> already voted the tax invalid on the ground of separability. In none of these eventualities would he have defeated the tax by changing his mind. Very possibly there was no such person as a so-called vacillating Justice in the case. But if there was, it is hoped that this discussion will help to strengthen the growing belief on the part of historians and other writers that Shiras was not that Justice."[10]

Wisely, the editor obtained competent professional assistance—as is evident throughout the discussion of the Court. This could not, however, avail to relieve the narrative of its hearsay character, so far as the chapters on the Court are concerned.

Because Shiras was a Justice he will be remembered; but he will not be remembered for anything he did or said as a Justice. Even his witticisms—like those of Mr. Marquand's General Melville Goodwin—draw their only interest from the office of the speaker. (As when, at the argument of *Dooley v. United States*, Shiras inquired: Who represents Mr. Hennessy?[11]) To his intimates, Shiras was an engaging, whimsical, unpretentious companion; he was an able practitioner and a conscientious judge. We are the wiser for this biography, which treats him respectfully and affectionately, but without any excessive claim.

Special mention goes to the University of Pittsburgh press, which has produced a really handsome book.

CHARLES FAIRMAN†

CASES AND MATERIALS ON PLEADING AND PROCEDURE. By Claude H. Brown, Allan D. Vestal, and Mason Ladd. Buffalo: Dennis & Co., 1953. Pp. xvi, 752. $8.00.

THIS volume reflects the growing trend in teachers who favor the Federal Rules, to devote casebooks to them and their state prototypes. This is the second such volume in little more than a year to come to the reviewer's attention, the first being Clark's *Cases on Modern Pleading*. While one can find no inherent fault with casebooks of this sort, it does not seem quite cricket to entitle them anything but "Federal Pleading" or equivalents. In the preface to his book, Judge Clark first states that he has tried "to make the book justify its title,"[1] and then proceeds to limit its contents almost exclusively to federal and federal rule state cases. Such is also true of the work under review, except that Messrs. Brown, Vestal, and Ladd clearly indicate that they are concerned primarily with the problems raised in federal rule jurisdictions.

10. P. 183.

11. P. 127.

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1. CLARK, CASES ON MODERN PLEADING viii (1952).

Before considering their book, it might not be inappropriate to comment on the growing demand for law school curricula to include a full-fledged course based on the Federal Rules. Since they became effective on September 16, 1938, they have been wholly adopted in Alaska, Arizona, Colorado, Minnesota, New Jersey, New Mexico, Puerto Rico, and Utah, and, for courts of law, Delaware; substantial portions have been adopted in Florida, Iowa, Maryland, Missouri, New York, Pennsylvania, South Dakota, Texas, and Washington, while states such as California, Connecticut, and North Dakota have taken over individual rules. In still other states, such as West Virginia and Louisiana, a trend to at least partial acceptance is clear.[2] Therefore, it is difficult to understand why most American law schools do not offer a course modeled upon the Rules.

In many schools, procedure courses are divided into Common Law Pleading, Code Pleading, and Evidence. The student must look to the second of these for his introduction to the Rules, but too often they are treated, if at all, extremely lightly. And in many schools, such as Columbia, Code Pleading is not taught at all, for the intermediate procedure course is devoted to a general survey of such random items as res judicata and judgments n.o.v. The student, therefore, must, in the main, look to the courthouse for his first acquaintance with the codified rules of both his state and the federal tribunals. While necessity frequently makes an able teacher, is not a law school shirking its responsibilities by granting law degrees to those who are fully familiar with the origin and history of the Curia Regis and the Writ of Ejectment, but do not even know that their local courts, both state and federal, are regulated by codes with which they are totally unfamiliar? One hopes that this volume will serve a subsidiary purpose by emphasizing the crying need for a first- or second-year course which can utilize it.

The authors suggest that they have designed their casebook for a first course in modern procedure. However, it would seem far better suited for a second course, following on the heels of one based primarily on the procedural system that emerged in 1848 with the adoption by New York of David Dudley Field's Code.[3] Both chronologically and logically, the Field Code, with its rapid acceptance before 1900 by some twenty-eight American jurisdictions, seems a proper place from which to start a study of what was once referred to as "reformed pleading." In fact, without an understanding of local procedural statutes, the Federal Rules themselves mean very little in states which model their procedure after the Field Code, since the two generally work hand-in-glove in actual federal practice. This is no criticism of the casebook itself, but merely reflects the reviewer's preference as to course sequence.

This reviewer has always felt that in any course on pleading and procedure at least seventy percent of the allotted hours should be devoted to pleading.

2. Clark, *The Federal Rules in State Practice*, 23 ROCKY MT. L. REV. 520 (1951).

3. See Reppy, *The Field Codification Concept* in DAVID DUDLEY FIELD CENTENARY ESSAYS 17, 30-6 (1949).

It has become, if not a lost art, at least a highly neglected one because of the liberal attitude which most courts take toward amendment and supplementation. However, poor pleading can, at most, seriously damage an otherwise promising case while, at the very least, it can consume counsel's valuable time and effort. The authors recognize this fact and, while the ratio of space allocated between pleading and procedure is not quite that proposed above, they have apportioned the major part of the casebook to pleading and such associated topics as amendments, objections, and joinder.

The authors' approach is eminently practical, patently designed to teach the student how to prepare his pleadings. The book even includes samples of headings, allegations, and verifications. There has been some pedagogical objection to this method, based primarily on the assumption that all students do not intend to practice as trial advocates and, therefore, should not be subjected to a course which might be of small value to them as office lawyers. However, a grounding in pleading from the trial man's viewpoint cannot be considered a headless arrow in the desk man's quiver, and it would seem that even the student who visualizes himself in the conference rather than the courtroom could not but be stimulated by the actualities of the latter.

Although the book's approach can hardly be classed as wholly novel—indeed, what casebook can make this claim?—it does have a certain originality in that main subject headings bear a relationship to each other based on normal litigation sequence. The material on complaints is grouped under the title "Pleadings Alleging Claims"; this is followed by a section called "Responses" which deals with answers, replies, and substantive objections. Under "Clarification of the Controversy" are found motions to strike and discovery procedures. "Scope of the Controversy" contains maximum and minimum limitations as to joinder of parties and claims, while in "Relief Sought," both ordinary and extraordinary legal remedies are presented. For an instructor who likes his course to proceed chronologically, this order should be highly satisfactory.

Most of the case material is that which one would normally expect in such a volume, and the authors have wisely devoted a considerable amount of space to such topics as certiorari, prohibition, mandamus, and the like. Although they treat equitable remedies with less detail—very probably on the assumption that they will be covered in other courses—it is gratifying to discover this generous page allotment to the extraordinary legal remedies which have been all but forgotten in recent adjective casebooks. The same might be said of res judicata, which is quite fully treated in this volume. In addition, the casebook contains much original comment which not only is helpful to the student's understanding of the related case material, but gives the entire volume a cohesiveness too often lacking in typical casebooks.

On the debit side, the authors make virtually no mention of the effect of the pleadings on the admissibility of evidence.[4] Only one case—and that one

4. See THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 484-6 (1898).

which antedates the Federal Rules—and a few random notes touch on this problem from the viewpoint of the answer. As far as the complaint is concerned, its evidence-control function is completely overlooked. In addition, the syllogistic relationship between fact pleading and rules of law is only obliquely referred to.[5]

The format deserves commendation. Pages are numbered on their lower outside corners in heavy boldface type, making it extremely easy to locate desired material from a standing position, a feature which every ambulatory instructor will appreciate. A flap for pocket parts is included on the inside of the rear cover. While no mention is made of the use to which this will be put, one hopes that it will contain new material of all types as it becomes available, rather than merely supplements of particular state rules or statutes. This reviewer has always felt that pocket parts can serve a valuable purpose by keeping a casebook up to date until a new edition is called for, and was delighted to find some evidence, at least, of that possibility.

A recent contributor to a legal periodical attempted to show that reviews of casebooks by teachers, particularly those in the same field, are characterized by either damnation by faint praise or excessive adulation. Although that observation was made through the medium of a humorous sample review, the writer was not flirting overmuch with truth. Too often, the reviewer seems to be proceeding from the assumption that, had he compiled the volume under scrutiny, it would have been a far better effort. On the other hand, in avoiding Charybdis, some reviewers scrape their bows on Scylla by confining their remarks to approbative platitudes, possibly in the hope that some future offering of their own may receive like treatment. That neither approach is equitable or useful is a truism, and it is hoped that this review has touched upon the good and the bad without overemphasizing either. In the last analysis, every casebook is no better or worse than the extent of its adaptability to the needs of its users, and it is in the classroom rather than on these pages that its ultimate utility will be determined.

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CHURCH, STATE AND FREEDOM. By Leo Pfeffer. Boston: The Beacon Press, 1953. Pp. xvi, 675. $10.

MR. PFEFFER has written a lengthy, extremely interesting, and often provocative study. He finds that religious and secular institutions have competed for and struggled over human destiny throughout recorded history. Whatever the particular manifestations of the struggle, each has sought to dominate the other and use it for its own purposes. In the Europe of 1787, all traces of the

5. See BLISS, CODE PLEADING 230 (3d ed. 1894).

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