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Book Review. Cases on Modern Pleading by Charles E. Clark

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As for Poynings' law, which made both the holding of a parliament and the introduction of legislation subject to the king's consent, the authors advise us not to "look for subtle motives." Henry VII was simply concerned to bring order into "his land of Ireland, among those that are called wild Irish," and to render void any attempt by a pretender to his throne to possess himself of that land. Though the results were far-reaching, they lay in the future and were probably not foreseen.

It would be ungrateful to ask for more from a book which gives so much, but more than once the detailed and documented description of developments leaves the reader wondering what, in the authors' view, are the reasons for these developments. A case in point is the role of the proctors of the lower clergy. In contrast with proctors in the English parliament, they appear late but continue to be regular members of the Irish parliament, and their attendance is as full at the end as at the beginning of the fifteenth century. The nearest we come to an explanation of why the proctors did not "coalesce with the knights of the shire and the burgesses" is because "they did, in fact, remain a small and separate 'house' "; because of "the way in which representation of the lower clergy arose" (i.e., if a bishop were not summoned, it was "not to be expected" that the lower clergy of his diocese would be represented); and because the "proctors were regarded as representing a special and limited interest." Perhaps the evidence, strictly construed, will not allow a more explicit answer.

But this is no criticism of what the authors have either intended or accomplished. Rather it expresses one reader's hope that they will now produce a history of the medieval English parliament and, giving freer rein to their opinions, will give us the full account which they are so admirably qualified to write.

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CASES ON MODERN PLEADING. By Charles E. Clark, assisted by Charles Alan Wright. St. Paul: West Publishing Co., 1952. Pp. xl, 1042.

For half a century, legal journals have been publishing comments highly critical of law school efforts to teach civil procedure. Everyone, it seems, has a solution for the pedagogical problems involved, and almost everyone can be persuaded to incorporate his ideas into a casebook. Thus, the year just past saw the publication of three entirely new casebooks on pleading. In addition, the publishers have now presented us with a substantial revision of Judge Clark's well known casebook, which represents his most recent effort to facilitate the proper teaching of pleading problems.

The key to the present work is found in the addition of the word "modern" to the earlier title. Judge Clark says in the preface that he believes a student should learn procedure as it exists in the court room today, and, with this objective in mind, he has effected an extensive revision to eliminate material dealing with some of the older historical anomalies. Particularly noticeable is the omission of the entire chapter on the early development of equity jurisprudence. Also omitted is the trial record which formerly introduced the course. Along with the excision of these older materials, he has carried out a thoroughgoing reorganization of the remainder. All the cases and materials on the complaint are gathered together and presented seriatim, although the formal separation of complaints in tort, contract and equity is continued from the second edition of his work. Similarly, all cases on the answer are found in a single chapter which follows the materials dealing with the complaint and precedes those on the reply. This revamping permits the teacher to present the cases on pleading in a logical order.

After pleading proper, there follows an excellent chapter on pre-trial devices—discovery, summary judgment and pre-trial conferences—which is almost entirely new. The next one hundred and twenty-five pages, devoted to the relationship of pleadings to the trial, include the difficult problems involved in the right to jury trial and the burden of proof. The rest of the book deals with joinder and party practice. Throughout, the book has been brought down to date by the addition of recent cases and new editorial comments.

I suppose the evaluation of any casebook must be made with reference to the objectives the teacher hopes to attain. There are at least two such objectives. First and foremost, the student should get from a course in pleading a sound understanding of existing procedural rules governing legal controversy. Secondly, the student should be provided with a sufficient background to enable him to evaluate and criticize those rules. To borrow Professor Sunderland's happy phrase, the student should become a "procedural iconoclast."

This book substantially meets the first objective. It contains instructive notes as well as leading recent cases, especially those interpreting the federal rules. The skillful selection and arrangement of the materials are simply what one has come to expect from the leading scholar and writer in the field. Praises of Judge Clark have been sung so often and so well that it seems pointless to add another voice to the chorus. All of this praise is well deserved, and it is, therefore, with regret that I must add a discordant note or two. While I agree with the editor's basic thesis that it is possible to teach modern pleading to students who have not first been indoctrinated

with common law procedure, I am not in complete agreement with the implementation of that idea.

Judge Clark states on p. 35 that in "modern pleading the main question usually concerns the degree of generality of statement. . . ." The problem of specificity in pleading remains important because the rule that the pleading cannot contain "conclusions" is still followed in a number of states. I doubt if a student after using this book will be capable of distinguishing "ultimate facts" from "conclusions of law" or "evidentiary facts," even theoretically. Perhaps there is some value in pointing out that the question of specificity exists, and in concluding, as the author does on page 106, that ". . . the amount of data or the detail of the allegation will be as much as the pleader thinks necessary to support his hypothesis, but not enough to tie his hand against future exigencies of proof." This generalization, however, is scarcely helpful to a student faced with the practical task of drafting a pleading. While taking the course he will reach for an aspirin, but thereafter he will seek his panacea in the form book.

My major disappointment with this book is the treatment accorded certain of the rules governing party practice under the federal rules. There is no suggestion in the notes that the "category" approach of Federal Rule 23, governing class actions, is open to improvement. While a quotation from Professor Chafee is included, there is no mention of his exceedingly able critique of the draftsmanship of this rule. Similarly, the intervention rule is referred to as "liberal" although it is of this same objectionable category type. In the section on compulsory joinder, since the editor presents one case holding that the missing parties were not "indispensable," it seems unfortunate that there is no editorial comment indicating the generally unsatisfactory rationale of this rule, now so firmly embedded in federal procedure.

There are always troublesome problems in apportioning the pages available in a casebook among the topics to be treated, and, accordingly, my dissent from the author's judgment may not be surprising. I do not believe that the subject of the "common count" is worth the space devoted to it, and the allocation of fifty pages to the "real party in interest" seems sheer extravagance. Furthermore, while it is sound pedagogy to include, as was done, a section on the relationship between pleading and proof, I doubt whether a teacher will have sufficient time to teach the really difficult problems of proof presented by the cases.

Turning to the second objective, the casebook is eminently satisfactory. The student learns at the beginning of the course and is reminded in the last chapter that rules of procedure require constant overhauling and revision. He is given no opportunity to entertain the belief, said to be held by

common law judges, that a rule of procedural law should be as finally decisive of a case as a rule of substantive law. Quotations from Clark are heavily relied on, but this is as it should be. Judge Clark has developed and ably defended a philosophy of procedure. Let the teacher who disagrees point out to his disciples such heresies as he may find.

Any book on procedure produced by Judge Clark deserves the respectful attention of the profession. The ultimate test of any casebook is, of course, its success in the classroom, but I am confident that this book will prove to be a worthy successor to its well-thumbed predecessors.

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NOTED

AMERICAN PIPE LINES. By George S. Wolbert, Jr. Norman, Oklahoma: University of Oklahoma Press, 1952. Pp. xi, 179. $3.50.

Ownership of American oil pipe lines is concentrated in the hands of twenty-two "major" companies. In recent years there have been strong and persistent demands for vertical disintegration of the oil industry, and more specifically, there has been pressure to divorce the pipe lines from the "majors." The author first presents a history of the development of the industry leading to present practices and ownership patterns, including details of the engineering and business aspects of pipeline operation. Against this background he treats the various allegations of restraint of trade and monopolistic practice. The analysis is objective and makes careful distinction between fact and argument. The rest of the book is devoted to outlining the remedial devices thus far employed by the Interstate Commerce Commission and in anti-trust decrees. The author concludes that divorcement of the pipe lines alone would not remedy the evils complained of, and that federal regulation should be continued under the Interstate Commerce Commission. But pending a careful evaluation of more comprehensive studies of the petroleum industry than are currently available, he favors the interim device of regional anti-trust suits by the Justice Department in those areas where the lack of effective competition indicates abuse.

COMMENTARIES ON THE CONSTITUTION, 1790-1860. By Elizabeth Kelley Bauer. New York: Columbia University Press, 1952. Pp. 400.

Some knowledge of the lives of the men who write law books assists in humanizing the law. With this in mind the author has devoted almost half her text to biographical sketches of the thirteen lawyers and judges who published constitutional commentaries prior to the Civil War. Placed in