

Less space is devoted to discussion of such common law offenses as blasphemy, simony, apostasy, duelling, embracery, heresy, piracy and other matters of more interest to the antiquary than to the practicing lawyer.

Due attention is given to offenses of new statutory regulations of a federal government constantly enlarging its power by expanding the definition of the commerce clause. Thus, discussion of the Mann Act has its place in the text, which was written just too late to warrant discussion of offenses under the National Prohibition Act and just too soon for authoritative exposition of offenses denounced by the National Labor Relations Act. When the fifth edition is published, will Senator Wagner be a prophet as forgotten as Volstead now is?

Such terms of the social scientists as "anti-social" and "social injury" have found their way into this commentary. Due recognition is given throughout the work to a fact which the authors well state: "Courts have shown at times a large capacity to ignore the wording of statutes." The revisers recognize, though not in such pointed language, that some courts sometimes show some capacity to ignore the language of their own decisions.

This book should be of more interest to students of the present than any previous edition was to students of the past, because in the process of putting new wine into an old bottle, language has been employed which is always interesting and at times fascinating. Its accuracy should make it of value to the practicing attorney.

GRENVILLE BEARDSLEY*

Moore's Federal Practice under the New Federal Rules. By James William Moore and Joseph Friedman. Albany: Matthew Bender & Co., 1938. 3 vols. Pp. lxxxiv, 827, 666, 1017. \$25.00.

This timely treatise on federal practice by authors of undoubted scholarship and demonstrated knowledge of the subject should make an instant appeal to those of the legal profession throughout the country who have occasion to appear in the federal courts. To them it will be an almost indispensable tool for unfolding the purpose and working of the new Federal Rules of Civil Procedure, and of showing how the Rules fit into an entire scheme, a considerable part of which is regulated by Acts of Congress. It should likewise be of profound interest to all lawyers and persons who have at heart progress and greater efficiency in the administration of the courts, as these Rules and their exposition may have a far reaching effect upon the practice in the courts of the various states. Local prejudices against federalizing state practice will inevitably disappear if the federal system demonstrates its superiority. That demonstration will depend on interpretations placed upon the Rules, and early interpretations may shape their ultimate direction and success. The publication of such a comprehensive and scholarly treatise so soon after the promulgation of the Rules has required a broad grasp of the problems of procedure in general as well as of federal procedure, a close association with the work of the drafting committee as it progressed, laying foundations of the book while the Rules were in the making, and a rare ability to keep a broad field of knowledge in perspective, organizing and expressing it clearly under a gruelling concentration.

Following an introduction dealing with background, scope and general summary, the work is divided into eleven parts giving specific treatment to each of the eighty-

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six Rules, showing their interrelation and relation to the federal statutes. This is followed by a supplementary part dealing with jurisdiction of and venue in the federal district courts, removal, and of jurisdiction of circuit courts of appeal, the Court of Appeals of the District of Columbia, and of the Supreme Court. An appendix of two hundred pages contains illustrative forms, Supreme Court rules upon details not covered in the Rules of Civil Procedure, the April 1937 draft of the Advisory Committee, a bibliography, tables of equity rules, tables of statutes, and a table of selected cases. An adequate index of two hundred and twenty-five pages concludes the treatise.

The mechanical features are excellent. Each part is divided into chapters, a chapter being devoted to each rule. The topical headings under each rule carry the section number of the rule and also serial decimal numbers to indicate the progressive subordinate treatment. The upper margin on each page indicates the topic there discussed and its appropriate serial and section number, facilitating easy identification of cross-references. The footnotes are copious. Printing and paper leave nothing to be desired. A pocket is provided in each volume for cumulative supplements to keep the work up to date.

A foreword describes the rules as clearly and concisely phrased. Clearness and conciseness are relative terms, their verity depending upon a common background of user and reader. The authors have done an excellent job in attempting to furnish that background. Their many citations and comprehensive discussions demonstrate their knowledge of former practices and current problems. They have the advantage of having been research assistants to the drafting committee, and of being familiar with the discussions while the rules were in their making. They have had an intimate association with Dean Charles E. Clark, the Reporter of the committee, know his views, and acknowledge their debt to him in terms which show that his views are their views. But even with a common background those views may not be shared by all readers. Committees, particularly if they are composed of intellectual leaders, seldom agree upon all problems before them. The more they know, the sharper will be the divisions. Compromises upon language do not always mean compromises upon ideas. General terms, capable of several meanings, will shift the determination of the particular meaning to another body. Who can say what draftsmen, as a body, mean by such terms, even though he may have heard the debates? The more vocal committee members are not always the more resourceful.

Rule 2, which is a foundation of the reform, adopts the "one form of action." The importance of this concept is recognized by the authors. They have given it more attention than any other, and have returned to it time and again. The phrase is concise, but if the meaning is clear altogether too much space is devoted to its exposition. Because it is not clear the space is justified. Everybody knows that it involves some sort of union of legal and equitable remedies, and the breaking down of ancient barriers between the forms of action, by the establishment of a single system of administration. The essential characteristics of that system have been the subject of controversy ever since 1848, when the first New York code of procedure announced there should be thenceforth "one form of civil action." Just before the Advisory Committee started its labors, and in view of the problems they would confront, Dean Clark and Professor Moore, one of the authors of the work here reviewed, published an article giving their views of what it involved.¹ They characterized as a "hangover doctrine," belonging to

¹ Clark and Moore, *A New Federal Civil Procedure*, 44 *Yale L.J.* 1291 (1935).

the horse and buggy days, any notion that the system called for separate dockets for law and equity cases, or for a type of pleading which identified or distinguished between legal and equitable remedies. They insisted that the determination of the mode of trial, with or without a jury, was a post-pleading problem. In an answering article² the reviewer pointed out that "merging" and "coalescing" involved considerably more than merely joining law and equity under one procedure; that though joining was desirable, jumbling together the things joined was not, since out of such a mixture it would be difficult, if not impossible, in any cases to determine whether a demand for jury trial should or should not be granted; and that juggling with the Constitution behind pleading smoke screens was too up to date to make an appeal to the reviewer. In these conflicting articles were presented the results of different political philosophies upon procedural problems.

The Advisory Committee had the articles upon the one form of action before it. Dean Clark was its Reporter, in a position of advantage to obtain a clear expression as to whether the one form of action involved the "merger" and "coalescing" of law and equity, as distinct from a less intimate union which preserved their identities after the joinder. In the rules we find only the smile of the Sphinx. The one form of action is given us without comment or explanation. In the pleading sections are found some concessions to the jumbling idea, but there are indications that a weather eye was being kept upon the Congressional injunction that trial by jury should not be prejudiced in setting up the one form of action. The conservative members of the committee succeeded in putting some brakes upon the modernistic views of procedure recently emanating from the Yale Law School. It is not surprising to find the text of the work under review advocating a complete adoption of the Clark-Moore-Yale concepts in interpreting the rules, releasing all brakes. They profess to see no brakes imposed by the committee. They refer constantly to the union of law and equity as a "coalescing," just as though there were no other term which could adequately express the true concept of the one form of action.

Although their references are not complete, the authors have called attention to the conflict of views as to the meaning and scope of a "cause of action," and have suggested that the draftsmen of the Rules avoided the difficulties involved in defining or describing it by adopting as a substitute the word "claim" where it might be customary to use "cause of action." Despite the tacit assumption that the word "claim" has a clear meaning and scope, the authors devote considerable space to stressing the importance of giving it that meaning of "cause of action" which was invented by Dean Clark, *i.e.*, that a "cause of action" is co-extensive with a "transaction," and may embody any closely connected series of events, though they give rise to different theories of relief, or different reliefs. The extent of the boundary is fixed by a sound notion of administrative expediency, and may vary in each case. This urge for pragmatism in dealing with the "claim" or "cause of action," for they are treated as the same thing, is appealing, but it is elusive because of so many differing opinions as to what is practical and efficient. The keen perception of the authors has discerned that by using the word "claim" the rules have not avoided the difficulties involved in the concept of a cause of action. They contend for a realistic treatment of the word "claim," and they find it in the elastic cause of action sired by Dean Clark. If adopted, there will be no difficult problems of joinder. If the trial court, or the counsel who

² McCaskill, *The Elusive Cause of Action*, 4 Univ. Chi. L. Rev. 281 (1937).

guide it, have the proper concept of pragmatism, the "claim" may be made to stretch around any statute or rule. This carry over of a political philosophy into the realm of judicial administration is refreshing and may give one an up-to-date feeling, but the reader is warned that there are other concepts of realism which may keep him more closely anchored to earth.

The authors have dealt with venue and jurisdiction problems with understanding and skill. The enlargement of the possible scope of a single litigation through liberal Rules on joinder of claims, parties, counterclaims, third party practice, intervention and interpleader creates intricate problems in a court whose jurisdiction depends upon amounts involved and residence of the parties. The authors show an intimate knowledge of the relation of ancillary jurisdiction to these problems, and have probed its various possibilities. Their suggestions are well worth considering even if they appear somewhat elastic at times.

It is the prerogative of authors of a treatise to emphasize their own views. Professor Moore and Mr. Friedman have done this throughout with consummate skill. It in no way detracts from the value of their work that others may not agree with some of their conclusions. The reviewer has no hesitation in commending this as one of the outstanding legal tools published in recent years.

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The Spirit of the Legal Profession. By Robert N. Wilkin. New Haven: Yale University Press, 1938. Pp. viii, 178. \$2.50.

Professor Wilkin's little volume, *The Spirit of the Legal Profession*, is the story of the origin and achievements of the legal profession from ancient Greece and Rome, through the struggles against English monarchical despotism, through the American Colonial period, to the present time. While in times past there may have been doubts as to whether civilization rested so completely upon the efforts of our profession, it is pleasing to read the records as disclosed by this scholarly gentleman. After reading it, of one thing, we are certain—the past is secure. We may as a body have been too modest to assert it, but it is an established fact, covered by both general and special findings. In proof thereof let it be recorded that we curbed the crown, subdued the lords, supplanted the clergy in judicial matters, and by example and teachings pointed the way for other great professions such as the medical, the professorial, and the engineers. Moreover, it is untrue that the motives of union labor ever prompted us. We have ever been, and still are, an uplift group. This is the teaching of this volume.

The book deals with four subjects, first with the Romans where the pioneers grasped an unusual opportunity and saved for our inheritance the richest part of that ancient civilization. Also, it appears that the lawyers of that day would have been specialists in brief writing now, for he tells us that their arguments ranged "from philosophy to agriculture and from poetry to finance."

The second part deals with the growth of the spirit of the profession in England. The record, here, too, is satisfactory—in fact, excellent. They fought an uphill, but a winning fight. They may not have had much to do with the historic struggle at Runnymede but Magna Carta would have been but a "scrap of paper" if lawyers of the character and courage of Lord Coke and Chancellor Moore, *et al.* had not seen to its enforcement.

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