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Review of "Supreme Court Practice," By Robert L. Stern & Eugene Gressman

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BOOK REVIEWS

SUPREME COURT PRACTICE (2d ed.). By Robert L. Stern and Eugene Gressman. Washington, D. C.: BNA Incorporated, 1954. Pp. xv, 585. $10.50.

This is a second and vastly improved edition of a very helpful work which first appeared in 1950. It has a pleasing format, the print and paper are good and the price ($10.50) is right.

The occasion for this second edition is no doubt the revised rules of the Supreme Court, effective July 1, 1954, which are reprinted verbatim. In addition, however, the book has been almost entirely rewritten to cover the changes made by the revised rules. The text dealing with the procedural law has also been brought up to date by adding cases decided since the first edition was published in 1950.

After a brief description of the Court and how it operates, the plan of the book is to set forth the jurisdiction of the Court over federal and state cases after which there is a very full analysis of the exercise of the certiorari jurisdiction. Then follows procedure on certiorari and procedure on appeals, with chapters on certified questions, original cases, and the extraordinary writs. A full chapter is devoted to briefs and another to oral arguments. Additional chapters deal with petitions for rehearing, motions and the problems of mootness and abatement. There is a final chapter on admission and disbarment of attorneys. The book is more than a practice manual dealing with how to do things; the jurisdiction of the Court is succinctly but adequately set forth.

As in the case of the 1950 edition, there is a full set of forms covering appeals, certiorari, original cases, the extraordinary writs, briefs, motions, etc.; indeed, there is a form for almost everything dealt with in the text. There is likewise a very helpful reprint of the more important sections of the Judicial Code, the Criminal Code and the appeal provisions of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. There is a good, workable twelve page index and a table of cases.

We therefore possess everything necessary to tell us how to get into the Supreme Court, what to do there and how to do it, and even, by inference, how to eject an unruly opponent therefrom. With such a book on our desks, there is not much excuse for doing things the wrong way. Nor, by reason of the adequate treatment of jurisdiction, is there much excuse for not knowing where we are and what our rights are in any given legal situation.

Comparing the present work with its principal rival, Robertson and Kirkham, *Jurisdiction of the Supreme Court*,[1] the latter work comprises 1147 pages and is in general more elaborate. It may be questioned, however, whether it contains much additional jurisdictional material. Certainly the Stern book is entirely adequate both as to the jurisdictional topics discussed and as to content. Of course, the Robertson work was written before the new Supreme Court rules—for this it cannot be blamed, but nevertheless this is a factor in estimating the present usefulness of the two works.

The Stern and Gressman work takes no position on the controversial subject of the present distribution of appellate review. Thus, it leaves the discretionary certiorari jurisdiction in its present unsatisfactory condition, though it states that "[i]t is this discretionary element that has caused much of the growing

1. Wolfson and Kurland edition, 1951.

criticism of the Court's exercise of its certiorari jurisdiction in recent years."[2] The difficulty, as our authors point out,[3] is that present Rule 19 or its predecessor Rule 38(5), as applied by prior grants or denials, provides no meaningful standards for the bar to follow. Perhaps, in the nature of things, this is impossible. However, this is no answer to the problem; rather it accentuates it. The ultimate difficulty of the certiorari jurisdiction is the inability of a lawyer, however expert in the field, to know how to advise his clients. For example, it was formerly the case that a direct conflict between decisions of courts of appeal meant a grant of certiorari as a matter of course. But this is not at all certain today, as Mr. Stern and others have pointed out.[4] Also, conflicts by no means account for *all* grants of certiorari;[5] there is necessarily more difficulty in arriving at a sound conclusion in non-conflict cases than in the first group.

The appalling waste of time and money involved in the denial year after year of 85% of the petitions for a writ of certiorari shows that something finally must be done about the matter. My own solution is the gloriously simple one of fining each petitioner $100 for each denied petition and giving the fine to the other party. This seemingly crass suggestion will be found to have deep psychological appeal and will, I guarantee, in one year cut down certiorari applications by a full 75%. In a cunning way it will cast an aura of malpractice and unsuccess about the whole affair; the client will blame the attorney and the attorney the client and in a few years the whole business will cease and desist. Such a rule would seem to be well within the implied powers of the Supreme Court, but, if not, there should be little difficulty in obtaining a constitutional amendment in jig time.

Our authors have done their best in exploring these tenebrious and "certiorarious" ways, and no better discussion of the certiorari jurisdiction and how it is exercised can be found anywhere. Counting the space devoted to procedure on certiorari, over 125 pages are devoted to this subject, and, in addition, there are over 25 pages of forms. Lawyers will, of course, continue to be baffled, but with the aid of our authors they will suffer a kind of intelligent bafflement—like a man trapped in a cellar, but a cellar with occasional gleams of light.

The work contains sound advice as to briefs and oral argument, echoing the acknowledged authority in the field, *Effective Appellate Advocacy*, by Frederick Bernoys Wiener.[6] As to oral argument, the authors state that "[i]t is generally inadvisable . . . to have more than one attorney arguing per side . . .,"[7] following new Supreme Court Rule 44(4). There is, of course, not much sense to splitting an appellee's or respondent's argument—it is a set piece of fireworks and one man ought to be as well able to touch it off as two. It is quite different, however, with respect to an appellant or petitioner; he has the opening and closing and there is no particular reason why one lawyer for appellant should not have the right to open and another (the mop-up man) close. Indeed, there is sometimes a positive advantage in this system; the lawyer on his feet is lost in the turmoil of argument; his colleague sitting beside him is like a general who surveys the battle field and, making a quiet estimate of the situation, sometimes comes up with the right answers.

The Supreme Court practitioner is lucky to have such good working tools. Although directed to different ends, it is difficult to match in any other field the

2. p. 109.
3. *Ibid.*
4. pp. 111-113.
5. p. 113. See also pp. 121-141.
6. Published in 1906.
7. p. 327.

Cyclopedia of Federal Procedure,[8] *Jurisdiction of the Supreme Court* by Robertson and Kirkham,[9] and the admirable *Federal Courts and the Federal System* by Professors Hart and Wechsler,[10] which, while designed for student use, has an added usefulness as an attorney's desk-book. Stern and Gressman's *Supreme Court Practice* can hold its own with any of these; indeed, for succinct and clear statement of the jurisdictional law or for helpful and constructive suggestions on the practical side, it need bow to none of the above.

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TRIAL TACTICS AND METHODS. By Robert E. Keeton. New York: Prentice-Hall, Inc., 1954. Pp. xxiv, 438. $6.65.

This book should be very valuable, if not a "must," for the law student and the inexperienced trial lawyer. It should also be helpful to the more experienced trial lawyer as a reminder of the many factors which should be considered in the preparation and trial of a case. The book examines the tactical aspects of trial methods and the factors which influence the trial lawyer's determination of what particular course of action should be taken in any given case.

The author does not undertake to formulate and prescribe a definite set of rules which, if followed, will produce successful results in the trial of a case. Instead, he recognizes that it may be neither possible nor advisable to use the same tactics in every case; the lawyer who is to try a case must determine for himself the precise avenue of approach which should be utilized in a particular situation. The problems which may arise, and the factors to be taken into consideration with reference to those problems, are discussed in such a way that a specific course of action may suggest itself to the trial lawyer who has reached certain conclusions in regard to his particular case.

Illustrative of the manner in which the book is developed, in the chapter entitled Preparation for Trial the author gives consideration to the various problems which might arise in regard to this particular phase of trial work. In addition to outlining what the trial lawyer should look for when interviewing his client, the author discusses the methods of investigating facts and whether the lawyer should do his own investigating or hire an independent investigator. He considers what should be the content of a statement taken from a witness and whether it should be written or mechanically recorded. Many other matters are discussed in this chapter, including the extent to which evidence supporting an adversary's case should be sought, the advisability of compensating a witness, and the proper procedure which should be employed in taking a deposition.

In another chapter of the book, the author considers the jury as a factor in the trial of a case. He discusses in detail the various problems which arise in the selection of a trial jury, such as the necessity of investigating the jury panel, the questions which should be submitted to the members of the panel, and the use of peremptory challenges. The rest of the chapter is spent examining the problems which may arise in regard to the jury as the trial progresses, and final comment is devoted to the handling of argument before the jury.

Many other considerations are discussed in other parts of the book, and although the subject matter is broken down into many sections examining par-

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8. 3d edition, 1951.
9. See note 1 *supra*.
10. Published in 1953.
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