Mercer Law Review

Volume 1 | Number 1 Article 10

12-1949

Book Reviews

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BOOK REVIEWS

JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES. By Charles W. Bunn. St. Paul: West Publishing Co. (5th Edition, 1949). Pages ix, 408. $4.00.

As Mr. Bunn points out in his preface, this fifth edition of his father's book is in fact a new work, made timely and appropriate by the recent revision and codification of the statutes relating to the Federal judiciary and its procedures. 28 U.S.C. §§ 1 *et seq.* (Effective September 1, 1948.)

Despite its title, the book is not a treatise or even a handbook on Federal practice. It is confined to jurisdiction. This is perhaps unfortunate, for the Civil and Criminal Rules of Procedure for the United States District Courts, notwithstanding their apparent simplicity, present many novel and difficult problems.[1] Nevertheless, Mr. Bunn has served a worthwhile purpose in setting out briefly and clearly the basic law relating to the jurisdiction of all of the Federal courts established pursuant to Article III of the Constitution of the United States. This law seems to be largely a mystery to the average lawyer. Consequently, he not only fails to get his share of the practice in the Federal courts, but, of more importance, he loses opportunities for securing such legitimate advantages as may come from choosing a federal rather than a state forum for the litigation of such cases as are justiciable in either. It is true that since *Erie R. R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), the Federal courts are bound to follow the appropriate state in the interpretation of the substantive common law, except with respect to Federal questions. However, the application of this doctrine has practical limits,[2] and in any case, the doctrine does not extend to matters of practice, procedure or evidence, as to all of which the Federal courts have their own rules and principles. These matters, as well as such imponderables as the time of trial, the composition of the group from which a jury is drawn, and the person of the judge, may well be of sufficient moment to dictate the selection of a Federal rather than a state court.

In organizing his material, Mr. Bunn first discusses in general terms the Federal judicial power derived from Article III of the Constitution. This discussion is primarily a restatement of established concepts. However, in considering the somewhat troublesome problem of when a case arises under the Constitution, laws or treaties of the United States so as to be cognizable in a Federal court, he embarks on his own independent reconciliation of *Cohen v. Virginia*, 6 Wheat. 264 (U. S. 1821), and *Gully v. First National Bank*, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936). The former held that a case is within the Federal jurisdiction whenever *a party's* right will be defeated by one construction of a federal statute and sustained by another. The latter held that a United States District Court is not presented with a case involving a Federal question unless *the plaintiff's* cause of action depends upon the Constitution, a treaty or an Act of Congress. Mr. Bunn argues, with much logic, that the reconciliation and true doctrine of these cases is that the question of Federal power is to be determined "as of the time when the case first sought to enter the Federal system, and on

1. For example, the Deposition and Discovery Procedures provided in Rules 26 through 37 of the Civil Rules have created a considerable furor, which reached the Supreme Court in Hickman v. Taylor, 329 U. S. 495 (1947), and is not stilled yet.
2. In King v. Order of United Commercial Travellers, 333 U. S. 153 (1948), it was held that a District Court sitting in a diversity case in South Carolina was not bound to follow a decision of a state trial court of record whose decisions were not published or digested but filed only in the county of trial under the parties' names.

the facts appearing in the record at that time." Page 27. The difficulty with this position is that Chief Justice Marshall specifically said in *Osborn v. Bank of the United States*, 9 Wheat. 738 (U. S. 1824), that it is not necessary that a Federal right be pleaded, and this doctrine has been neither impeached nor overruled. Only last term the Supreme Court again treated with the problem in *National Insurance Co. v. Tidewater Transfer Co.*, 69 S. Ct. 1173 (1949), which held that Congress could constitutionally confer on the District Courts of the United States jurisdiction of suits between citizens of a state and citizens of the District of Columbia. The opinion of Justice Jackson, with whom Justices Black and Burton concurred, lends support to Mr. Bunn's position insofar as it states that jurisdiction based on a Federal question is dependent on the assertion by the plaintiff of a Federal right. However, separate opinions by Justice Rutledge, with whom Justice Murphy concurred, and Justice Frankfurter, with whom Justice Reed concurred, take issue with this view. They would reconcile the *Osborn* and *Gully* cases on the ground that in the former the Court was speaking of the power of the Federal judiciary under the Constitution, while in the latter it was speaking of the power of the District Courts under their statutory grant of jurisdiction.

As would be expected, Mr. Bunn devotes most of his text to the jurisdiction and venue of the District Courts. In addition to his discussion of the most common grounds for the exercise of such jurisdiction, diversity of citizenship, and the existence of a Federal question, he treats in detail the exceptional jurisdiction in civil rights cases; the exceptional limitations on jurisdiction to enjoin the enforcement of various state regulatory and tax statutes; the jurisdiction in interpleader; and in habeas corpus and the partial substitute therefor by way of motion, provided by § 2255 of the Judicial Code. In addition, he examines the problems involved in the necessity for a jurisdictional amount in controversy, in actions in personam and in rem, and in attachment and garnishment.

The principal shortcoming is that he devotes only three pages to suits against the United States. The vast scope of the operations of the Federal Government, coupled with the new statute making the United States amenable to suit in tort, makes such suits a fertile source of litigation. Admittedly, many of the problems arising under the Tort Claims Act, 28 U.S.C. §§ 2671-2680, such as the nature of the claims upon which suit may be brought, the relationship of the tort feasor to the United States, the right of subrogation, and the joinder of parties are yet to be settled and consequently hardly ripe for speculation in a handbook such as Mr. Bunn's. Nevertheless, there seems to be little excuse for not including at least a sufficient paraphrase of the Act to set forth the numerous exceptions to liability incorporated therein.

The discussion of the jurisdiction of the District Courts on removal of causes from state courts is short but reasonably adequate and fortified by citations to the leading cases.

The jurisdiction of the Court of Appeals is treated briefly, the author confining himself largely to a statement of the nature of the final and interlocutory orders of District Courts which may be appealed, and of the types of orders of administrative agencies which are reviewable. In connection with administrative agencies there is also a chapter confined to a discussion of the particular courts in which admittedly reviewable actions of administrative agencies may be reviewed.

Mr. Bunn is to be especially commended for including in his work a good treatment of both the original and appellate jurisdiction of the Supreme Court,

a subject too often slighted in similar works. He discusses not only the ramifications of the three different types of appellate jurisdiction—certiorari, appeal, and certification—but also refers to the practice on appeal and certiorari and the bases on which the Court determines whether or not to exercise its discretion to review.

A concluding chapter discusses the law applied in the Federal Courts in the light of *Erie R. R. v. Tompkins, supra,* and subsequent decisions further defining and implementing the principle there enunciated.

A convenient appendix includes pertinent provisions from the Constitution of the United States, the Judicial Code, the Administrative Procedure Act, the Internal Revenue Code, the Rules of Civil Procedure for the District Courts, and the Rules of the Supreme Court.

This is a handbook. It has the advantages and disadvantages that one expects of a handbook. Not the least of the advantages is the style. Mr. Bunn writes without pretension or pomposity and does not pile up cumulative references and footnotes which do little more than demonstrate erudition. He says what he has to say simply, directly, readably and briefly. One wonders whether the writers of our treatises and law reviews would not do well to follow suit.

BRYCE REA, JR.*

GEORGIA PRACTICE AND PROCEDURE. By Wiley H. Davis and Arnold Shulman. Atlanta: The Harrison Company. 1948. Pages xxiii, 738. $15.00.

The last few years have brought with them deep-rooted changes in Georgia judicial procedure. The declaratory judgment was introduced to our practice in 1945 and the new, speedier rules for both trial and appellate courts were promulgated in 1947. In addition to these innovations, there has been a steady stream of decisions from our high courts bearing directly or indirectly on procedural problems. In these decisions, the courts have had to deal with a number of vastly complex fact situations and as a result there have been many refinements and changes in our rules of procedure. The last book on this subject was A. W. Cozart's *Georgia Practice Rules,* the third edition of which was published in 1933. There was need for a new book on Georgia practice and procedure.

Wiley H. Davis and Arnold Shulman have acted to fill this need. Both are graduate lawyers. Mr. Shulman is a practicing attorney in Atlanta and Mr. Davis is a member of the editorial staff of The Harrison Company.

The book which they have prepared is an asset to the legal profession in Georgia. They have organized their material in a logical and orderly fashion. The topics covered are arranged in a rough chronological order, commencing with Chapter 1 on Actions and ending with Chapter 26 on Appeals. There is an exhaustive and excellent chapter on Parties (Chapter 2). The chapters on Amendments to Petitions, Cross Action, Set-off and Recoupment, and Judgments are particularly well handled.

The style of the authors is lucid and pleasant. They seldom make dogmatic statements and they have made efficient use of copious footnotes. Certainly the table of cited cases, which covers 74 pages, is evidence of the patience and industry of the authors. The index and table of contents are well arranged, and

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space is provided in the back of the book for cumulative supplements to keep the volume up to date.

However, complete agreement with everything in a book is never required of a reviewer. In their preface, the authors state that this volume is written both for the bar and for the law schools of the State. It seems to be their purpose that the book serve as a practice manual for the lawyer and as a text on Georgia procedure in our law schools.

A practice manual such as is widely used in many states should be a down-to-earth guide on the rules and forms of procedure to be used as an integral part of the practicing lawyer's equipment. On the other hand, a textbook to introduce the law student to our type of practice in Georgia should be of a broader nature and of a more elementary construction. It is the opinion of this reviewer that in attempting to fulfill both requirements the authors have weakened the book.

When considered from the viewpoint of the active practicing lawyer, a great deal of the book is too elementary. For example, Chapter 14, Sub-sec. 1, takes up the organization and jurisdiction in general of the Superior Court. It explains judicial circuits, sessions and powers of the Superior Court, exclusive jurisdiction of the Superior Courts, etc. Again, in Chapter 8, the authors go into some detail regarding the organization and jurisdiction of the Court of Ordinary, Justice Courts, City, County and Municipal Courts. In the chapter on Actions, the authors explain the relationship between Cause and Action, the differences between an action ex contractu and ex dilicto, etc. Such subjects may be justified in a law school text, but obviously have no place in a practice manual.

Considered from the viewpoint of a text to be used in law school, this reviewer finds the book somewhat more adequate. Assuming, of course, that the student has had the general courses in procedure before taking up this text in a law school, the book is a good introduction to practice in Georgia.

However, viewing the book even as a textbook, this writer is somewhat doubtful of the emphasis used by the authors in which 54 pages are devoted to Actions and Parties, while only 44 pages are allotted to the entire subject of motion for new trials, bill of exceptions and appellate practice in general. The reviewer also questions whether Chapter 10 on the Statute of Frauds rightly is placed in a volume on Practice and Procedure. It would seem that this partakes of the substantive law of contract, and would properly have no place in this volume. Also, Chapter 16 on Domestic Relations would seem open to the same objection.

Despite the fact that the authors are subject to these minor criticisms, their volume is a valuable addition to the legal literature of the State. It fills a need which has been acute for the last several years and will be of use both to our practicing bar and our law schools.

JOHN B. HARRIS, JR.*

THE LAW OF BANKRUPTCY. By Charles Elihu Nadler.** Introduction by Carl D. Friebolin. Chicago: Callaghan & Company. 1948. Pages xxxvi, 1043. $20.00.

It was my privilege to be with Mr. Nadler some of the time during his work on this great book, and to know of the monumental and painstaking effort which has gone into its production. I know, too, of the fine reception which it has had at the hands of the Bench and Bar, and the glowing reviews of it which have

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appeared in other leading professional periodicals. So, it occurred to me that the readers of this law review would be better served by my calling to their attention these reviews prepared by outstanding authorities, rather than by my personal review of the work. Hence—this "Review of Reviews."

It was fitting that the review published in the American Bar Association Journal should have been written by William B. Woods, Esq., President of the National Association of Referees in Bankruptcy, and Referee in Bankruptcy, Cleveland, Ohio, since the greater part of Professor Nadler's active career as a practitioner of the law was at the Cleveland Bar. That review appeared in the March, 1949, number of the American Bar Association Journal.[1] He commences: "Charles Elihu Nadler, a one-time able craftsman of the law, and now professor of law at the Walter F. George School of Law, Mercer University, has a lucid style, and an effective and comprehensive way of presenting the law of bankruptcy in a single volume." And, he says:

"The golden anniversary of the enactment of the Bankruptcy Act was only last year. Within a period of over fifty years the federal courts have charted the sea of bankruptcy and over its wide expanse have set many buoys and beacons. To the young lawyer and many general practitioners, these aids to navigation are unknown. This compendium of the law in a single volume should serve very well the student who is starting on his way to examine a particular question or to become a specialist in the bankruptcy practice," and

"The volume should be a useful tool for the busy lawyer, for the author sets out at length many forms of pleadings and orders taken from his large practice in bankruptcy in the district courts and before the referees of Ohio and Georgia."

The Journal of the National Association of Referees in Bankruptcy bestows upon Professor Nadler's work what to my mind is praise of the highest degree.[2] It quoted verbatim an excerpt from it, entitled "Administering Estates of Decedent Debtors."

When I read the review in the American Bar Association Journal from which I have quoted, I thought that the defect in it was that it failed to remark that this work, too, was an invaluable aid to the busy lawyer, the experienced practitioner.

This is noted by Mr. Morris Weisman of the Philadelphia Bar, in his review which appears in the Commercial Law Journal, (of which he is Editor-in-Chief) March, 1941.[3]

Says Mr. Weisman: "This book fills the need of the busy practitioner for a work on the law of bankruptcy in one volume. Compressed into it is well-selected material capable of providing a sound working knowledge *of the substantive* law and procedure. It is a work which is a fine composite of theory and reality. Its author, formerly a busy lawyer in Cleveland, withdrew from active practice to become a full-time professor of bankruptcy at the Walter F. George School of Law, Mercer University, Macon, Georgia. This splendid book reflects the bent of the scholar and the business experience of an active practitioner. It is the kind of accomplishment a man of Nadler's background would write. It is not merely a practice and procedure book, or a manual of bankruptcy law; it is, rather, a combination of both, compiled for the every day use of the busy lawyer."

The Referee in Bankruptcy for the Middle District of Georgia is the Honorable E. P. Johnston of Macon. I daresay that there is no referee in the United States with the background of practical experience in the administration of the Bankruptcy Act which has been that of Mr. Johnston. The span of his professional

1. 35 A.B.A.J. 215-216.
2. 23 J.N.A. REF. BANKR. 80-81.
3. 54 COM. L. J. 60.

life is practically contemporaneous with the Bankruptcy Act of 1898, and the amendments thereto. Praise from him is praise indeed. Reviewing Mr. Nadler's book in the February, 1949, issue of the Georgia Bar Journal,[4] he says: "This book is in one volume which makes it a handy and practical guide for the average lawyer . . . To the every day practitioner this book, in my opinion, is one of the best books ever written on bankruptcy. . . . The entire Bar of the United States owes to Charles E. Nadler a debt of gratitude for this excellent treatment of the Bankruptcy Law. It is a book the practitioner cannot be without."

Mr. Weisman, in his review, has concluded: "The League congratulates Professor Nadler for the accomplishing of a most formidable task, one which many writers have tried and failed to do."

The Bar of Georgia in particular joins in these congratulations. And we welcome not only the book, but the author, who is devoting himself so unselfishly to the betterment of the administration of justice and to the training of our youth at the Walter F. George School of Law of Mercer University.

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4. 11 GA. B. J. 339.