

## REVIEWS

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION. Edited by Arthur T. Vanderbilt. Published by The Law Center of New York University for The National Conference of Judicial Councils, 1949. Pp. xxxii, 752. \$7.50.

THIS is a valuable book upon a specific but important area of legal activity. It will be of no interest to those lofty souls of our profession who look down upon the plebeian subject of court procedure. It will be anathema to those vigorous iconoclasts who regard "procedural reformers" as in league with the devil in trying to preserve and make workable an outworn system. But to a large group of active workers it will be a vade mecum of professional activity throughout the nation directed toward the improvement of court structure and court administration. This group is indeed an ever increasing body; hardly a bar association now fails to be somewhat permeated by the spirit which first found definite recognition in the federal rules of procedure and now is embodied in the movement for the integrated courts. And it is handy to have at hand the definite story illustrated by maps conveniently picturing the states from dark to speckled to white on the basis of the extent to which they have accepted the various recognized steps in procedural reform. Even the most chauvinistic state legislator can hardly fail to be somewhat impressed to observe the blackness of his own state thus contrasted with the snow-white condition of near neighbors.

The method of preparation of this volume was somewhat unique. It represents the conclusions from what is termed a factual survey of all the states conducted through seven or eight questionnaires to "state reporters" under the auspices of the Junior Bar Conference of the A.B.A. This involved the enlisting of the activities of a very wide group of persons all over the country. It also had the advantage of giving a reflex of court procedure and administration not merely as found in books, but as adjudged by persons of some competence in the local field. The returns were tabulated and checked by competent people and were then edited for this volume. Obviously the final task of editing would be both as onerous and as important as, indeed more so than, any other part of the work. It is interesting that here the only person who seemed immediately able to undertake the difficult job was the leader in the movement from the beginning, the distinguished law teacher, practitioner, bar leader, and now head of the judicial system of a reformed state, the Chief Justice of New Jersey. It is always a matter of amazement to see how much a single leader can accomplish; it is doubly so when one person combines so many activities of leadership so successfully as in this case. But he himself demonstrates the truth of his own statement here: "Manifestly judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat." And we are all in his debt.

This method of study of procedure has the advantages indicated of tend-

ing to avoid overoptimistic conclusions from observing statutes and court rules alone. I suspect, however, that it contains a certain optimism all its own, because the state reporters must naturally be those interested in the subject; and that means only optimists. So far as I can see, however, the statements are in general judicious and restrained. For example, as to court rule-making in Connecticut, where the State Judicial Council has somewhat exuberantly stated that "the legislature has gone 80 per cent of the way"<sup>1</sup> (a statement which overlooks that the final distance is by all odds the hardest, and doubtless also the longest of all), the statement and map in this volume list the state as one of crossed lines, quite properly showing only limited grants of rule-making power as to certain proceedings or in certain courts.<sup>2</sup> The great value of the volume is in any event for the over-all picture in each state, which, like a jury's verdict, may be expected to be pretty correct even though individual details may be less so. The various topics considered are those definitely recommended by the Section of Judicial Administration of the A.B.A. and in substance appearing in that section's pamphlet, *Handbook on the Improvement of the Administration of Justice*. The two will make a proper combination, the pamphlet stating the program and this book pointing to the degree of its execution in the states.

One can easily take exception to certain details of the program even if one has general sympathy with its over-all aspects. Thus the reviewer is not convinced that the Association's "Missouri Plan," which tends to freeze selection of judges in a select group of successful practitioners, may not prove too limitedly conservative for continuing public satisfaction. But such differences in detail hardly deserve airing here where warm approval of the very substantial professional activity reflected in this volume seems more in order. Its reach may, just possibly, extend eventually to a state such as Connecticut, where the some 400 courts and 2,000 personnel of the "minor" and probate systems well illustrate the need of procedural reformers after all. Since I have often had occasion to object to the steady conservatism of our greatest professional organization, it is a special pleasure to pay tribute to its worth-while program and accomplishment in this field. The several notable leaders thus developed, themselves led by the editor of this volume, are continuously affording evidence to disprove the teaching of the English experience that the hope for court reform rests entirely with the laymen.

CHARLES E. CLARK†

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1. ELEVENTH REPORT OF THE JUDICIAL COUNCIL OF CONNECTICUT 7 (1948).
  2. MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 100, 104, 105 (1949).

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THE SENSE OF INJUSTICE. By Edmond N. Cahn. New York: N. Y. University Press, 1949. Pp. 186. \$3.50.

REASON AND LAW. By Morris R. Cohen. Glencoe, Ill.: The Free Press, 1950. Pp. 211. \$3.50.

THESE are both "slim volumes", but they are more provocative than many a weightier tome in their field. The style and content of each is quite different. Yet they address themselves largely to the same key questions in legal philosophy, and their answers may fruitfully be compared.

But first a more general word about the two books. The volume by M. R. Cohen is another of his posthumous publications—a collection of articles and speeches. The heart of the volume consists of two law review articles, one on fundamental ethical notions in relation to the criminal law<sup>1</sup> and one which examines absolutist ideas in law and ethics.<sup>2</sup> Both are meaty contributions. The latter article attacks various forms in which absolutism manifests itself, *e.g.*, in the realm of definitions, in divisions of the law (*e.g.*, into civil and criminal, substantive and procedural), in the attempt to set up "self-evident" principles or unqualified ethical notions whose limitations or difficulties in application have been inadequately appreciated. The criminal law article critically analyzes the numerous theories of punishment, stressing among other things the limitations upon the "crime is a disease" approach (in view of the lack of basic knowledge on the determinants of human behavior, the tremendous cost of an individualized rehabilitation program, the apparent public need for giving vent to resentment and horror through the present largely retributive system), limitations on the fashionable view that punishment does not deter, and various other interrelationships of legal and moral concepts in the criminal law. Reprinted also is the brief summary of Cohen's jurisprudential approach which appeared in the *My Philosophy of Law* Symposium in 1941;<sup>3</sup> an essay on Kant's legal philosophy,<sup>4</sup> which served to clarify for me a long-standing confusion over the meaning of that metaphysician's obscurities; a short piece on Italian Legal Philosophy<sup>5</sup> which suffers, I think, from the negligible attention paid to the many insights of the great Pareto; a hitherto unpublished paper on the "Sanctity of Law" containing little that is not contained in the others; two relatively minor addresses;<sup>6</sup> and seven book reviews, the most important

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1. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940).

2. Cohen, *On Absolutisms in Legal Thought*, 84 U. OF PA. L. REV. 681 (1936).

3. MY PHILOSOPHY OF LAW (1941).

4. It is a contribution to THE HERITAGE OF KANT (1939).

5. Cohen, *Italian Contributions to the Philosophy of Law*, 59 HARV. L. REV. 577 (1946).

6. One is on *Legal Philosophy in the Americas*, presented at the Eighth American Scientific Congress (1940) and published in its proceedings, Vol. 10, p. 501 (U.S. Dep't of State, 1943). The other is on *Jurisprudence as a Philosophical Discipline*, presented to the American Philosophical Association and published in 10 JO. OF PHIL. 225 (1913).

of which are those giving a pretty severe analysis of Fuller's *The Law in Quest of Itself* (1940)<sup>7</sup> and Robinson's *Law and The Lawyers*.<sup>8</sup>

Professor Cahn's book, too, stems from prior writings, but the two law review articles<sup>9</sup> forming the basis of the work have been revised, and considerable new material has been added. Prof. Cahn declares it to be his purpose to present an "anthropocentric view of the law." Legal abstractions or concepts, he says, have "engrossed the attention of legal philosophers at the expense of what is vibrant, fleshly, and individual"; the meaning of any concept should be "investigated by observing the occasions when that concept becomes relevant to the homely experiences of individual human beings." He chooses as concepts which "can be expected to cast the clearest light on the nature of law" the "classic antitheses of legal theory . . . Justice and Power, Freedom and Order, Security and Change." (pp. 1, 2) Basic to the analysis is the notion that to begin on the foundation of experience and observation one should begin with the sense of *injustice*: "Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative and contemplation bakes no loaves. But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism. . . . Nature has thus equipped all men to regard injustice to another as personal aggression." (pp. 13, 24). Various occasions for exercising the sense of injustice are presented (*e.g.*, the demand for equality, for dignity, for conscientious adjudication, etc.). Analyses of the concepts of freedom and security (involving broad-stroke sketches of some areas of law) lead to the conclusion that they too are closely connected with the sense of injustice.<sup>10</sup> Throughout the book the "anthropocentric" approach is exemplified by the attempt to put concepts in a human context, as in the discussion of the secondary role of legal rules in the judicial process,<sup>11</sup>

7. The review appeared in 36 ILL. L. REV. 239 (1941).

8. The review appeared in 22 CORNELL L.Q. 171 (1936).

9. Cahn, *Justice, Power and Law*, 55 YALE L.J. 336 (1946) and *Freedom, Order and Law*, 23 N.Y.U. L.Q.R. 20 (1948).

10. "When we came to consider the species of human mobility which is called 'freedom,' we discovered that it involved a series of tacit assumptions concerning man, truth and law. Those assumptions seemed to float out of reach of earth, until we observed how the sense of injustice, like a sturdy cable, held them down and maintained their connection with the native capacities of men." (p. 177).

As for Security, obedience to the sense of injustice can "supply us with firm footing, with social support. . . . The experience of the sense of injustice is itself the greatest of all species of social transformation, because it incites men to join with one another and to participate—first in the perception of jeopardy, then in the resistance, and finally in the exultations of an achieved success. These are all public acts of solidarity. . . . Justice as a working process creates its own cumulative rewards in every emergent occasion. Among these are freedom, cohesion, and mutual confidence. . . . There is . . . the certain opportunity that men may, through exercise of the sense of injustice, draw closer and become everywhere increasingly secure." (pp. 178, 186).

11. See pp. 33-6.

the suggestion of particular biological bases of the urges for freedom (p. 53) and for security (p. 130), the discussion of how the legal concepts and procedures of the governors in their turn cultivate and develop the sense of injustice of the governed (pp. 118-20) or serve (*e.g.*, by the degree to which perils and liabilities of various types are limited, privacy afforded, and the incidence of change reasonably controlled) to strengthen or weaken their general feelings of security (pp. 133-50) or otherwise affect security by affecting their sense of guilt (pp. 152-9), or their feeling of individual identity (pp. 159-63), or their impulses away from strict conformity to legal requirements (pp. 163-6), or the sense of affiliation and protection which comes from membership in community or nation (pp. 166-73).

One way to assay these two books is in terms of the language factor. The incisive and earthy lucidity which has characterized Morris Cohen's other writings is present in this work, too. Cahn's style, on the other hand, is not the kind normally regarded as most effective for an analytical, argumentative essay in socio-legal theory. It is a poetic style full of imagery. There is not a great deal of detailed elaboration of the major themes; the legal references are generally treated not with precise particularity but suggestively and in the large, as though the audience were already learned in the ways of the law and would know what the author had in mind. But even some lawyers in the audience will (like myself) wonder at some points. This is not to deny that the partial sacrifice of precise communication has greatly augmented the standing of the work as expressive literature.

There is another aspect of the language factor which deserves mention. One of the irritating things about the history of jurisprudential writing is a recurrent and largely unnecessary controversy over *definitions* (of such terms as "law", "justice", etc.). If one is giving a dictionary-type of definition (*i.e.* one which purports to reflect usage) the sensible way to resolve the controversy is to consult the dictionary. If the definition-maker is giving a stipulational type of definition (*i.e.* stipulating the meaning which *he*—irrespective of usage—is assigning to the word throughout the particular discourse in which he is engaged), then, again there need be no controversy. Obviously such a stipulation is neither true nor false. If the definition-maker is attempting to give a truthful description of some *agreed* entity (*e.g.*, a horse), there may properly be a controversy over the truthfulness and completeness of the description—but beware of such purportedly truthful and complete descriptions where the entity (unlike the horse) is not an agreed one, but some abstraction which may or may not symbolize exactly the same thing to practically all people and hence *cannot* be given a description which is *verifiably* true and complete. Beware also of the type of definition which is defended as truthfully giving some *inherent* essence of a word; this is a relic of primitive word-magic.<sup>12</sup> Morris Cohen is clearly aware of the relativity

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12. I have attempted a more elaborate analysis of definitions in an article on jurisprudence in a forthcoming issue of the MICHIGAN LAW REVIEW.

of definitions. He is further aware that some definitions are more useful than others, and in particular that it would avoid confusion not to depart too far from common usage.<sup>13</sup> Cahn does not concern himself explicitly with definitional theory. While he would doubtless agree with Cohen's observations, I think it well to indicate that some of Cahn's phraseology is such as might suggest an assumption, however unintended, of "inherent" meanings of words.<sup>14</sup>

A tendency in jurisprudential literature, as in most polemical literature, is to overstate one's opponent's case and thereupon demolish the overstatement. There is some evidence of this in both Cohen and Cahn, insofar as they indulge in the popular sport of flogging the "positivists". Cahn observes (p. 10) that there is a modern "attitude of extreme positivism. . . . The business of the jurist, we are told, is to look at the law as given and to study its day-to-day operations in the courts and administrative agencies. Other considerations are matters for politics, sociology, or ethics; jurisprudence cannot solve the enigmas of justice and injustice, progress and regression, so it should be satisfied to explain the law in terms of an existent

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13. "What is law? If we recognize that a definition is a resolution to use a word in a certain sense, we need not argue as to which is the proper definition of law; we may only ask whether any given definition is consistently followed and whether the meaning of the word used is always clearly indicated. And if we view definitions as attempts to state briefly the essential nature of any actual or historic object such as the law, we must recognize that a diversity of such definitions is possible because different writers are concerned about different parts or aspects of it." (p. 2).

"If we ignore the facts of actual historic usage, a definition is a resolution to use a word as a sign or symbol for a certain object and involves no necessary assumption that the object exists in nature." (p. 67).

"Regard . . . for common usage is a counsel of prudence or practical wisdom." (p. 67). "The meaning that words acquire in common usage becomes generally habitual and Humpty Dumpty's notion that we can by the fiat of arbitrary definition make any word denote anything we please, is far more vain than most New Year's resolutions to change our habits, since it is hard for any writer or speaker to change also the habits of his readers or hearers." (p. 167). "Definitions . . . can help us to grasp more clearly the fundamental ideas or patterns in any field of study and thus serve to create a definite point of view or perspective for the organization of our subject matter. In this respect some definitions are more helpful than others." (p. 68).

14. "But mobility has a polar aspect that suggests its *inner meaning*. Not all movement wins regard." (p. 67) (*Italics added*). Doubtless all that Cahn intends to say is that *his* meaning of the term is a qualified one; that he is referring to mobility towards approved destinations.

"The romantic school came somewhat closer to the meaning of freedom." (p. 52). Again, I think all that Cahn intended to say was that the romantic school came closer to that point at which Cahn deemed it desirable to place the boundaries of social restraint.

". . . [T]he *search* for the *meaning* of justice appears to have been given up." (p. 11) (*Italics added*). Evidently Cahn has in mind that what has been given up is the careful attempt to determine (a) which specific legal arrangements will further the particular objectives deemed desirable or just, and/or (b) which objectives should be selected for this purpose.

going concern. It should describe, but not attempt to evaluate".<sup>15</sup> In the same way, Cohen (pp. 78-9) attributes to "the younger American jurists" who adopt Holmes' famed definition of law (the one in terms of predictions of what the courts will do) a failure to concern themselves with the problem facing the court rather than the counsellor; *i.e.*, "the problem of the court is not to predict what it will do but how the case should be decided" in the light of consistency with generally recognized principles (p. 79). They allegedly neglect the Ought for the Is. And yet it is obvious that Holmes' definition did not prevent him from recognizing, examining and discussing the "Ought"—even though such considerations would have to be given a label other than "law". And it is equally obvious that the "younger American jurists" referred to have been at least as active as their brethren in concerning themselves with what the law ought to be, that they are quite aware that judges' decisions embody some "ought" and that their concern for the separation of the Is and the Ought is for such separation only *during* the process of examining the Is.<sup>16</sup> This is exactly the kind of separation for which Cohen himself argues forcefully at several different points in his book. In other words it seems to me that both Cahn and Cohen have set up something of a straw man.

With the "principle of polarity" the name of Morris Cohen is often associated—and the application of it in the present book is not dissimilar to one aspect of Cahn's approach. Cohen advises "trying to save the truth in opposing views by drawing the proper distinction which enables us to harmonize them." (p. 65) He criticizes the viewing as either opposites or identities, of law and justice, fact and theory, logic and experience, and other such couplings, as well as the tendency to ignore one at the expense of the other (pp. 1-8, 15, 142-3).<sup>17</sup> He constantly counsels examining all the opposing factors, avoiding half-truths, seeing that easy generalizations are appropriately qualified. He had pointed out many years before, that "the function of intelligence is not only to recognize but also to evaluate opposing forces, and to determine their resultant with the highest attainable accuracy. Only in that way can we, in part at least, mitigate the perpetual and cruel swing from one extreme error to its opposite."<sup>18</sup> So too Cahn in explaining his choice, as chapter-headings, of Justice and Power, Freedom and Order, Security and Change, points out (p. 2) that the "life of any re-

15. See also p. 128.

16. See, *e.g.*, McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 *YALE L.J.* 827, especially 834-6 (1941).

17. An extension of this point of view, including its application to philosophic perspectives in general is eloquently presented in the recent article by Morris Cohen's distinguished son. See F. S. Cohen, *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238 (1950).

18. COHEN, *LAW AND THE SOCIAL ORDER*, vii (1933). See also the following in his *REASON AND NATURE* 426 (1931): "Universality and individuality, justice and the law, the ideal and the actual, are inseparable, yet never completely identifiable. Like being and becoming, unity and plurality, rest and motion, they are polar categories. Deny one and the other becomes meaningless. Yet the two must always remain opposed."

flective undertaking has been shown to consist in the clash and conflict of hostile principles; i.e. in the persistent antitheses of the particular field. The collision of force with opposing force is what sheds flying sparks of illumination. That is why the ideal is habitually set off against the positive, identity against time, the free against the determined, reason against passion."

A final basis for comparison is the fundamental ethical theory of the two authors. The outlines of Cohen's position are quite clear: (1) The ethical ought is to be distinguished from the is, and cannot logically be deduced from the latter (since an ought-conclusion cannot logically be deduced from premises containing no ought) (pp. 6-7; 179). (2) The usual ethical maxims (e.g. equality, giving each man his due, etc.) are too indeterminate or ambiguous to be very valuable (p. 7, 21-2). (3) The values and interests to be compared and harmonized are incommensurable; we not only lack a common denominator for the different values or interests but we do not regard every individual's interest on the same basis (those remote in time, space, social group, etc. are normally regarded differently) (pp. 28, 93-7). (4) Even if ethical maxims were not ambiguous, they are not unchanging, but rather exhibit great variety in different times and places (pp. 23-6). (5) There are limitations on the capacity of law to bring about a just social order (e.g., because of diversity of interests between the governing and the governed)<sup>19</sup> (pp. 97-101). (6) In spite of these difficulties it is both possible (p. 181) and necessary (p. 97) to organize logically an ethical system which involves (a) "knowledge of natural causal relations which determine what means are necessary for certain ends,"<sup>20</sup> and (b) "a critical consideration of what is ultimately good or worthwhile and for which we ought to strive. Such a

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19. This had been elaborated in *REASON AND NATURE* (1931) as "the intractability of human materials." (p. 420). Cohen there included in his discussion the lack of necessary knowledge on the part of the legislators and their imperfect power to control judicial interpretation; resistance on the part of the governed to law enforcement in certain fields of human life; the frailties of human officials; and the possibility that an attempt to effectuate an apparently just objective may on the whole do more harm than good. In addition to the intractability of human materials Cohen had listed among the difficulties in evolving a theory of justice, the "indeterminateness of jural ideals" (pp. 415-20), which is mentioned in the text above, and the "abstractness of legal rules" (pp. 425-6)—the inability of the law to depart much from an abstract uniformity in spite of individual differences among the governed.

There is an interesting discussion of the latter point in Prof. Cahn's book (pp. 159-63) including reference to the "reasonable man" standard and the practical leeway afforded by the reactions of juries and officials.

20. The point had been explained in *REASON AND NATURE* as follows (pp. 441-2): "If I wish to preserve my health I must take account of the laws of physiology. But ought I always to preserve my health? That depends on some further assumptions. If I value the safety of my country, my family, or my own creative artistic activity, I may answer in the negative. And so, ethics may be viewed as dealing with hypothetical imperatives which condition a rationally coherent plan of life. Such a science directly enlightens us only as to necessary means, but in so doing it clarifies the choice of ends by showing what is involved in such choice. We can better decide what road to take if we know what we can reasonably expect on the way. While, therefore, rational science can-



system may be called a rational art rather than science." (p. 181). (7) Such a system will enable us to determine whether we are "mistaken as to what ends we really think worthy of achievement", and "we can make progress at least in the clarification of our ideas." (pp. 90, 91). (8) The foregoing necessarily means a rejection of any *absolute* standards unrelated to the postulated needs of the particular society. "To kill the patient in order to follow the rules of hygiene is no more absurd than to ruin a society for the sake of observing a supposed rule of justice. Even the divinely ordained Sabbath was made for man, not man for the Sabbath." (p. 101).

Note the limited character of the claims for this proposal. Cohen knows there is a role for science in the field of *instrumental* oughts in 6 (a) above—*i.e.* in verifying whether a particular ought will in fact achieve a particular desired end—but that the determination of the *ultimate* oughts (*i.e.*, what these desired ends shall be) is not a matter of science at all. All that he can say of this determination is that it demands a "critical consideration" (and presumably it should pay some heed, in a democratic society, to *majority* feelings and needs in the matter.) This is a matter of "free" choice rather than scientific evidence; nor are we able to make the choice between competing ultimate oughts (*e.g.*, economic vs. spiritual values) on the basis of any common denominator of ultimate oughtness. It is possible, however, that "ethical judgments can be verified if applied to long spans of human experience." (p. 181).

Professor Cahn would, I think, agree, in spite of indications here and there which might suggest a more absolutist position.<sup>21</sup> Certainly he recognizes

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not give us absolute moral rules, it is, like mathematics, inherently applicable to the actual world."

21. Thus, in observing that "the aspect of equality" in the sense of injustice "shows itself in the proposition that no human being, however exalted, may lawfully cause the death of an unoffending neighbor, however insignificant, even to save his own life." (p. 29), he cites the famous case of *Queen v. Dudley*, [1884] 14 Q.B. 273, where seamen were convicted for the murder of another whom they devoured because of hunger, and also *United States v. Holmes*, 26 Fed. Cas. 360, No. 15, 383 (C.C.E.D. Pa. 1842), where the homicide conviction was for throwing people overboard in order to lighten the load on a leaky boat. The following observations seem pertinent here: (1) As Cahn notes elsewhere (p. 118), the death sentence in the *Dudley* case was commuted by the Crown to 6 months imprisonment. (2) The grand jury refused to indict Holmes for murder, but indicted for manslaughter carrying a maximum penalty of 3 years, and he was sentenced to only 6 mos. (having waited 8 mos. in jail). (3) Stephen, in 2 *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 108 (1883), after referring to the situation involved in the *Holmes* case and to the classical hypothesis of two drowning men struggling for a plank which can support only one, says "it is impossible to suppose that the survivors would be subjected to legal punishment." (4) The *Holmes* court seemed to think the homicide could be justified if lots had been drawn as to who should go overboard. I mention these considerations to show the highly ambiguous and controversial character of such a standard as the above "equality" standard—and that Cahn's use of it without explicit recognition of such character in this context might suggest to some an acceptance of an illusory absoluteness. But as indicated in the text above, the conclusion would be unfair.

*Cf.*, however, the discussion (pp. 113-14) of the Willie Francis double electrocution

fully both the relativity and indeterminacy of the ethical ideals which he finds suggested by the sense of injustice (equality, desert, dignity, conscientious adjudication, containment of government within its proper functions, fulfillment of common expectations). The kind of rationalistic calculus suggested in 6 (a) above for Cohen's position is not foreign to Cahn's "sense of injustice" for he is using that phrase to represent "an indissociable blend of reason and empathy. It is evolutionary in its manifestations. Without reason it could not serve the ends of social utility, which only observation, analysis, and science can discern. Without empathy, it would lose its warm sensibility and its cogent natural drive. . . . Is the sense of injustice right? Certainly not, if rightness means conformity to some absolute and inflexible standard. . . . Blended as it is of empathy and reason, its correctness in particular cases will vary greatly, for how can we know that the intellect has understood and that projection has comprehended every last relevant factor?" (p. 26). " . . . [T]he sense of injustice may be and frequently is applied mistakenly. And even when its exercise is correct according to the measure of the known facts, certain critical data may not be known or may not yet exist to become susceptible of knowledge. . . . But . . . we can slowly learn to record some of the habits of its vicissitudes and to manipulate them with cumulative craftsmanship." (p. 184)

Thus, while both authors are more concerned with the normative than the existential aspects of law, and while both may be described as ethical relativists, Cohen's emphasis is on logical *system* and the power of *reason* which must be brought to bear on our moral impulses. Cahn's emphasis is on that "inner conviction" (p. 26) which suffuses the moral impulses, but which, he recognizes, stands subject to rational correction and systemization. In exploring, with flashing insight and beauty of phrase, the part which those impulses play in our law and the ways in which they may in turn be affected by the law, he has written a book which the author of *Reason and Law* could have endorsed. That, to me, is praise of the highest.

SAMUEL MERMIN†

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case, *Louisiana v. Resweber*, 329 U.S. 459 (1947), where Cahn explicitly recognizes the fact of controversy among the justices, and asserts that the court "failed" by making too low an estimate of its role as educator of the sense of injustice. But a consistent theory of justice which considered not only the psychology of retribution but also the psychology of deterrence might sanction the second electrocution. So, too, Cahn's point that the sense of injustice revolts against different treatment for five different violators of the same legal standard (p. 14) is not correlated with the point recognized later (p. 111) that penal theory may be directed toward achieving "reformation of the criminal by preparing him for a new existence of social usefulness." *I.e.*, modern notions of *individualization* of punishment run counter to the idea that "as human integers, men are indistinguishables." (p. 15). Thus, a rational theory as distinct from an emotional response (though the reformation objective may not be wholly free from "emotion") makes debatable this "fixed star . . . of an anthropocentric jurisprudence: [that] nature has made man a prime which positive law cannot justly differentiate." (p. 15).

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THE GROWTH OF AMERICAN LAW. By James Willard Hurst, 1950, Boston. Little, Brown & Co., pp. xiii, 502. \$5.50.

THIS is a work so broad in scope and so new in concept as to make categorization and description difficult. It is the first of a contemplated multi-volume series under the general heading of its title, with the particular sub-heading "The Law Makers" for this volume. The "law makers" are constitutional conventions, legislatures, judiciaries, executives, and the bar.

If we take the publisher's word for it, this is a legal history. But it is not a legal history in any conventional sense. The development is not chronological, and the emphasis on modern or contemporary description is heavy. At the same time, it would be misleading to describe it as a survey of the modern scene. Summation can be put in two ways: This is a historical description of American legal institutions, with heavy weight on events of the past 30 years; or, this is a description of contemporary American legal institutions, with real historical depth and perspective.

Statements of an author's fundamental theory are sometimes given in a preface, sometimes in a conclusion. Hurst has chosen the latter, and there he accepts the theory of John Calhoun ("our only first-rank political thinker of mid-nineteenth century"), that "[T]he central job of law was to bring power into balance sufficiently so that particular blocs could not run roughshod over other interests in society." Hurst continues, "At one time or another law in the United States dealt with tensions that traced to differences in religion, race, color, and social class. But no factors bore so powerfully upon the legal order, or so much shaped its problems, as the main currents in the growth of the economy." Operating with this principle, he states his own thesis: "To trace the manner in which legal institutions had dealt with the resulting tensions in one field of public policy after another was the central theme for legal history in the United States. To that theme this volume forms an introduction."

Hurst's work is, as he puts it, "not a study made chiefly from original sources. . . . The general purpose is to interpret already available, but generally scattered materials." And yet description in terms of secondary materials or in terms of such familiar institutional structures as bench or bar may sell a good book short. This is no conglomeration of the kind of facts that political science texts might cluster around such labels as "the judiciary." It is social history and description with appraisal and criticism. No reader will escape substantial new information or substantial new ideas<sup>s</sup> from the volume as a whole; and very few readers will be so expert even on one of the subdivisions as to learn nothing from the particular parts with which they are most acquainted.

In short, Hurst has created a genuinely new work. A check with some of my brethren more familiar than I with the literature on constitutional conventions and courts shows that there is no close approximation of the description Hurst gives of those institutions. The legislative and executive branches have been the subject of such extended discussions elsewhere that

Hurst subordinates their combined treatment here to less than a quarter of his book. The novelty and scope of the bar section will appear from the discussion below.

Hurst's sources are secondary, as he says, but they are also certainly "scattered," and oftentimes are obscure. A random opening of the volume, for example, shows a two page excerpt on lawyers' incomes. The supporting bibliography actually used in that two pages is 13 works, including nine biographies, one firm history, one treatise, one law review article, and one government survey. (For ease of reading, all references are neatly accumulated in a 20 page pile at the rear of the book so that he who wishes may ignore them.)

Neither Hurst nor his publisher tells us what audience is contemplated, probably because the work is sufficiently novel so that they didn't precisely know. It is well written, and reads easily and quickly. The bar, generally, can enjoy it; Hurst himself uses it as a text in American legal history course; and I have used it for the same purpose. Professor Van Hecke of North Carolina is planning to assign it in the first year "introduction" course, and the book should have great usefulness for this now almost universal part of the curriculum. Correspondence with teachers about to begin courses in legal history shows that the existence of this general text is stimulating the development of American legal history as a distinct and separate study.

There is not space in a book review for profitable survey of a work which ranges so widely, and, certainly without derogation of the remainder, I may be able to suggest the flavor of the whole by concentrating on a few thoughts occasioned by one section. For my students and for me the most interesting part of the volume is that third of the book on the bar. The outline of that section is appended in the note.<sup>1</sup>

Hurst's discussion is both descriptive and critical. The account of the growth of bar associations, for example, is no song of praise, though it is not as severely descriptive of some American Bar Association activities as

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1. Hurst's outline of the bar chapters is as follows:

Chap. XII. The Character of the Lawyer in United States Society

1. Popular attitudes toward the bar.
2. The place of the bar in the social structure.
3. The distinction of a professional education.
4. Standards of admission to the bar.
5. Bar associations.

Chap. XIII. The Uses of the Bar

1. The types of law practice
  - (a) The subject matter of law practice.
  - (b) Lawyers' skills.
2. The economics of the legal profession.
  - (a) The size of law firms.
  - (b) The overhead cost of legal service.
  - (c) The division of labor at the bar.
  - (d) Lawyers' Incomes.
  - (e) The "Overcrowded" bar.
  - (f) Lay competition for law business.
  - (g) Ethics and economics.
3. Social functions of the bar
  - (a) Individual and corporate contributions.
  - (b) Social Inventors.
  - (c) Master of fact.
  - (d) Administrators of social relations.
  - (e) The bar as a source of leadership.
  - (f) Symbol makers.
  - (g) Lawyers as a pressure group.
  - (h) The working philosophy of lawyers.

would seem to me warranted; the description of the "overcrowded" bar also includes an account of the legal work which society needs but which is never done; a history of legal ethics highlights the manner in which ethics have served our pocketbooks.

One comment on legal education in this section on the bar is worth quoting because it reflects the theory of the whole book. Hurst observes that "Langdell contributed greatly to legal education", and fairly documents his point; but he goes on to score the "narrowness" of Langdell's methods: "The radical defect of the case method, when it was treated as a self-sufficient principle on which to form a law curriculum, was that it isolated law study from other threads in the pattern of United States society. Corollary to this root defect, Langdell's method involved grave limits when it was considered simply as technical training for the practice of law." The legal training of John Quincy Adams, described by Hurst with reference to his readings, had some long advantages over a good deal that schools have offered since. Presumably Hurst wants his book to add some wholesome 18th Century balance to 20th Century unduly case-focussed education.

The Hurst chapters on the bar are unquestionably the best synthesis available on this subject. They therefore underline the limited amount of material available about the profession.

There is real paradox here. Ours is a paper-using profession. Call us what you will—the inheritor of the tradition of the village letter writer; the "precision artist with words", to quote someone; long-winded old gas-bags on paper, if you want to take another view of it. We are a profession specially trained to "make a record". Yet while we make the records for the commercial community, we do not make them for the profession itself.

Each lawyer can put the matter to the test in his own experience. Take, for example, the very questions Hurst tries to answer, and apply them to any community: exactly what do lawyers do in the course of making a living? Do they handle property transactions, commercial matters, government business? What abilities are most in demand? How large are law firms? What are the incomes of the profession, and how are they distributed? How is the bar regarded by the community, and why? What socially useful services does the bar perform, and where are its greatest failures and successes? Today's lawyer has some knowledge on each of these matters in his own geographic area; but how much will an historian in the year 2050 be able to discover about the role of the bar in the life of the society of our own times?

Hurst's work demonstrates that the sources of history of the bar are so limited that it is unlikely that we will ever have information on a number of subjects. Take, *e.g.*, the controversy over the respective merits of an appointive and elective judiciary. Lawyers commonly have strong opinions as to the respective merits of each. Evidence is not available on which exponents of either view can actually prove their point. When one is through

ticking off a few judges or a few episodes, satisfactory or unsatisfactory, under each system, he is pretty well out of information.

This is no mere matter of antiquarian's regret; it means that we have let a century of experience be wasted, thus losing the benefit which experience might lend to judgment. One of the recurrent themes of Hurst's book is that with legal institution after legal institution, one state follows another without either an attempt at or a basis for intelligent choice.

We are, of course, improving the sources of knowledge. We are not leaving 2050 as dependent as 1850 left us on fat-backed, flossy-papered glorifications of "The Bench and Bar of . . .", or on the necrologies and memorial services which, it must be conceded, have not greatly improved in the century past. We make more and more studies of current bar problems; more and more biographies, surveys, and statistical compilations. The superb reports of the Administrator of the United States Courts, for example, are at least giving us some idea of the extent and nature of federal litigation.

But in one branch of professional self-acquaintance, we make very little progress. Each firm has its own unwritten and uncollected history, which is rapidly being lost in time. Any one such history may be of no great importance by itself; but to the extent that it is part of community or professional history, it may have significance far beyond the individual minutia which make it up. Skilled workmen can put the little facts together to make a significant whole.

The information shortage is illustrated in the Hurst book by the fact that when this author of a general history reports the evidence shown by "the office dockets of leading law firms in a moderate-sized Illinois city at three intervals from the 19th Century on", he has used up all the detailed information readily available on that subject for the entire Mid-West.

There are some published firm histories. As Hurst fairly says, Swaine, *The Cravath Firm*, "stands pre-eminent for its rich sources on the flow of business through a great, busy law office of the 19th and 20th Centuries", and he has used it freely. At the same time that the value of the Cravath work for reference purposes is conceded, its loneliness in the field is accentuated. Hurst perforce cites it eighteen times, and has nothing comparable to use as a source.

This is not the place to assess the strengths and weaknesses of particular firm histories, which can unquestionably range from high value to near worthlessness. The central point here is that the use to which Hurst has put the Cravath work (despite its substantial limitations) shows how a firm history can, for its good qualities, be brought into the general stream of historical literature.

Both for themselves, and to permit further general writing in American legal history, we need more firm histories. Many materials are available, though space problems have of course forced destruction of many records. The problem of maintaining proper respect for privacy is not greater than

in other branches of detailed economic and social history. Three steps are in order:

1. Firms with rich histories, either on dissolution or from time to time, ought to turn quantities of their records over to libraries. Whenever possible, a sifting job ought to be done by the firm and the library at the moment of transfer to reduce collections to manageable size. The organized bar might well set up small historical committees, charged with the duty of searching out manuscript collections for historical societies, a project which Hurst is now promoting in Wisconsin for the State Bar Association and the State Historical Society.

2. Public spirited firms ought to publish, in book or article form, histories of their own. Since for such firms the expenditure of time may be an even greater handicap than the expenditure of money, experiments should be made by firms to create research scholarships, appropriately guarded to insure scholarly standards, whereby collaborative work might be done on the history of the donor firm. Hower, *The History of an Advertising Agency* (1949), a work done in collaboration with the Harvard Business School, shows the use of this technique in a related field.

3. The universities ought to encourage graduate students to write theses in this field.

Needless to say, this is not an adjuration to scholarly advertising, to pompous glorification, or to dreary recitals of how partner A begat partner B begat partner C, and so on. If these works are to take their place among real sources of American history, they must answer questions worth asking. One of the uses of Hurst's work is in the implicit suggestions it can give someone undertaking a firm history.

Professor Hurst is at work on the outstanding original research now under way in American legal history—studies in the legal and economic development of the Mid-West. He interrupted those studies to prepare this volume, bringing the talents of scholarship to an original discussion of American law. He presents the first integrated discussion of his subject in a manner which should prove of substantial value to students and the bar.

JOHN P. FRANK†

FEDERAL PRACTICE AND PROCEDURE WITH FORMS. Rules Ed. Civil and Criminal. By William W. Barron and Hon. Alexander Holtzoff: St. Paul and Brooklyn: West Publishing Co. and Edward Thompson Company, 1950.—vol. \$70.50.

It is finally possible to review at least one volume of this new treatise which was "announced" last November 14th. The set was originally supposed to contain "five or more volumes,"<sup>1</sup> and it will apparently be "more,"

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1. Inside back cover, 86 F. Supp. Adv. Pt. No. 1 (Nov. 14, 1949).

for the publisher concedes that "it is now definitely certain that . . . [the entire work] will require at least six volumes."<sup>2</sup> How many of these will deal with the rules of civil procedure and how many with the criminal is difficult to tell, but we are promised a thorough treatment of both with an index and forms to boot.

Since this treatise presumes to present "a complete picture of the federal practice under the rules and acts of Congress,"<sup>3</sup> it seems fair to compare it with others in the same field such as *Moore's Federal Practice* and the *Cyclopedia of Federal Procedure*.

Nine hundred sixty-seven pages of text and footnotes are contained in Volume I of the *Barron & Holtzoff*. The first 205 deal with "procedural reform generally," jurisdiction, venue and removal. A comparison of the page coverage of each of these subjects by the *B & H* and the *Cyclopedia* is unfavorable to the former:

	<i>B &amp; H</i>	<i>Cyclopedia</i> <sup>4</sup>
Procedural reform generally	37	265
Jurisdiction	96	682
Venue	38	132
Removal	34	562

The *B & H* treatment of many matters seems overinclined to brevity. Diversity jurisdiction, for example, is disposed of in 69 lines of text which with footnotes cover 7 and  $\frac{2}{3}$  pages.<sup>5</sup> The *Cyclopedia's* handling of the same subject requires 126 pages and is adequate. Students of procedure will note that in this connection the *B & H* states<sup>6</sup> the important rule<sup>7</sup> of *Strawbridge v. Curtiss*<sup>8</sup> without telling the reader where it comes from. The case is mentioned only in a quotation from Mr. Justice Frankfurter's majority opinion in *City of Indianapolis v. Chase National Bank*.<sup>9</sup> And this quotation is used by the *B & H* with two footnotes<sup>10</sup> as an exclusive device to present, without discussion or comment, "the doctrine governing the alignment of parties"<sup>11</sup> as set forth by the Supreme Court. Most practicing attorneys will be disinclined to accept this as wholly sufficient.

To the problem of whose citizenship controls as between real, rather than nominal or formal parties, the *B & H* devotes eight lines of text,<sup>12</sup> correctly

2. Pamphlet accompanying volume 1, signed "The Publishers."

3. Preface, p. ix.

4. Not including at least 150 pages in the pocket supplements on the same subjects.

5. § 26.

6. Text accompanying n. 95 to § 26.

7. Diversity jurisdiction cannot be sustained unless there is complete diversity between all plaintiffs on the one hand, and all defendants on the other; i.e., no plaintiff may be a citizen of the same state of which any defendant is a citizen.

8. 3 Cranch. 267 (1806).

9. 314 U.S. 63 (1941).

10. Nn. 96 and 97 to § 26.

11. P. 59.

12. Pp. 59 and 60.



stating the judicial views on the most common types of cases. But the reader's humor will not be bettered appreciably by use of the terms "class action", "unnecessary parties," and "indispensable parties" when they remain undefined.<sup>13</sup> Nor is any distinction made between true, hybrid and spurious class actions.

Under "Federal Question" jurisdiction, it is said that "[a] federal question is presented in any case in which the correct decision depends on the construction of the Constitution, treaties or laws of the United States or on the validity of a statute or treaty."<sup>14</sup> This is *only* accurate when qualified by the rule that "[t]he existence of a federal question is to be determined from plaintiff's pleading, unaided by any defenses interposed or anticipated." Although this qualification is set out by the *B & H*,<sup>15</sup> it is not nearly so forcefully stated as an inviolate rule ought to be. There is not even any discussion of how it was evolved, and the principal case cited for its support<sup>16</sup> is a *per curiam* opinion itself barren of any reasoning on the point. Moreover, the hurried or harried attorney may be deceived into thinking that as a practical matter the point is ordinarily about as important as the following statement which appears in the text seven lines later: "A case arising under an Indian treaty is within federal jurisdiction."<sup>17</sup> I am at a complete loss to understand this curious emphasis.

Under the heading of venue one of the more interesting practical problems surely deserving treatment is the applicability of the doctrine of *forum non conveniens*. The *B & H* treats this subject in 4 and  $\frac{1}{2}$  pages,<sup>18</sup> of which one third consists of a long quotation from Mr. Justice Jackson's opinion in *Gulf Oil Corporation v. Gilbert*.<sup>19</sup> This case is cited as "An authoritative definition and explanation of the doctrine . . ." <sup>20</sup> (of *forum non conveniens*), which it may very well no longer be. The reader ought to be told in so many words that it was decided before the adoption of the transfer provision in the 1948 Title 28 revision. The alternatives in *Gulf Oil* were (1) hearing the case where it was, and (2) *dismissal of the action*. The latter is no longer an alternative in such a situation, because there is now a transfer provision designed to preclude hardships which may attend dismissal, and this fact may modify the very part of the *Gulf Oil* opinion quoted. Professor Moore's *Commentary on the U. S. Judicial Code* explains all this and more in an 11 page analysis giving an exhaustive background of the new provision.<sup>21</sup> The *B & H* contains no such analysis—only conclusions better drawn by the reader from statutes which ought to be reprinted.

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13. Pp. 60 and 61.

14. Text accompanying n. 64, § 25.

15. Text accompanying n. 72, § 25.

16. *Peyton v. Railway Express Agency*, 316 U.S. 350 (1941).

17. P. 53.

18. § 87.

19. 330 U.S. 501 (1947).

20. P. 166.

21. ¶ 0.03(29).

While it may be that *forum non conveniens* is not the most important thing in the world, it must be conceded that even the practicing lawyer is concerned with the question of what law is to be applied in the federal courts. Since 1938, this issue with respect to non-federal matters has centered about the *Erie* doctrine,<sup>22</sup> which in such cases requires the federal courts to apply state substantive law. It must now be agreed that in terms of judicial interpretation, the *Erie* Railroad has carried *Tompkins* all over the country somewhat in the manner of a derailed locomotive gone berserk. Where it will go next no one knows, but this is no excuse for omitting a record of its previous peregrinations. Nevertheless the *B & H* contains no extended discussion of the *Erie* doctrine in spite of its immense importance. Whether this is because of its complexity or simply oversight I do not know, but the *B & H* contains only scattered and casual references to the fact that this matter or that is procedural or substantive. Compare the *Cyclopedia's* 323 page<sup>23</sup> treatment of this subject; the *B & H* omission then becomes almost as startling as it is uninformative.

#### *The Rules Themselves*

Rules 1 through 16, covered in the last 762 pages of the *B & H*, are probably the least difficult of all the rules to understand. The complicated problems which they pose number exactly three: first, the effect produced on the statute of limitations by the filing of a complaint (Rule 3); second, jurisdictional troubles arising on the filing of a counterclaim (Rule 13); and third, problems of jurisdiction and venue arising under Rule 14 in third party practice. Compare the page coverage of these rules in the *Moore*, with that in the *B & H*:

	<i>Moore</i>	<i>B &amp; H</i>
Rule 3	47	13
13	106	59
14	117	38

One of the less simple problems under Rule 14 is the question of when impleader is available by and against the United States. Professor Moore treats this issue in 9 pages;<sup>24</sup> the *B & H* in only four lines.<sup>25</sup> I infer from these comparisons and a reading of the texts that the *B & H* leaves relatively unexplored some of the problems which are more difficult to handle.

And the *B & H* treats badly two other matters of interest. The appellate review of pre-trial orders, for example, is not discussed at all; Professor Moore devotes 7 pages to it.<sup>26</sup> Moreover, an interesting but only slightly

22. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

23. Not including over sixty pages in the pocket supplement on the same subject.

24. 3 MOORE, FEDERAL PRACTICE (2d ed. 1948) ¶ 14.29.

25. Text accompanying n. 16, § 422.

26. 3 MOORE, FEDERAL PRACTICE (2d ed. 1948) ¶ 16.21.

complicated question under Rule 8(c) is butchered for absolutely no reason. I want to treat it in some detail simply as an example of the cursory treatment accorded matters which may easily be understood with the aid of a little background. The problem is this: does the *Erie* doctrine relieve a defendant of the necessity of alleging and proving contributory negligence, which is labelled an "affirmative defense" by Rule 8(c), where state law requires the plaintiff to allege and prove its absence? If the defendant needlessly raises it as an affirmative defense, he may be saddled with the burden of proving it, under the doctrine of invited error. But if he is required to raise it and does not, he may be deemed to have waived it as an issue. The practical answer to the dilemma is both obvious and correct: the party having the burden of proof on the point ought to have to raise it procedurally. Since burden of proof is "substantive" for the purposes of the *Erie* doctrine,<sup>27</sup> it should fall to the plaintiff to allege the absence of contributory negligence in the federal courts where he would have to do so in a state court. The absence of contributory negligence is part of his cause of action, something like the death of the deceased in an action for wrongful death. Though the proper conclusion is stated well enough in the *B & H*, it is supported with a confusing footnote<sup>28</sup> containing a quotation erroneously described as propounding the same rule, which it simply does not. Rather, it takes the position that the defendant ought always to have to raise the issue, no matter who has the burden of proof. In short, the text is sound and the "supporting" footnote is not. But how is the reader to know? If he were told that the *Erie* case was decided after the promulgation of the rules of civil procedure, he might be able to figure out for himself that the rules were not made up with *Erie* in mind, and that the sensible solution can be reached in spite of the language in the rules. He would also know from such a chronology that the statement in the text that "[i]ndeed it may fairly be assumed that Rule 8(c) was intended to apply only in those cases where contributory negligence is an affirmative defense under the applicable state substantive law"<sup>29</sup> could not possibly be accurate unless the rule-makers were using a crystal ball. And he would finally tumble to the idea that, as Professor Moore puts it, "the *Erie* case calls for a re-examination of the problem of what are affirmative defenses."<sup>30</sup> So much for all this contributory negligence.

So far as the overall treatment of Rules 1 through 16 is concerned, Professor Moore treats in 1118 pages what Barron and Holtzoff cover in 762; in so doing he cites 7355 cases to their 5637 (approximately). The *Moore* seems to me to have a good deal more text in it per page and although the

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27. *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Cities Service Oil Co. v. Dunlap*, 303 U.S. 208 (1939).

28. N. 27, § 280.

29. Pp. 514 and 515, § 280.

30. 3 Moore, *FEDERAL PRACTICE* p. 1687, ¶ 8.27[1] (2d Ed. 1948).

*Moore* pages are physically smaller than those in the *B & H*, absent footnotes both would contain the same number of lines (45).

*Certain Other Matters*

There is one thing about the *Barron and Holtzoff* which makes it truly an astounding work: in spite of the fact that it has been advertised as "completely new [and] . . . personally prepared by outstanding authorities,"<sup>31</sup> its footnotes in countless instances consist of nothing but reproductions of headnotes taken (oddly enough) from the publisher's standard reports. In some instances the headnotes have been doctored to make better sense by removing phrases such as "with respect to first cause of action" and others of similar heavy import, but often they are just quoted verbatim. Where this is done, of course, the footnote is *exactly* as reliable as the headnote. Following are some of the footnotes and headnotes arranged so that the discerning reader can detect the similarity. I have made no attempt to track down all of the recidivistic elements lurking in this volume, but I have no reason to believe that they are not scattered throughout.

*Barron & Holtzoff*

Footnote 29, p. 667:

"Where question of whether banks and realty companies were indispensable parties, because of certain agreement, might well depend upon surrounding circumstances, and where because of such uncertainty, and other issues raised by pleadings giving rise to factual issues, it would be more equitable to have a hearing on the merits before deciding such issue, motion for dismissal of complaint because of failure to join such banks and realty companies would not be granted. *Van Kirk v. Campbell*, D.C.N.Y. 1947, 7 F.R.D. 231."

*Headnote to case cited*

Headnote 6:

"Where question of whether banks and realty companies were indispensable parties, in respect to first cause of action, because of certain agreement, might well depend upon surrounding circumstances, and where because of such uncertainty, and other issues raised by pleadings giving rise to factual issues, it would be more equitable to have a hearing on the merits before deciding such issue, motion for dismissal of complaint because of failure to join such banks and realty companies would not be granted. Federal Rules of Civil Procedure, rule 12(b)(6), 28 U.S.C.A. following section 723c."

See also identical text in 31 Federal Digest, part 3, 1950 supplement page 62.

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31. See inside front cover, 86 F. Supp. Adv. Pt. No. 1 (Nov. 14, 1949).

## Footnote 86, p. 797:

Where patent action involved use, manufacture or sale of stabilizers by customers of defendant who defended the action, defendant's action for use, manufacture or sale by plaintiff of stabilizers which allegedly infringed defendant's patent did not arise out of the "transaction or occurrence" so as to require that defendant set up his counterclaim in plaintiff's action. *Clair v. Kastar, Inc.*, C.C.A.2d, 1944, 138 F.2d 828."

## Footnote 28, pp. 809 &amp; 810:

"An informer's qui tam action under 31 U.S.C.A. §§ 231-233 and former § 234, being remedial and seeking restitution to the government of money taken from it by fraud is not subject to Rule 13(a) (b) permitting a counterclaim against the opposing party notwithstanding the withdrawal of the government from the action, since to permit such a counterclaim would be a strong deterrent to genuine informer's actions and since to permit a counterclaim would be contrary to public policy. *U. S. ex rel. Rodriguez v. Weekly Publications*, D.C.N.Y. 1947, 74 F. Supp. 763."

## Headnote 5:

"Where patent action involved use, manufacture or sale of stabilizers by customers of defendant who defended the action, defendant's action for use, manufacture or sale by plaintiff of stabilizers which allegedly infringed defendant's patent did not arise out of the "transaction or occurrence" so as to require that defendant set up his counterclaim in plaintiff's action. Federal Rules of Civil Procedure, rule 13(a), 28 U.S.C.A. following section 723c."

See also identical text in 51 Federal Digest, 1950 supplement page 117.

## Headnote 3:

"An informer's qui tam action being remedial and seeking restitution to the government of money taken from it by fraud is not subject to the federal rule permitting a counterclaim against the opposing party notwithstanding the withdrawal of the government from the action, since to permit such a counterclaim would be a strong deterrent to genuine informer's actions and since to permit a counterclaim would be contrary to public policy. 31 U.S.C.A. §§ 231, 232; Federal Rules of Civil Procedure, rule 13 (a, b), 28 U.S.C.A. following section 723c."

See also identical text in 31 Federal Digest, part 2, 1950 supplement page 70.

It does not seem unfair to conclude that this reproduction is a direct consequence of the fact that (as the publishers put it): "The editorial staff of the U. S. Code Annotated has lent its exceptional facilities and experience to the authors, enabling them to examine, with the utmost thoroughness, every pertinent decision on every phase of the law."<sup>32</sup> I have an idea that one of two things is true: either the staff lent a good deal more than its "facil-

32. See inside back cover, 86 F. Supp. Adv. Pt. No. 1 (Nov. 14, 1949).

ities," or Mr. Barron and Judge Holtzoff have been surreptitiously head-noting cases for the West Publishing Company for quite a while. Which ever happens to be the case (I incline to the former interpretation), the fact remains that a lawyer who has previously subscribed to the reporter systems and the Federal Digest is now being asked to pay for the same thing, or part of the same thing, the third time around. This may be a charm, as the saying goes, but it can become *awfully* expensive.

There are many other features about this book which fortunately are as rare as they are undesirable. The table of contents, for example, has no page numbers on it. This is a unique feature in my limited experience. The table in fact is only a guide to chapter headings, and the point at which each chapter begins must be discovered by leafing through the pages. Once you have found the lead page in the chapter, you have also stumbled upon a section-by-section breakdown of the subject matter; but the page numbers are again withheld with a kind of exasperating and promiscuous coyness making the whole thing a sort of seventh veil proposition. Should the reader play the game all the way and find the page on which the discussion of any given rule is commenced, he may also find a footnote dealing with prior amendments to its text; but he will search in vain for anything resembling Professor Moore's step-by-step history of each rule from its inception.

Another undesirable feature is that of calculated citation restriction. Except in Supreme Court cases and those in the bankruptcy field, the reader is cited only to the publisher's reports (Federal Supplement, Federal Reporter, and Federal Rules Decisions). So far as I can determine, the Callaghan Company's excellent Federal Rules Service is never cited except where the matter cannot be helped, as in cases where a report or summary of the Advisory Committee, containing such citations, is itself quoted. This is a rank disservice to those who are sufficiently careful about federal procedure to use the Rules Service, for they need seldom seek case material anywhere else. It is fast, printed weekly, and in one place collects cases which can otherwise be located (at least in my own experience) only in a volume which is invariably being used by someone else seeking the "substantive law."

All in all, the *Barron and Holtzoff* seems to me not to be a treatise at all, but rather a collection of rules, excerpts, phrases, and statements which mark it as a combination digest and handy practice manual. I do not see how it can properly be cited by the judiciary as representing an extensive and considered summary of existing law, let alone proposed changes, because the background material and thoroughgoing discussion which should characterize a treatise are not complete. Put differently, the text is often arbitrary in its conclusions rather than explanatory. Compare *Moore's Federal Practice* as a general proposition. I believe that the *B & H* contains very few erroneous statements in the text itself; its faults lie instead in what

might be analogized to nonfeasance rather than misfeasance. Unfortunately, the reader must be extremely cautious about accepting any flat statement in the text as wholly accurate without doing some scouting around for qualifications which may be several pages away. And if he happens to be looking for supporting cases, he is not likely to find as many in the *B & H* as he would in the *Moore* or the *Cyclopedia*.

Mr. Barron and Judge Holtzoff have been leaders in the revision of the criminal code. The field is more open for contributions there than is the field of civil procedure. It is to be hoped that this factor will lead the authors closer to a degree of perfection in some of the many subsequent volumes.

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