

## REVIEWS

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MOORE'S FEDERAL PRACTICE. By James W. Moore. Albany: Matthew Bender & Company, 1962. Nine Volumes. \$175.00.

The publication of Volume 1A completes the monumental second edition of *Moore's Federal Practice* and serves as an excuse for a review of the entire work. The many years taken to complete the treatise, the first volume of which appeared in 1948, emphasize to the scholarship and care it represents. These virtues, however, are apparent from the work itself and need not be established by extrinsic evidence.

The treatise is an authoritative exposition of the workings of federalism in our court system. From its treatment of the historical background of that system,<sup>1</sup> to the discussion of jurisdictional conflicts,<sup>2</sup> and the *Erie Railroad* case and its progeny,<sup>3</sup> the treatise combines erudition with wisdom in a manner which makes it the definitive historical and theoretical work in its field.

Professor Moore's study is of great value to the practicing lawyer. The frequency with which, year after year and substantially daily, both state and federal courts have cited the work in reported opinions provides one indication of its importance as a basic source for dealing with the problems that frequently arise in daily litigation.<sup>4</sup> Unfortunately no statistics are available to indicate how extensively practitioners and judges in courts which do not publish opinions use the treatise. It is safe to say, however, that practically no federal practice question is approached by lawyers or judges without consulting *Moore*. Rare indeed is the occasion when *Moore* does not either provide an answer or stimulate pursuit of avenues of inquiry which enable the advocate to piece together the fabric of a persuasive argument applicable to his case. In this respect it is also a two-edged sword. Woe to the advocate who builds a house of cards in the face of Professor Moore's logic and scholarship!

A further measure of the book's merit and usefulness to the practicing lawyer is its authority on questions of state law when the applicable state statute or practice rule resembles its federal counterpart. *Moore's* authority is as compelling and useful in these areas as it is in the federal courts. In those situations where the states have borrowed heavily from the Federal Rules *Moore* is likely to be the arbiter of close questions.

The value of *Moore* to the profession is not merely as a compendium of the decided cases or even as a scholarly synthesis of the rules, statutes and cases.

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1. MOORE, FEDERAL PRACTICE ¶ 0.6-0.7 (2d ed. 1960) [hereinafter cited as MOORE].

2. 1A MOORE ¶ 0.20-30 (2d ed. 1961).

3. *Id.* at ¶ 0.306-28.

4. After a check of 500 federal cases selected at random and of 500 state court cases, Mr. John Frank has concluded that *Moore's Federal Practice* was cited more often than any other treatise. Frank, Book Review, 50 CALIF. L. REV. 582 (1962).

The work is both of these and it is invaluable because it is. But it might well be urged that its greatest value lies in the manner in which it brings the intellect and vigorous personality of its author to bear upon many doubtful or unresolved questions. The opinions he expresses have often been followed by the courts. Sometimes they have not. But the advocate perplexed with such a question will know that whether or not he finds *Moore* in support of his position, he will find there a solid analysis of the problem and discussion of all pertinent considerations.

Impressive examples of Professor Moore's influence on the continuing development of federal procedure are revealed by an examination of the proposed amendments to the Federal Rules submitted by the Civil Rules Advisory Committee of the reconstituted Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,<sup>5</sup> and recently promulgated by the Supreme Court. For example, the addition to Rule 15(d) allows, at the trial court's discretion, a supplemental pleading where the original complaint fails to state a claim upon which relief can be granted. This change is consistent with what *Moore* says is the "preferred" interpretation of the previous Rule.<sup>6</sup> Professor Moore's view that Rule 25 "is easily the poorest rule of all the Federal Rules"<sup>7</sup> was heeded by the Committee. Their amendments eliminate the inflexible requirement that an action be dismissed as to a deceased party if substitution is not made within two years after death. The new Rule substitutes a time limit based upon the time death is suggested upon the record, thus obviating *Moore's* criticism that the old Rule acts as an "arbitrary time limit."<sup>8</sup>

The treatise notes that the limitation on issuance of letters rogatory under Rule 28 to cases where they are necessary and convenient<sup>9</sup> may result in wasted time and even in the loss of testimony.<sup>10</sup> The Rules Committee recommended a change eliminating this restriction and leaving the issuance of letters rogatory to the court's discretion. A third instance in which the Committee adopted a view similar to that advanced in the treatise is found in its addition to Rule 56(e), which insures that summary judgment procedures are available to "pierce the pleadings" in order to determine the presence or absence of a genuine factual issue requiring trial. Professor Moore has been a vigorous opponent of the line of cases holding that averments of fact in a pleading cannot be overcome by affidavit on motion for summary judgment.<sup>11</sup> Finally, the amendment of Rule 81(c) to the effect that a proper demand for jury trial in a state court secures the right to jury trial without a new demand in a federal court after

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5. Professor Moore is, of course, a member of this Committee.

6. 3 *Moore* ¶ 15.16, at 859 (2d ed. 1948).

7. 4 *Moore* ¶ 25.01 [7], at 510 (2d ed. 1962).

8. *Id.* at 511.

9. Rule 28(b) actually read "necessary or convenient" but the courts have not accepted a showing of convenience as an independent basis for issuance of letters. Note, *Use of Letters Rogatory Under Federal Rule of Civil Procedure 28(b)*, 46 *IOWA L. REV.* 619, 622-24 (1961).

10. 4 *MOORE* ¶ 28.06, at 1913-14.

11. 6 *MOORE* ¶ 56.11 [3], at 2068-69 (2d ed. 1953).

removal is in line with *Moore's* view of the correct interpretation of the old Rule.<sup>12</sup> The fact that the Advisory Committee's Note accompanying each of the above mentioned rule changes cites the treatise as authority for its recommendation is an indication of the weight given to *Moore's Federal Practice*.

It would, of course, be error to suggest that the Committee recommended only those changes favored by Professor Moore. In recommending amendment of Rule 4(e) expressly to authorize the commencement of actions in federal courts against nonresidents by using state procedures for obtaining quasi in rem jurisdiction, the Committee adopted a position characterized by *Moore* as an unwise extension of diversity jurisdiction.<sup>13</sup>

A measure of the author's insight into the requirements of a workable system of procedural rules can also be gained from an examination of the treatise's comments concerning the unadopted rule changes recommended by the 1955 Committee on Rules of Practice and Procedure. In numerous instances, after a detailed analysis of those proposals and comparison with the practice under the existing rule, Professor Moore found the recommended changes unnecessary<sup>14</sup> or unclear.<sup>15</sup> His personal influence is easily discernible in the somewhat less than enthusiastic reception given the 1955 Committee's recommendation.<sup>16</sup>

In view of the author's influence, it is pertinent to inquire into his view on desirable changes in the Rules even beyond the current proposals. The most important task yet to be accomplished, according to the author, is the promulgation of a set of rules on evidence applicable to all actions in the district courts to replace the "makeshift" provisions of Rule 43.<sup>17</sup> Moore points out that it was not practicable for the original Advisory Committee to delve into the complexities of evidence at the time the Federal Rules were originally drafted, but he strongly recommends that future Committees undertake this formidable task.<sup>18</sup> Moore would apparently favor the addition to Rule 43 of a provision al-

12. 5 MOORE ¶ 38.39 [3], at 321-22 (2d ed. 1951).

13. 1A MOORE ¶ 0.528 [4], at 5632; 2 MOORE ¶ 4.01 [10] (Supp. 1962).

14. See, e.g., 2 MOORE ¶ 5.01 [5] (2d ed. 1962) (discussing amendment to Rule 5(a) insuring that third-party defendant must serve pleadings on original plaintiff); 3 MOORE ¶ 16.01 [5] (Supp. 1962) (addition to Rule 16 permitting assignment of case to designated judge where protracted litigation threatened); 4 MOORE ¶ 30.01 [8] (Supp. 1962) (addition to Rule 30(a) permitting court to regulate time and order of taking of depositions).

15. See, e.g., 3 MOORE ¶ 23.02 [6] (Supp. 1962) (addition to Rule 23 designed to make class-suit device more flexible); 4 MOORE ¶ 34.01 [6] (Supp. 1962) (addition of new paragraph to Rule 34 providing for discovery of documents without court order in certain cases.)

16. 1A MOORE ¶ 0.528 [5]. Professor Moore was the only member of the 1955 Committee who did not concur in the Committee Report recommending adoption of the proposed changes. See 1A MOORE ¶ 0.528 [4] for the text of the dissenting statement.

17. *Id.* ¶ 0.504, at 5-42; 5 MOORE ¶ 43.02 [5].

18. 5 MOORE ¶ 43.02 [5]. Moreover, Professor Moore was chairman of the Chief Justice's Special Ad Hoc Committee on Evidence which formally recommended that federal rules of evidence be formulated.

lowing a witness to be contradicted by proof of inconsistent statements without having first called the statements to the witness's attention, at least where the witness is testifying by deposition.<sup>19</sup> The treatise also favors elimination of the established federal rule limiting the scope of cross-examination to the subject matter of direct examination.<sup>20</sup> Yet despite a felt need for changes, Professor Moore opposes any sweeping revision of the Federal Rules. He even frowns upon most "clarifying" amendments. This view stems from his conception of the Rules as the means by which district courts are provided with a relatively simple procedural system under which a great deal of discretionary power is lodged in the trial court.<sup>21</sup> Thus, he feels that most alleged abuses under the Rules will be best resolved by a more sensitive response of the district courts to the problem of abuse and a correlative use of the extensive protective powers . . . [they] now possess."<sup>22</sup> This preference for flexibility in federal procedure is buttressed by a fear that "declaratory" or "clarifying" amendments may create more ambiguities than they resolve.<sup>23</sup> The action to date of the present Advisory Committee on the Federal Civil Rules suggests that Professor Moore is not alone in his views.

In short, the second edition of *Moore's Federal Practice* represents the best efforts of the professor to evaluate and summarize fifteen years of federal practice under the Federal Rules of Civil Procedure. The result of these efforts is a scholarly and yet practical exposition of the principles of federal practice, pleading and procedure, accompanied by an impressive collection of authorities and an adequate, but not burdensome, historical background. For lawyers who rarely visit the courtroom, the treatise will provide legal reading of exceptional enlightenment and enjoyment; to their litigating brothers, its use is almost imperative.

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ONE MAN'S STAND FOR FREEDOM, MR. JUSTICE BLACK AND THE BILL OF RIGHTS. Edited by Irving Dilliard. New York: Alfred A. Knopf, Inc., 1963. Pp. xiii, 504. \$6.95.

JUSTICE Black is best known among the public for his strong support of individual freedoms. It is too seldom recognized, however, that he finds warrant for the positions he takes not solely in his personal political commitment to individual liberty, but also in his conception of what model our nation's funda-

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19. The special necessity where testimony is by deposition arises from the fact that the witness normally will not be present at the trial so as to enable reference to contradictory statements as a foundation. 4 MOORE ¶ 26.35, at 1693.

20. See 5 MOORE ¶ 43.10.

21. 1A MOORE ¶ 0.504, at 5042.

22. 4 MOORE ¶ 26.02 [3] at 1039 (referring specifically to criticism of discovery rules).

See also references cited *supra*, notes 14-15.

23. 1A MOORE ¶ 0.528 [4], at 5632.

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