BOOK REVIEWS

FEDERAL PROCEDURE. *Stanley F. Brewster. Callaghan & Co., Chicago, Illinois. 1940.*

This is an addition to the National Text Book Series, which be of value to student, instructor and the young lawyer preparing for admission to practice in the United States Courts. The frank and modestly expressed purpose of the author is to provide a simplified text for law students.

Professor Brewster is impressed with the debatable theory that to acquire a practical understanding of the new federal rules, one must have a fundamental knowledge of law and equity procedure obtaining in the federal courts prior to the adoption of the rules. If this is correct, the student would be confronted with the impractical task of learning the rules of practice governing law in every state in the Union, as under the now repealed Conformity Act (*Sibbach v. Wilson & Co.,* 85 L.Ed. Advanced Opinions 349) state adjective law generally applied in federal civil procedure. Some of the state procedure was prescribed by varying codes, some was under common law rules, and the rest was under a hybrid system. Thus, if the student was familiar with his state procedure, he had little trouble with the practice obtaining in law cases in federal courts in that state; but both beginner and experienced practitioner had difficulty when appearing in actions at law in other states; this was one of the reasons for the unified rules.

In the matters of trial administration, as against local federal court rules, and state laws dealing with cross-examination of the adverse party the Conformity Act was held inapplicable. Completely to understand the new Rules affecting these questions, knowledge of the preexisting law on these points is essential. This may be illustrated in the discussion by Prof. Brewster of involuntary dismissal in Section 697,772 *et seq.* If he had presented this subject in one section, it would have been more readily understood by the student, and would have been clarified by a consideration of the law as it stood prior to the Rules. The Supreme Court had pointed out that in case of non-suit, for which a motion to dismiss is the Rules substitute, a new action might be brought; to modify this, Rule 41 provides that a dismissal, other than for lack of jurisdiction or venue, operates as an adjudication on the merits, "*unless the court otherwise specifies.*" The motion for a directed

verdict, which obtains, of course, in jury trials, ends the action. Therefore, the experienced lawyer even under the rules will pragmatically choose the motion for directed verdict, whenever he can, to avoid the possibility of the trial judge specifying that the dismissal is not an adjudication on the merits. Another question that with profit might have been posed for the student is whether under these Rules, the practitioner is to be governed by the doctrine that reliance on motion for nonsuit and failure to move for a directed verdict, precludes review of sufficiency of the evidence, notwithstanding motion for non-suit (*Swift & Co.* v. *Daly 44 Fed. (2d) 40* and cases).

. . . It is to be feared that a misconception of the special verdict may arise from the statement on page 422, that the court may direct the jury to bring in answers to one or more specific questions of fact submitted; this is pertinent to interrogations to be answered and returned with a general verdict; moreover, a finding upon each *issue of fact* is required in special verdicts. These need not be returned in answers to questions, but may be on a written form, submitted by the court, which may also use such other method as it deems appropriate. The general verdict may be tested by interrogatories, and it seems to the reviewer that a definite distinction between the two should be marked. It is clear to Ohio lawyers because of our state statutes. It may also be noted that while Rule 49 provides for a finding on each issue, in the special verdict, this must be constructed as calling for a finding upon an issue or issues that will determine the action, when the court applies the law to the finding.

In his resumé of appeals, it would be well if the author had presented the inception and period of time provided by statute for the appeal.

It is interesting to see that the author has emphasized the requirement of definiteness in pleading (*Sec. 211*) which contrasts with the form of pleading suggested by the Rules for a negligence action. The committee preparing the Rules clearly say however "the rules control the forms"; and the chairman has written the reviewer that if the statements in a form are too general adequately to advise the adverse defense, the pleading is subject to motion to make definite under Rule 12(e). The appendix of forms was provided for the guidance of lawyers accustomed to common law forms who might not understand the new system. The courts generally take the view of Prof. Brewster. For illustration see, *Washburn, et al.* v. *Moorman Mfg. Co., 25 Fed. Supp. 546.*

The author has admirably covered the entire subject beginning with the system of the federal courts, and including jurisdiction, relationship

of state and federal courts, removal of causes, venue, the new rules, extraordinary remedies, special proceedings, trial practice, declaratory judgments, judgments, new trials, appellate procedure, and federal criminal procedure. With this wide field to cultivate, it will not be strange if some of the germinating corn has been passed unnoticed. No doubt the author felt that something should be left for the instructor using the text, as there are many problems, still unsolved by the courts, which when posed to the student will give rise to stimulating class discussion.

This well indexed book is the best that we have seen for the purpose for which it is intended.

JAMES I. BOULGER
Member of Columbus Bar

THE LAW IN QUEST OF ITSELF. *By Lon L. Fuller. The Foundation Press, Inc. 1940* JURISPRUDENCE. *By Edgar Bodenheimer. McGraw-Hill Co., Inc., 1940.*

Writing in 1887 Hastie quotes from Maine[1] (1861) to describe the "widespread dissatisfaction with existing theories of jurisprudence" which existed in England in both their times. For Hastie the evils were an Austinian positivism and "the Utilitarian Principle." The former was "unfruitful in scientific result," and the latter was not "capable of longer satisfying the popular mind with its deepening Consciousness of Right." Today, as evidenced by the two books under review, positivism is again under attack, and the return urged, while not to the metaphysics of Kant, is at least to the rule of reason of natural law.[2] Thus American jurisprudence traverses a cycle which began with a philosophy of natural law, discovered the volkgeist of Savigny, applied the positivism of Austin, developed the utilitarianism of Bentham and the pragmatism of James, only again to seek a "Consciousness of Right" in the methods of natural law.

It is against the extremes of positivism that the present reaction is most usually directed. Whether the nadir or the zenith of jurisprudential theory was voiced by Holmes when he wished the divorcement of all words of moral significance from the law,[3] at least he fathered a thought which in the name of Neo-Realism today seeks a temporary

[1] Translator's Preface to KANT'S PHILOSOPHY OF LAW, p. xxv, quoting from MAINE'S ANCIENT LAW.

[2] For instance: HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS; HARVEY, JEAN JACCUES BURLAMAQUE; OBERING, THE PHILOSOPHY OF JAMES WILSON; LEBUFFE AND HAYES, JURISPRUDENCE; SCOTT, LAW, THE STATE AND THE INTERNATIONAL COMMUNITY.

[3] HOLMES, *The Path of the Law*, COLLECTED LEGAL PAPERS, pg. 179 (1920).