Fordham Law Review

Volume 19 | Issue 2 Article 8

1950

Book Reviews

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Recommended Citation
Book Reviews, 19 Fordham L. Rev. 237 (1950).
Available at: https://ir.lawnet.fordham.edu/flr/vol19/iss2/8

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BOOK REVIEWS

EXAMINATIONS BEFORE TRIAL. (Revised Edition). Two Volumes. By Hon. Edward J. McCullen. New York: Baker, Voorhis & Company, 1950. Pp. XCIX, 677; 783. $27.50.

It is singularly fitting that the Foreword to Justice McCullen's two volume revised edition of his *Examinations Before Trial* should have been written by the Honorable David W. Peck, Presiding Justice of the Appellate Division, First Department, whose opinion in the now celebrated case of *Dorros, Inc. v. Dorros Bros.*[1] was, in the words of Professor Finn, "epoch-making"[2] in the field covered by Justice McCullen's work. The value of a law book often depends upon the vantage point of its author, and this is particularly true when it deals with a phase of procedural law the purpose of which is to reveal the facts. "Examinations before trial" states Presiding Justice Peck, "probably contribute more to that end than any other instrumentality of the law" and the author's "career in the courts, first as a clerk, then as librarian of the Supreme Court, and for the past seven years as a Justice of the City Court, has brought him into wide contact with the legal profession. It has uniquely equipped him for practical writing on legal subjects. We of the profession are fortunate that he has taken the personal time in this way to aid and facilitate our work."[3]

The introductory chapters of the work consider the origin, development, and nature of the remedy and classify its various phases to guide the reader throughout the book. These are followed by chapters which discuss parties to examinations—the movant, the respondent, and the witness—and the actions in which examinations are allowed. Also discussed is the status of parties as it relates to the right of examination and the stage of the action or proceeding at which it may be obtained. The nature of the inquiry, including the production of books and papers and discovery and inspection, the limitations thereon, and the matters upon which it is permissible, conclude what may be termed the "substantive" portion of the work. This is followed by procedural chapters which deal extensively with examinations pursuant to order and pursuant to notice; and, as to the latter, its vacatur or modification by motion, how response to the notice may be compelled, and the manner of taking of testimony pursuant thereto. The first volume concludes with chapters dealing with examinations before action is commenced, during trial, and after judgment.

The second volume discusses the taking of testimony by stipulation, Letters Rogatory, examinations without the state for use within and within the state for use without, and the perpetuation of testimony in real property actions and testimony to be used on motions. In addition, there are chapters which do not, strictly speaking, deal with examinations before trial, but with allied phases of the subject, such as admissions, physical examinations, and blood grouping tests. The general discussion of discovery and inspection in chapter 9 of Volume I on the Nature of Inquiry is supplemented by an entire chapter in Volume II[4] on the procedural details of the subject in all its phases. Then there are chapters which deal with examinations pursuant to various statutes of the Consolidated Laws, as, for ex-

1. 274 App. Div. 11, 80 N. Y. S. 2d 25 (1st Dep't 1948); 17 FORD. L. REV. 288 (1948).
2. Finn, Book Review, 18 FORD. L. REV. 327 (1949).
3. P. iii.
4. Chapter 24.

ample, the Agricultural and Markets Law, the Debtor and Creditor Law, and the General Business Law, concluding with examinations under the Code of Criminal Procedure. The last three chapters deal with oral examinations in specific causes of action and examinations on written interrogatories as to specific issues. Concluding is a chapter which deals extensively with examinations in specific courts: the Surrogate's Court, the City and Municipal Courts of the City of New York, the Court of Claims, the Justice's Court, the Nassau County District Court, and the 57 City Courts in various cities of the state, alphabetically arranged, from the Albany City Court to that of the City of Yonkers.

The work is written in a clear and comprehensive style with cases and statutory authority cited in footnotes in the accepted manner. Particular cases, although not cited by name in the text, are nevertheless adequately analyzed. Variations, where they occur in the several judicial departments,[5] are clearly indicated and illustrated by selected cases. Where there is a conflict in the decisions generally, the author does not shrink from taking a stand. For example, in chapter 40, which deals with oral examinations in specific causes of action, there is a section on Cross-Examinations[6] in which the author discusses the pro and con of the debate which has for some time been the subject of editorial comment[7] and letters from correspondents[8] in the New York Law Journal, as well as of a leading article in one of the law reviews.[9] The conflict has not yet been resolved by the courts.[10] The Judicial Council, however, has recommended to the justices of the Appellate Divisions the adoption of a new rule of civil practice to resolve the conflict and clarify the law so as to permit the cross-examination of a party by his own attorney, without his having obtained an order for that purpose.[11]

A personal observation may perhaps fittingly be made at this point. While the

5. The Court of Appeals has refused to settle the conflict in the several Judicial Departments with respect to examinations before trial in negligence cases, holding that the matter "rests in the discretion of the Supreme Court, and therefore, cannot be reviewed by us." Middleton v. Boardman, 240 N. Y. 552, 553, 148 N. E. 701 (1925).

6. Section 811.

7. Editorial in three parts: 121 N. Y. L. J. 1214 Col. 1 (April 5, 1949); 121 N. Y. L. J. 1232, Col. 1 (April 6, 1949); 121 N. Y. L. J. 1250, Col. 1 (April 7, 1949).

8. 121 N. Y. L. J. 1704, Col. 1 (May 12, 1949); 121 N. Y. L. J. 1960, Col. 2 (June 2, 1949).

9. Morris, *The Mechanics of an Examination before Trial,* 22 St John's L. Rev. 53 (1947).

10. Mr. Justice Walter, after an extensive review of the entire subject of cross-examinations upon examinations before trial, has recently held in Gottfried v. Gottfried, 95 N. Y. S. 2d 561, 568 (Sup. Ct. 1950), that "upon an examination of a party before trial the examined party is entitled to be cross-examined by his own counsel with respect to all subjects as to which the applicant for the examination has examined him" without having obtained an order for that purpose. Mr. Justice Hecht, on the other hand, reached a contrary conclusion in American Worcestershire Sauce Co. v. Armour & Co., 194 Misc. 745, 87 N. Y. S. 2d 738 (Sup. Ct. 1949).

11. Proposed Rule 129-a of the New York Rules of Civil Practice provides: "A party whose testimony is being taken by deposition may be cross-examined as upon a trial by the adverse party, or, when the deposition is being taken at the instance of the adverse party, by his own attorney." See Sixteenth Annual Report of the New York Judicial Council 71 (1950).

principal purpose of an examination before trial is to get at the facts which are material and necessary in the prosecution or defense of an action, it is also an instrument of strategy to ascertain the adversary's version of the transaction or to "size-up" the adverse party and his counsel or to create a suitable occasion to meet for the purpose of discussing settlement. Whatever the objective, it is advisable to keep the examination within careful bounds, otherwise the applicant may prepare his opponent's case by unwittingly informing him of his trial strategy by the nature of the items or topics of examination or by the questions propounded during the examination. Since, as the author notes, "either party may read the deposition in evidence, even in the face of objections by the one causing the testimony to be taken,"[12] a party who has obtained the deposition may find himself in the anomalous position of having aided his adversary in establishing *his* case, without himself deriving any benefit from the examination. To avoid the danger of strategic errors of the character above described, it is necessary for counsel to have a thorough and comprehensive knowledge of the subject and to think through the problem in the particular case with a view not only of the next step but of the step beyond. Justice McCullen's work, although it does not discuss strategy as such in any one place, contains much valuable information that reflects his wide practical experience in this respect.

Every phase of motion practice in connection with examinations before trial, discovery and inspection and the other subjects treated in the work is illustrated by a complete set of motion papers; the notice of motion, the supporting affidavit, and the order. Actual questions in specific causes of action have been formulated in chapter 40, which also sets forth a complete examination wherein the propriety of the questions asked reached the appellate division for consideration.[13] Chapter 41 contains written interrogatories in respect to specific issues, as, for example, character, mailing, abandonment of a contract, and the authority of an agent. But even more important is chapter 12, which contains items or topics of examination illustrative of numerous types of actions—contract, tort, property, and miscellaneous—with appropriate case references. Too many motions involving examinations before trial reach the courts with items or topics which are defective as to form.[14] Possibly many examinations would be consented to or motions therefor unopposed were the items correctly drawn. The form of items suggested by Justice McCullen will, therefore, prove most useful, provided, of course, that they are adapted to the specific situation presented in a particular case. An examination before trial "must be confined to material and necessary matters."[15]

The book has a complete Table of Contents and a very extensive and detailed Table of Statutes which is correlated to the sections of the book, as are the general

12. Section 643.

13. Section 813.

14. In Cerf v. Krupnick, 58 N. Y. S. 2d 557 (Sup. Ct. 1945), Mr. Justice Shientag called attention to the improper practice of setting forth items of examination by means of detailed narrative assertions of fact, for the most part a repetition of the allegations of a pleading, instead of stating concisely the matters or topics upon which the examination is sought. In Wood v. American Locomotive Co., 246 App. Div. 376, 286 N. Y. Supp. 994 (3d Dep't 1936), the court reminded the Bar that the drawing of items of examination "is the function of counsel instead of the ceourt." *Id.* at 378, 286 N. Y. Supp. at 997.

15. Matter of Ryder, 275 App. Div. 994, 91 N. Y. S. 2d 227 (4th Dep't 1949).

Index and the Index to Forms. A particularly useful feature of the Table of Cases, which is also correlated to the sections, is that the citation of each case, official and unofficial, is set forth in the table itself.

The book is handsomely and durably bound in red fabricoid with gold lettering, and has pocket sections for supplements. Each book is manageable so far as size and weight are concerned, although the two volumes are somewhat bulky for a briefcase. Experience has shown that a good book on examinations before trial is most useful while conducting the examination of the trial of a case, and the author wisely organized the work as to have most of the text in one volume and the forms in another, supplemented by explanatory material as a guide to their use.

"Encyclopedic" is the term which best characterizes this work. Rarely has a phase of procedural law been so exhaustively treated. Not only does the author give you the origin of the subject, but tells you what the law is, the conflicts, where they exist, and his views thereon. The rules are formulated and applied to almost every class of action. Forms for every type of motion connected with depositions are made available with suggested topics or items of examination in typical actions.

The new practitioner will find it a font of information in the solution of his everyday questions in this field of adjective law; the more experienced and the Bench, a source book for the solution of the more perplexing problems.

SAMUEL S. TRIPP†

MAX D. STEUER, TRIAL LAWYER. By Aron Steuer. New York: Random House, 1950. Pp. 301. $3.50.

Justice Aron Steuer's account of his father's life, supplemented by extracts from five of his father's most devastating cross-examinations, should be read by every judge, lawyer and law student. Frankly, more can be got out of this book than out of any ordinary course on contracts, torts or criminal law. This book makes one live the law—something which law schools cannot very well do.

The only fault that I have to find with *Max D. Steuer, Trial Lawyer* is that excessive modesty has caused Mr. Justice Steuer to lean over backwards. It reminds me of the old story, which, incidentally, is squarely in point, of the hill country recruit who wrote home that the army gave him meat every second day. When the censor asked him why he didn't tell the truth and say every day, he pointed out that the actual fact would never be believed by the folks at home. The same is true of Mr. Justice Steuer's account of his father, who, in my considered judgment, was that *rara avis*—a lawyer in a class by himself. True it is, he was so brilliant and successful at trial work that, during his lifetime, nobody could be mentioned in the same breath. But—and Mr. Justice Steuer could not very well say it without seeming to be guilty of undue puffing—his father excelled also as a sound business adviser, a capable briefer, a thoroughly competent pleader, and last, but by no means least, he was as brilliant at arguing a difficult motion or appeal as anyone I have ever known, not even excepting Benjamin N. Cardozo.

The first law office job which I had was in Max Steuer's office in 1908. To live around him was a daily and constant education. The amount of work which he could get through in the course of a day was truly unbelievable. While Mr. Justice Steuer rightly emphasizes his father's almost incredible skill in cross-examining

† Member of the New York Bar.

witnesses, I have seen his father do something even more remarkable. On returning from court at about 5 p.m., after a hard day's work, Mr. Steuer felt that it was imperative for us to serve a complaint for specific performance of a rather complicated real estate contract on behalf of a very prominent operator. I begged off on the ground that I was loaded up with work. Dave Podell was not available because he was preparing a case for trial and had a number of witnesses in his room. Mr. Steuer, then and there, called in the stenographer and dictated the complaint forthwith—not an interruption, not a pause, and when I read it over the next day—not an error. Please show me any other man at the Bar who could do a job like that.

To return to the book itself, the first thirty-nine pages are devoted to a discussion, chiefly biographical in nature, of the factors which raised Max Steuer to pre-eminence. He was born in 1870—the precise date is in doubt—in a small village in Czechoslovakia. His parents came to this country when he was six years old. The family pocketbook was just sufficient for six steerage passages. The family settled on Columbia Street, on the lower east side of New York City, where overcrowding, lack of proper sanitation and general ugliness added to the burden of human existence.

Like the hero of an Alger story, Max Steuer began as a newsboy. He told me, from time to time, some of his youthful adventures which are not set forth in the book. Even in his youth, he must have been a most remarkable person. While in the College of the City of New York, and subsequently at Columbia Law School, he earned his way, mainly by work in the post office. He thoroughly believed in the "case method" of law study, which had been introduced into Columbia Law School just about the time he began his course there. He excelled as a law student, and undoubtedly would have been a Law Review man if such had then existed.

As his son points out,[1] Mr. Steuer admired our legal system chiefly for its certainty. What he would have said about today's emanations from our court of last resort at Washington, it would be uncharitable of me to think. In fact, when I told one of our greatest American judges recently that I admired the wit and rhetoric of an address which he delivered at the Bar Association, and that I wished that Cardozo was alive to hear it, he replied to me, "But would it be kind to bring our sainted Ben back to Washington today?" No, there is no certainty today except uncertainty. So that the lawyer says, with Warwick in Shakespeare's "Henry VI":

"But in these nice, sharp quillets of the law, Good faith, I am no wiser than a daw."

After Mr. Steuer graduated from law school in 1893, he could not obtain a position in any law office. A large firm specializing in the defense of negligence claims rejected his application for a job at $6 per week. Necessarily, he had to start out for himself, without money, without social standing, without background. In one of his first cases, he collected a debt of about $2,500. He put in a bill for $25 with an air of apology. The client paid him $250. Do these things happen today? The question answers itself. But, honestly, I remember the late Sam Klein, of Fourteenth Street on the Square, criticizing a bill for my services in the Court of Appeals in the amount of $500 as unfair—unfair to me—and Mr. Klein insisted on paying $1000. But today there are not many Kleins around.

1. P. 10.

In course of time, Mr. Steuer became known as the most skillful practitioner in the City Court of New York. Even the sharp firm of Howe & Hummel steered clear of Mr. Steuer as they would the plague.

Mr. Steuer, like many a worse man, succumbed ultimately to matrimony. While trying a case, a substantial juror watched him carefully, figured (and rightly) that he was a rising young man, and invited Mr. Steuer to call at his East 60th Street residence. The eldest daughter of this far-seeing juror is the mother of Mr. Justice Steuer.

Mr. Steuer's practice consisted of both civil and criminal cases. He never hesitated to accept retainers on behalf of defendants in the criminal courts, provided that he felt that there was a reasonable chance of success. In fact, I often heard him discuss his criminal cases with great gusto, and with the keenest interest in the problems which they presented.

His cross-examinations in the celebrated cases of *People v. Gardner, People v. Harris and Blanck* (the Triangle fire tragedy), and *People v. Rickard* (the young girl's morals case) appear in the book at pages 41, 83 and 111 respectively. The other two examples of his cross-examination presented by his son grow out of negligence and libel litigations. The cross-examination in the *Rickard* case is particularly interesting because it was tried on behalf of the People by Mr. Justice Pecora, then the Chief Assistant District Attorney, and was presided over by that able and experienced jurist, Hon. Isidor Wasservogel. Each of the cross-examinations is prefaced by a brief and illuminating preliminary introduction written by Mr. Justice Steuer presenting the background of each case.

Beginning about 1918, Mr. Steuer made a charge of $1,000 *per diem* for each day in court, in addition to a preliminary retainer. Subsequently, he raised this charge to $1,500 a day. He was well worth it. The payment of such fees to him illustrates his acknowledged leadership in his field of law practice. He was active until his death; in fact, as I recall it, he was preparing a case for trial at Jackson, N. H., in the White Mountains, when he was suddenly stricken.

While he was interested in some other things—for example, cards and the theater—his great love, first, last and all the time, was our Lady of the Common Law. He pursued her with a relish and delight that never terminated.

Some very distinguished lawyers have received their training under him. He pressed them to their physical and mental limits, even as he pressed himself. His memory was prodigious, and he expected others to live up to his standard. During the course of a trial or the argument of an appeal, he would very rarely make notes, yet could repeat almost verbatim what had transpired previously. While this factor impressed me chiefly, Mr. Justice Steuer states that Judge Seabury advised him that what impressed him most was "Mr. Steuer's unequaled resourcefulness."[2]

I do wish that every reader of the FORDHAM LAW REVIEW would read and study this informal biography of Max Steuer and the five summaries of his remarkable cross-examinations. But, I repeat, Max Steuer was far more than the greatest trial lawyer of his day—he was a genius. I do not expect to see his like again. Today we breed no such Titans. The energies of our best lawyers in these days ordinarily are not devoted to court work. What a pity!

I. MAURICE WORMSER†

2. P. 27.

† Member of the New York Bar; Professor of Law, Fordham University School of Law; former Editor, New York Law Journal.