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Book Reviews

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BOOK REVIEWS

THE PROBLEM OF PROOF, BY ALBERT S. OSBORN, PUBLISHED BY MATTHEW BENDER & COMPANY, NEW YORK AND ALBANY, 1922.

It is seldom, in these days of "the making of many books," that a reviewer is given an opportunity such as that which is presented by the volume entitled "The Problem of Proof," by Albert S. Osborn, whose earlier work on "Questioned Documents" won for him an enviable reputation as an author of unquestioned ability and worth. The present treatise on "The Problem of Proof" is one of the most arresting productions that has emerged from the vast literature of the law during the past two decades, and if mere commendation could insure its prompt and widespread circulation among the members of the profession, there are no words of eulogy which we would deny ourselves in the effort to persuade both active practitioners and students of the law that, in this work, there is a mine of information and sound advice that none can afford to ignore without suffering serious and needless loss.

The work is not only admirably constructed, not only eminently practical in all of its aspects, but the style of treatment is fascinating in the extreme. The winning method employed is sure to conciliate the favorable opinion and to capture the thoughtful attention of every intelligent reader.

While this work deals, in the main, with the same theme which was elaborated by the author in his previous work, "Questioned Documents," yet the text is interspersed with useful and illuminating essays on a variety of topics which have to do with the general practice of the law. The title, "The Problem of Proof," very happily summarizes the wide sweep of the contents.

A few extracts and references will suffice to give the prospective reader a foretaste of what this delightful volume has in store for him. In his Preface, the author puts this thought in the forefront of his work:

"The task of the advocate is to convince a judge, or a jury, that his client is entitled to a favorable verdict. He works with facts, ideas, law, testimony and argument. All of his preparation and all of his

efforts finally focus on the central question of proof, and only when he is prepared to prove his case is he ready for trial."

The difficulties which confront the beginner are thus impressively stated:

"If one could tell another how to do a thing, so that the other could go out and do it, then skill and ability would be passed on from generation to generation, but each of us must begin almost at zero. Each one must burn his own fingers, but to learn the lesson it is not always necessary to cripple the hand for life. But it is incomparably harder to take advice than to give it. To be able even to recognize a new idea, or appreciate a new emphasis, among the great mass of ideas of high and low degree that flow by in the stream of thought, is a clear proof of intelligence, and to adopt an idea and make it our own is a distinct achievement. The test of ability is to recognize it and to see genius is a sign of genius."

Turning to the subject immediately in hand, the author tells us:

"The progress of civilization has brought about a great increase in the use of documents. A few hundred years ago many a home contained no pen and ink for the reason that no member of the household could write. In those days a document was a rare and mysterious thing that was looked upon and handled with a feeling of awe. It is difficult fully to realize the change that has come about from that day to the present. We now live in a world of documents, and with this increase has come the opportunity for their fraudulent production and use."

Referring to the divergent standards of qualifications and efficiency which obtain in our law courts, he says:

"One who goes from court to court cannot but observe the varying quality of law practice, a variation wider, perhaps, than in any other profession. It ranges from the delicate, masterly skill of the legal artist down to the work of the ignorant bungler who knows but little of the facts or of the law of the cases he tries and even less of human nature. A law suit in many courts is not the scientific work of trained and skillful specialists, but too often is the crude performance of the inexperienced and the unfitted. As a rule the surgical clinic shows the skilled work of trained men; but the courthouse often shows the bungling effort of the unskilled. For every lawyer now and then to try important cases in the law courts is as if every doctor attempted on rare occasions to perform major operations. The legal operating room shows many mangled legal corpses."

Having premised that "evidence is merely information," the author proceeds to drop this wholesome warning, with reference to the all-important matter of cross-examination:

"The cross-examination contest between the examiner and witness has a moral as well as an intellectual phase. The court and jury sit on one side and observe the contest and draw conclusions therefrom. The cross-examiner often seems to be wholly unaware of the fact that on the moral side he, as well as the witness, is being tested. Is he fair and honest and sincere, or, when the performance is finished, has it been to the jury a spectacle in which a wily, experienced advocate has taken advantage of one who cannot defend himself."

A very striking statement concerning the somewhat technical problem of circumstantial evidence is in these words:

"A common fallacy in connection with the problem of proof is the idea that every fact or circumstance in a body or mass of evidence is connected with and dependent upon every other circumstance. This fallacy is embodied in the common understanding of the familiar phrase, so dear to the hearts of defense attorneys and to all who would prevent proof, that 'A chain of circumstantial evidence is no stronger than its weakest link.' This idea is discussed in an illuminating manner by Bentham in *Judicial Proof*. It is shown that the fallacy lies in the idea that circumstantial evidence can correctly be described as a 'chain.' A statement with a very different import, but more nearly true in most cases, would be that 'A cable of circumstantial evidence is as strong as the combination of all its strands.' The common refuge of those against the facts in attempting to defeat proof in any matter of any kind, is to find the weakest element in the proof and then assume that all the other elements are dependent upon it. Proof in a great majority of cases is not a succession of 'links' but a combination of 'strands.'"

Discussing the subject of "Persuasion and Practical Psychology in Courts of Law," the author says:

"A trial at law is simply a competition in persuasion. It is a contest where many influences are brought to bear to persuade a judge or a jury to take certain action. Law is administered through the minds, the consciences, the emotions, and the prejudices of men. . . . This ability to influence others is of priceless value in many fields. With it, as Emerson says of perfect manners, all doors open. Its importance to the lawyer can hardly be overestimated. . . . The citadel of the mind may be captured in more ways than one, but an entrance is not often gained without a proper approach."

Defending "expert" testimony, as it relates to disputed documents, against some of the superficial criticism to which it has been subjected, the author rightly observes:

"Handwriting expert testimony, when given with reasons and illustrations, is not merely opinion testimony but is 'demonstration testimony,' and is not an appeal to credulity but to the sense and the intelligence of the hearer and the observer."

A timely word of warning, again, will be found in this pregnant sentence:

"Always in a criminal trial, and often in an ordinary law suit, it is

necessary for one party to prove a fact, or a series of facts, upon which a verdict or judgment is to be based, while the principal efforts of the opposition are directed, not to the proving of anything, but to the prevention of proof. Among the weapons of those who would prevent proof are confusion, complications and delay."

With this introduction, the author then proceeds to point out and emphasize the importance of "System, Methods, and Tendencies," in a chapter that will bear very careful reading and study.

Of all the chapters in this most valuable book, perhaps the most interesting and instructive and helpful, particularly for the young law student, is that on the subject of "Advocacy." Professor John Henry Wigmore, who has contributed a short Introduction to the work, pronounces this chapter "the climax of the book," and states that "It should be read aloud every year before every law class." The chapter on "System, Methods, and Tendencies," previously mentioned, and that on "'Off the Record' Influence in Trials at Law," &c., are two that will undoubtedly create a deep impression and exercise a salutary influence. But not the least valuable part of the volume, from every standpoint, is that which provides the reader with a "Bibliography." It might better be called a "critical" bibliography, for the author gives concise estimates of the various works cited and recommended, which will help the book-buyer in making selections according to his taste or needs. The learned author truly remarks that "There is no excuse good enough to excuse one for not reading good books," and he quotes Milton's memorable deliverance that "A good book is the precious life-blood of a master spirit, embalmed and treasured up on purpose to a Life beyond Life." Pointing the moral, Mr. Osborn adds: "There are doors that never open because the steps leading up to them were not taken. It is not necessary to be a poorer lawyer, or worse doctor, in order to be more of a man. . . . More and more, students of law and of medicine are being prepared for professions and for life and not merely for business."

Out of the six-page list of "good books" recommended for reading, it may be worth while to notice particularly the following: "How We Think," by John Dewey; "The Principles of Psychology" and "Selected Papers on Philosophy," by William James; "Elements of Rhetoric" and "Elements of

Logic," by Archbishop Whately; Quintilian's "Institutes of Oratory;" "Aequanimitas, With Other Addresses," by Dr. William Osler; Ram on "Facts;" and "Bleak House" and "The Pickwick Papers," by Dickens, with their unapproachable accounts of the "celebrated trial" of "*Bardell v. Pickwick*," and the devious practices of "Jarndyce and Jarndyce." The reading of these last, declares the author, "should be a requirement for admission to the bar." To these we take space to add "Fragments of Science," by John Tyndall, with its original and suggestive disquisition on "Scientific Use of the Imagination," for calling attention to which we have to thank the author of the present volume.

Not since the appearance of Wellman's popular work on "The Art of Cross-Examination," has a book of more practical value, or more captivating and stimulating, than the work here under review, fallen under our observation. We pity those, if such there be, who may feel that they cannot afford this book, and even more deeply those who may, perchance, deliberately deny themselves the pleasure of perusing its pages. As a purely business investment, it cannot fail to pay for itself many times over, if anything like proper use is made of its contents, for, as Dean Wigmore truly says, "There is wisdom on every page."

*SAMUEL M. WILSON.

THE GREAT EXPERIMENT

By THOMAS DILLION O'BRIEN, PUBLISHED BY THE ENCYCLOPEDIA PRESS, NEW YORK, 1922.

The Great Experiment is a book of particular value to one who is interested in a comprehensive discussion of the particular safeguards of the constitution, their relation to the government and the progress of its citizenry. The right of a people to an effective government and the place of a constitution in establishing this right, are taken up and discussed in an effective manner.

The work gives a general survey of European conditions prior to the American Revolution, showing that these conditions reflected upon the economic life of America and brought about the revolution. In this short discription special stress is

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given to the power of the European Monarchs over their subjects, special attention being given to England and France. Following this description the author endeavors to show the fundamental purpose of a constitution and the particular safeguards thrown around the citizens of a constitutional government. Not only the safeguards of the national constitution are analyzed, but those of state constitutions are considered. The duty of a citizen of a constitutional government receives special consideration. The fact that such a government cannot exist without the support of its citizenry is the general theme of this part of the work.

The police power, its place, necessity and interpretation are given a comprehensive examination. The federal police power in its relation to the police power of the various states is one of the principal themes treated by the author under this subject.

The progress of America with its relation to the constitution has always caused considerable controversy. It is to be noted that since the adoption of the constitution tremendous changes have taken place in the commercial life of the United States, modern inventions making a huge commercial country possible have come into existence, territory and population have increased manyfold. One of the remarkable things of modern history is the power of the constitution to meet these conditions and exist in its original form as the safeguard its framers intended it to be. The author gives a clear, concise discussion of these changes, showing that the government under the constitution is a progressive government, giving to its citizens a guarantee of an intelligent progress.

The courts and their relation to the constitution, and how they maintain the constitution by construing acts of the state and national legislatures in their relation to the fundamental law, are necessary themes for any work of this nature. Mr. O'Brien has not neglected them; both the state and federal courts are treated. He shows their importance and place in maintaining a constitutional government.

The spirit of the book is one of high regard for the American Government and its Constitution. It contains a spirit of loyalty which is inspiring. The author's conception of the United States Government is treated in one section referred to as, "A government maintaining the civilization which Christ-

ianity has produced. This spirit of profound respect, patriotism and loyalty, issues a challenge to those who doubt our government, its spirit and aspirations, to ask themselves the question propounded in the words of Webster, "What am I to be?"

G. W. MEUTH.

THE THINGS THAT ARE CAESAR'S

By GUY MORRISON WALKER. PUBLISHED BY A. L. FOWLE,
NEW YORK.

There was a time when a brave heart was needed to champion the cause of labor. Today organized labor has become a mighty force, emphatic in its demands, and of sufficient numerical power to enforce its determinations.

The modern iconoclast defends wealth. Such a stand denotes at least originality of thought. For that reason, aside from the merit of his work, Guy Morrison Walker's, "The Things That Are Caesar's" is especially interesting.

Most of us are surfeited with labor propaganda. Laborers, toilers ourselves, we are full of the food of our own thoughts. Compelled to work for our daily bread, taught to envy the holders of money bags, it is difficult for us to see the capitalist's side of the labor question. To such as we, Guy Morrison Walker's defense of wealth presents a new angle to an old problem, a clear challenge to thought and reflection. We may not agree with the book in its entirety; we must agree that it is timely, convincing, and absorbingly interesting.

The author has written a strong preface. He admits the difficulties in the path of one who would approach the problem of capital and labor. It is universal, omnipresent, and as yet unsolved. But the author believes he has found the solution and with the conviction of one who, as he says, "writes between successive operations with the fear of approaching death" he seeks to speak nothing but the truth. He asks us to consider his work in the nature of a dying declaration.

The book opens with a study of the beginning of wealth. Two men of the Stone Age kill, divide, and devour a wild fawn. One, gorged to capacity, seeks a nearby stream, drinks, and sleeps. The other, with the memory of his two-day hunger still upon him, hides the offal of his share in a neighboring tree-

fork. Two days later, unfortunate in their search for game, they seek the scene of their former killing. As the older man, who has saved a portion of his meat, ravenously devours it, the younger begs for a share. "Give me half of the meat that you have saved and when my hunger is satisfied and my strength renewed, I will go hunting and give you half of my next kill." But the older man continues to satisfy his hunger. When he has finished, he pushes over the remainder of the meat to the younger man and strikes a bargain on these terms.

"The saving of the uneaten portion of the fawn was the beginning of wealth, and the use of it to save the starving young man, the beginning of capitalism, while the hunting of the younger hunter to repay the debt he owed to the older, who had fed him when he was starving, was the beginning of the wage system."

Thus did man begin to lay up the surplus of today's labor for tomorrow's rainy day. Gradually men found that by saving the fruits of summer, they could escape the pangs of hunger in winter, that by simple inventions, they could lessen their labors, that by increased exertion at certain seasons, they could have leisure at other times for study, thought, and pleasure.

But a certain part of the population of every tribe lived from hand to mouth, from day to day, from meal to meal. They accumulated no surplus. And they envied their betters. One man wanted the wealth that belonged to another. The same inequalities are with us today.

The author takes as his major premise the proposition that wealth is created "not by labor but by brains." "Social philosophers have ignored the most extraordinary thing that makes for human inequality and that is, the diversity of ability and quality in the human mind."

The most graphic illustration in the whole book is under this topic. The building of the tunnel under the Hudson is cited. A New York newspaper sent a reporter there to write a story of the work. "It was curious," he says, "to note the purely mechanical stroke of the crowbar and shovel, the workmen simply went faithfully through the motions that they were hired to make, not one of them worked as if he had an interest in the job, yet not one was lazy or shirking. The engineers, however, showed the intensest interest, a nervous, high-strung

devotion, as if brain and heart were all in the enterprise." Not an ounce of energy did the laborers expend in thinking! The brains of the engineers were on fire! The most valuable element in the accumulation of wealth is not labor but brains.

The book throws aside the modern doctrine of socialistic, community wage systems, where each man works for a like wage, like hours, at a common speed, and reiterates the old doctrine of competition.

"Whether the law of competition be good or evil, it is here. Evolution is competition. We must recognize it and adapt ourselves to it. . . . The law of competition has operated and will continue to operate to insure the survival of those who have best developed the habits of work."

The author closes with a pertinent question, "What did ignorance and poverty ever produce?" Wealth builds our railroads, erects our factories, it won the late war. It is the surplus laid aside by the provident of the race. It prevents famine and preserves stability. It insures progress!

What is the hope of Labor. What is the author's solution to the problem? Walker believes that Labor should create a surplus. Labor should add interest, education, and above all brains to its physical tasks. Laborers should not be automata but thinking, planning, creators of wealth, always saving a surplus, that they too may become capitalists, each in his own ability.

The book does not offer a complete solution to the problem. The tendency of capital has always been to form a monopoly and by trusts to control both the price the consumer pays and the wage of the laborer. Labor has been forced to use drastic, organized means to control this evil. The author would have us believe that trusts tend to lower prices. Our observation has been otherwise. The worker must help to control wealth as well as help to produce it.

The book is a notable achievement in a needed line of thought. It can be read in two hours; it will be remembered a

R. M. MORELAND.