plaintiff would be able to determine the legal theory on which his claim would be considered and that a bona fide but erroneous theory of the plaintiff would result in a decision on the merits; however, the author carefully notes the failure of some courts to grasp the principle, thus resulting in a dismissal of such cases on the improper grounds of want of federal jurisdiction.[5]

Illustrative of the author's intimate knowledge of the field is the chapter on Removal Jurisdiction. In the discussion concerning removal of separate claims, the setting of the former practice is described tersely but with characteristic lucidity and is followed by an able critique of the impact of the new Code language which provides for removal of separate and independent causes of action.

The analysis of the subject matter covered in the commentary is more penetrating than the title might indicate, and the author has determined the depth of approach dependent upon the necessities of the problems. Thus, fifty-two pages are devoted to a survey of the *Erie-Tompkins* [6] problem which

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[1] 9 Wheat. 738 (U.S. 1824).
[2] 115 U.S. 1 (1885).
[3] P. 137.
[4] 327 U.S. 678 (1946).
[5] P. 144.
[6] 304 U.S. 64 (1938).

alone would prove most enlightening to the student or member of the profession.[7]

The commentary on the Judicial Code is documented with well-chosen illustrative cases; some of the more important of which are analyzed with marked clarity by a brief statement of the facts and holding. The value of the book is further enhanced by a wealth of references to outstanding law review comments and notes which give additional illumination on many of the most troublesome problems.

The book is well bound in a convenient sized volume and is printed in a clear type which is easy to read.

During this period of interpretation of the new Code, this book will be a valuable asset to both the practitioner and the scholar.

KEITH W. BLINN*

PRACTICE PARLIAMENTARY PROCEDURE. By Rose Marie Cruzan. McKnight & McKnight Publishing Company, Bloomington, Illinois. First Edition, 1947. Pp. 202. $2.50.

Unique in a work of this nature is the author's introduction of the entire subject of parliamentary law to the reader. She begins her treatise with directions on how to organize a club, making it possible for newly formed clubs, or clubs to be formed in the future, to set themselves up in good working order. Instructions are offered as to the manner of drawing up club charters, constitutions, and by-laws. Methods of voting are discussed, and the duties and responsibilities of officers are clearly laid out. An entire chapter is devoted to the subject of committees and their functions. Finally, the author has seen the need of bringing home to the organization member the necessity of good discipline based upon parliamentary courtesy. The final two chapters are particularly interesting in that they deal with the subject of forums and discussions, the procedure which should be followed in either case, and in the last chapter, suggestions are made for initiation and installation services. The indexing has been accomplished with careful discretion, thereby making it possible for the reader to find with ease the information sought.

In writing this highly technical work, the nationally recog-

[7] Pp. 307-359.

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nized author has gone afield to give the reader a bit more of the practical application of parliamentary law than is the rule in most other works on this subject. This she has done by inserting into her text at frequent intervals simple illustrations of the rule in application, thereby making it possible for the novice parliamentarian to gain an exact interpretation of the rule previously set out. As the writing progresses the knowledge of the reader is correspondingly broadened and the examples become progressivly more difficult, thereby bringing forward situations which could and do arise under the parliamentary law. Without this exemplification, interpretation of the more difficult rules would be extremely difficult to the individual not versed in parliamentary procedure.

Thus, the author of this book has satisfied a great demand for a readable text on principles of parliamentary procedure, and has done so in such a manner as will appeal to both the expert and the neophyte parliamentarian. In fact, the manner in which the book is written hardly offends the most disinterested reader of books of a technical nature, yet the treatise provides all the fundamentals on the subject upon which it is written, with a goodly measure of "literary entrees" which are both informative and interesting.

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BOOKS RECEIVED

Scottsboro Boy — By Hayward Patterson and Earl Conrad. Garden City, New York: Doubleday & Company, Inc., 1950. Pp. viii, 309. $3.00.

Social Meaning of Legal Concepts, No. 2. Criminal Guilt — New York University School of Law, 1950. Pp. iii, 93-187. $1.50.