Foreword

Fleming James, Jr.†

Bill Moore is a giant in the field of procedure. His treatise on federal practice is one of the classics of our time.[1] It has a wealth of background material from history, ancient and modern, including the many reports of the advisory committee and the steps taken in the formulation and changes of the Rules themselves. Beyond that it rates penetrating analysis and broad vision, all expressed in lucid style. Others will treat more fully Bill's impressive contributions to his chosen fields of scholarship. I shall not try to do that here but want there to be no doubt about my hearty amen to praise on this score.

During the summer of 1935 Dean Clark, who was Reporter for the Supreme Court's Advisory Committee on Rules for Civil Procedure, was engaged in putting the finishing touches on a draft of the Rules and had money from somewhere to employ a number of younger men to work under him. At this time Bill Moore had just completed the work for his J.S.D. at Yale and was to teach here the following year; I was a junior teacher in procedure and a profound admirer of Dean Clark. Both of us were in the group. I first got to know and respect Bill that summer. Out of it (and out of his previous work in procedure) came some articles which played a seminal role in the early days of the Rules and as forerunners of his monumental treatise.[2]

That summer, or shortly after it, I was present at a discussion between Bill and Thurman Arnold about class suits. Thurman was then greatly preoccupied with res judicata—he was teaching virtually a whole course by ringing the changes on the *Baldwin* cases[3]—so the conversation naturally turned in that direction. Under Thurman's

† Sterling Professor Emeritus of Law.

1. J.W. MOORE, FEDERAL PRACTICE (2d ed. 1948). (The first edition was published in 1938.)

2. Clark & Moore, *A New Federal Civil Procedure* (pts. 1-2), 44 YALE L.J. 387, 1291 (1935); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551 (1937); Moore & Levi, *Federal Intervention I, The Right to Intervene and Reorganization*, 45 YALE L.J. 565 (1936).

3. American Surety Co. v. Baldwin, 287 U.S. 156 (1932); American Surety Co. v. Baldwin, 2 F. Supp. 679 (D. Idaho 1933); Baldwin v. Anderson, 52 Idaho 243, 13 P.2d 650 (1932); Baldwin v. Anderson, 51 Idaho 614, 8 P.2d 461 (1932); Baldwin v. Anderson, 50 Idaho 606, 299 P. 341 (1931). *See* T. ARNOLD & F. JAMES, CASES AND MATERIALS ON TRIAL JUDGMENTS AND APPEALS 117-36 (1936).

questioning and prodding, Bill then and there, as the conversation developed, charted out the analysis which became embodied in Rule 23 and dominated the thinking about class suits which prevailed for a good many years.[4]

This incident reveals one of Bill's great points of strength. From the very first he has shown an unusual capacity to work with other scholars, to profit by their ideas, and to be a catalyst to the thinking of others. Many of his early articles were done in coauthorship,[5] and the treatise has been the product of a considerable staff. But the work throughout has borne the stamp of Bill's own strong personality, his power of analysis, and his fine craftsmanship. As Clark had been before him, Bill has been the creator and the architect.[6] And because of his capacity to work with and through others he has been able to project himself on a scale which has seldom been matched.

Another occurrence shows how this man, the leading procedure scholar of his generation, never became pedantic or doctrinaire at the expense of common sense. When Bill and I were co-counsel for the trustees in bankruptcy of the old New Haven Railroad, the trustees had to petition the court for authority to borrow money under a federal guaranty in order to continue operation of the road. The loan was to be secured by a lien on the property which (after the manner of receivers' certificates) would be given priority over existing mortgages. I drafted a petition along the spare, economical lines of federal pleading according to the teaching of Clark and of Moore. Bill took issue with my draft. The situation, we all knew, was a touchy one so far as relations with the bondholders and the public were concerned. Bill felt that the petition, which would get immediate publicity, should be made a vehicle for explanation and justification of our petition far beyond what the rules of good pleading would require or condone. At the time I viewed Bill's draft as a baroque monstrosity—and so it was to the purist in pleading—but the trustees saw it his way, which was certainly the wiser one.

During the New Deal and much of the early postwar period the law school faculty was almost monolithically liberal in political viewpoint.

4. *See* Moore, *supra* note 2, at 570-76.

5. In addition to the sources cited in note 2 *supra*, see Moore & Wiseman, *Market Manipulation and the Exchange Act*, 2 U. CHI. L. REV. 46 (1934).

6. During the second world war I was director of the litigating division of the Office of Price Administration and as such had extensive contact with federal practice and federal practitioners throughout the country. In this experience two things impressed and gratified me. One was the universal respect accorded to Clark as the master of procedure and guiding spirit in formulating the federal rules. The other was the recognition which Bill's *Federal Practice* was already beginning to have among courts and practitioners.

Bill stood out as a militant and conspicuous conservative, a role he enjoyed and often dramatized. But beneath the dramatics and the accompanying humor I have always felt were deep and sincere feelings. Moreover, Bill had the courage and independence to express these feelings when they were generally unpopular and before he had eminence in his own field.

The affection and respect I formed for Bill during that summer of 1935 have increased over the years in spite of many differences of opinion. I enjoyed and profited from being his colleague and friend for so many years and welcome him to the fraternity of the prematurely retired.