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Recent Legal Literature

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RECENT LEGAL LITERATURE

THORPE'S CONSTITUTIONAL HISTORY OF THE UNITED STATES.—The Constitutional History of the United States, by Francis Newton Thorpe, in Three volumes 1765-1895. Chicago: Callaghan & Co., 1901.

Some months ago, Dr. Francis Newton Thorpe added to our historical literature his work on the Constitutional History of the United States. The book was well received by the reviewers and was at once eagerly examined by those who are interested in the history and development of our constitutional system. It was obvious, however, that three large volumes stored with facts and replete with references to original sources could not be assimilated at once, even by readers with special training and preparation. The book was evidently the work of a ripe scholar. It differed from much that had previously appeared, in that the life of the constitution was its theme, as distinguished from the lives of the framers and expounders of that instrument. Again it differed from some of the earlier works on the same subject, in that the author seemed determined to present to the reader *facts* rather than his own inferences from the facts. As was pointed out by one discriminating reviewer, the work was seen not to be "predominantly legal exposition, metaphysical analysis, sketchy biography or historical essay writing." It is, on the contrary, a compact and orderly presentation of the facts respecting the origin, the formation, the adoption and the exposition of that document which we call our Constitution. In it the reader finds a statement of those relevant facts which lie embedded deep down in the earlier strata of English history. Here, too, he finds an exposition of the questions involved in the income tax cases decided by the supreme court of the United States as recently as 1895. Between these two extremes are massed, in orderly array, the myriad facts of intermediate history. These facts are recorded just as they occurred and the record discloses neither bias nor temper.

Such a book may of course be consulted as a work of reference. It has, however, a peculiar value for him who reads it as a whole. Sufficient time has now elapsed since publication to make it possible not only to read the book carefully but to indulge in some reflections suggested by the author's discriminating historical treatment. It is only through such a use of the book that one can fully grasp the all-important conception that our constitution is the result of a slow development—the product of ages of experience and not the creature of sudden inspiration. Because of a failure to appreciate this truth, many intelligent readers, both laymen and lawyers, are apt to underestimate the importance of constitutional history. A reading of such a book as Dr. Thorpe's is the best corrective for such a mistake. The mere contemplation of the historical facts in their sequence is certain to result in the conviction that from them may be drawn practical inferences of the very highest value.

Among the interesting thoughts which keep recurring to the mind of the reader of the work are those concerning the points of similarity and difference

between our constitutional system and that of England. Englishmen feel as sure as do citizens of the United States that executive, legislative and judicial power will never be exercised except with due regard for the fundamental interests of the individual. The basis of their assurance is experience. The interests of the individual have so long and so uniformly received legal protection that these legally protected interests have ripened into "constitutional rights." He calls them *vested* rights; but the name adds nothing to his security. A "vested" right is merely a right which has usually received recognition. The story of the development by which the interests of the Englishman have gradually gained this recognition is a long story. No argument is needed to show that familiarity with it is essential to a clear understanding of what is the true significance of the rights themselves and to an estimate of how justifiable is the Englishman's assurance that his enjoyment of them will not be disturbed. In other words, the importance to the Englishman of a study of constitutional history is evident and beyond all dispute. In this country, however, there is a prevalent belief that the basis of our constitutional security is different from the Englishman's. We are accustomed to point a contrast between the English constitution and our own and in many respects the contrast is striking indeed. We all know, in a general way, that in England the executive power is vested in the Crown, the judicial power in the Courts of the realm, including the House of Lords, and the legislative power in Parliament. To some of us the conception is familiar that the power of Parliament is supreme. Some of us, not many, realize that while the sovereign is by no means a figurehead, far less constitutional power is vested in the crown than in the President of the United States. The real power among our English brethren is the majority in the House of Commons, whose leader for the time being is premier. With us the President wields the whole military and a large share of the civic power of the nation. His veto may control legislation and at times it rests with him to determine whether we shall have war or peace. In dispensing the enormous patronage which in accordance with our political system he controls, he exercises (as has been well said), "functions which are more truly regal than those of an English monarch. Elect such a magistrate for life, or give him a permanent hold on office, and he may be termed Mr. President but will be every inch a king."—(Hare). Again, still fewer realize that Parliament has power to pass all laws, with no other limit than that set by the reason and judgment of the Lords and Commons. Parliament may supersede the courts of justice by a commission acting under martial law and may "arrogate to itself the trial of any cause that it does not desire to leave to the ordinary tribunals." The Courts have no jurisdiction to declare acts of Parliament unconstitutional. Why, then, may it not be said that Parliament is despotic? In what sense is England under the sway of a constitutional government? The reply of the historian is that for ages the Parliament has proceeded according to the rules and precedents which are deeply rooted in the minds and hearts of all Englishmen, and there is no subject of the King who is in danger of being deprived of life or liberty or property except in accordance with that due course of law prescribed by Magna Charta. In a real sense, therefore, it may be said that Parliament cannot run athwart the traditional liberties of Englishmen. We, the people of the

United States, on the other hand, have embodied in a written constitution the declaration of principles in accordance with which it has been our will to live. In England, when a measure is proposed in Parliament, no question of legislative *power* need be considered. The only inquiry is: "Is the measure consistent with principle and such as the circumstances demand?" With us the question must be: "Is the measure expedient and, if it is, is it consistent with the provisions of our Constitution?" No matter how great the expediency of an act may be, it is of none effect if it transgresses the limitations set by our fundamental law. As is well known, it is the peculiar function of the American judiciary to determine whether or not an act of Congress or of a state legislature is constitutional. The exercise of this vast power may be regarded as essential to the conception of a written constitution. The supremacy of the judiciary over the legislature has been our boast. It is a feature of our constitutional system which has excited the admiration of foreigners. Our Constitution, as interpreted and developed by the supreme court of the United States has proved to be the bulwark of our liberty. By a use of the judicial power that may well be regarded as inspired, Marshall (after Washington the greatest of Americans) found it possible to make of us a nation. By a wise exercise of the same power, Miller and Bradley, worthy successors of the great Chief Justice have removed the barriers interposed by states to check the even flow of national commerce. Perhaps no better description of this feature of our American system can be found than that contained in the opinion of Mr. Justice Harlan in a recent case: "The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and the duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The people of the United States, then, have framed an elaborate statute for their own government. Legislative and executive action not in harmony with the provisions of this statute is inoperative. For us, the interests which the provisions of the statute protect are "vested constitutional rights." It is thus seen that while the basis of the Englishman's security is the fact that his people have been accustomed to act only in accordance with certain principles, the basis of our security (if there is really a difference) is found in the fact that our ancestors have made a formal declaration that future action shall conform to what are fundamentally the same principles. But we cannot forget that behind and beyond the declaration is the story of the principles which the declaration embodies. On the hither side of the declaration is the story of the treatment which the constitution has received in the house of its friends. Clearly, then, the importance to us of a study of constitutional history is as great as to the Englishman. It is essential that we should know the pedigree of each provision that our constitution contains. We must be familiar with the steps which led to the assembling of these provisions in a single instrument. The operation of the adopted constitution must be studied. The elements of its strength and weakness must be scrutinized. Accepted

and rejected amendments cannot be overlooked. An estimate must be formed of the strains which it has withstood, if we are to have an intelligent opinion respecting its durability. We must, in fine, study constitutional history in order to know what a constitution is and what our attitude toward it should be. Shall we think of the constitution itself as the basis of our security or shall we rely rather upon the continuing satisfaction of the mass of the people with the principles which it embodies? This is an interesting practical question. If we adopt the former alternative, we shall be apt to think that the remedy for every ill is to insert in the constitution a provision upon the subject. In interpreting the constitution we shall be apt to ignore the relation between the question at issue and the national will. If we adopt the latter alternative, we shall be slow to insert in the constitution anything but declarations of principles which have already become fixed and fundamental. We shall hesitate so to interpret the constitution as to leave the United States stripped of any one of the powers usually exercised by sovereigns, whether the power relates to territorial acquisition or to other matters.

That this question respecting our conception of the Constitution is a practical question sufficiently appears when we examine the constitutions of the several states. In the state constitutions we find prohibitions upon local and special legislation, upon the consolidation of parallel and competing railway lines and various other provisions dictated by a distrust of the legislature or a desire to impose upon the community for all time an economic theory of doubtful soundness. There are those who think that the cause of Christianity can be promoted by inserting the name of God in the Constitution of the United States. There is observable in many quarters, an impression that the only qualification for the admission of a provision into the Constitution of the United States is the willingness of the people to insert it. Once inserted, it seems to be assumed that the whole question is set at rest and that no future national development will threaten the efficacy of the restriction.

Dr. Thorpe has given us in attractive form the material from which to construct a truer theory of the relation of our national Constitution to national growth. His story of the recognition of the new nation is followed by an accurate and detailed narrative of the evolution of the national Constitution. Then comes the account of the submission of the Constitution to the people for ratification in the several states, followed by an exhaustive consideration of the first twelve amendments. Perhaps the most interesting part of the whole work is that which is found in Book 4—"Contest and Compromise." Under this title we find a discussion of the contention for sovereignity between the states and the United States and the admirable chapter on "The Law of the Constitution," in which Dr. Thorpe shows himself to be a constitutional lawyer as well as a historian. In this chapter, Dr. Thorpe has been wise in making use of the work of Judge Cooley and thus places himself indirectly under obligation to the University of Michigan. In this book also appears the history of the Kansas-Nebraska struggle, of the Dred Scott decision and of the progress of secession. Here, also, is found an interesting chapter on "The Rejected Amendment of 1861." "The amendment," says Dr. Thorpe, "is one of the paradoxes of history. Few Americans are aware that while states were seceding and their representatives in Congress were proclaiming that no compromise on slavery could longer keep them in 'the

old Confederacy,' a Republican House, a Democratic Senate and President Buchanan, proposed an amendment to the Constitution making slavery perpetual in the United States. And perhaps fewer are aware that President Lincoln, in his inaugural, declared that he had 'no objection to its being made express and irrevocable.' But man and nature were against the principle of the proposed amendment. We shall see how it was ignored by the Nation." The third volume (which begins with Book 5) traces the story of emancipation. Then comes the history of the 13th Amendment, while Book, 6 deals with the extension of the suffrage, including the history of the 14th and 15th Amendments and of the re-construction policy. "With the adoption of the 15th Amendment, the Constitution as a piece of political work extending into two centuries during its formative period, was completed."

Dr. Thorpe's work ends with two chapters, "The Sources and Authorship of the Constitution" and "Later Exposition of the Law of the Constitution." The last chapter might have been amplified with advantage, in order to preserve a balance with the detailed treatment given to similar matters earlier in the work. As it stands, the chapter is hardly more than a sketch and an incomplete one. Perhaps, however, this latter exposition of the law of the Constitution has not yet become "history." Perhaps it is too soon to expect the historian to accord it more than passing mention. It is to be observed, however, that it is only in virtue of this chapter that Dr. Thorpe's work can be regarded as covering a period more recent than, say, 1870.

Such is the outline of the author's treatment of his subject. When regard is had to the slow development of each of the provisions of the Constitution and its amendments and when consideration is given to the many evidences of the futility of constitutional declarations which do not reflect national will, it is difficult to escape the conclusion that the true basis of our security, like that of the Englishman, is to be found in the historical fact that we, as a people, have formed and are forming "constitutional habits" which are re-inforced but not created by the declarations of our Constitution. If we read this constitutional history with care, we shall be slow to give our adherence to any interpretation of our Constitution which tends to bring it athwart the stream of national progress.

PHILADELPHIA, May, 1902 GEORGE WHARTON PEPPER

THE AMERICAN STATE REPORTS, containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol LXXXII. San Francisco: Bancroft-Whitney Company. Law Publishers and Law Booksellers. 1902. Sheep, 8vo, pp. 1059.

Considered as an entirety, the "American" series of reports (comprising the AMERICAN DECISIONS, 100 volumes of cases selected from the American reports from the earliest period down to 1869; the AMERICAN REPORTS, including selected cases from the various state reports from 1869 to 1888, and the AMERICAN STATE REPORTS, now numbering 82 volumes, from 1888 to the

present time,) must undoubtedly be regarded as the most practically useful series of reports which any lawyer can have in his library in addition to the reports of his own state. Although the AMERICAN REPORTS were not originally published by the publishers of the other two series, the copyright was afterwards acquired by them, so that the Bancroft-Whitney Company now own and control the three series, and they may properly be regarded as one continuous set. The editorial work upon the AMERICAN REPORTS was different from that upon the other series, but not so greatly so as to destroy their continuity. The purpose of the present series is to give in six volumes a year "the cases of general value and authority decided by the courts of last resort of the several states," with annotations not only referring to previous cases in the same series but to American and English cases generally. That the "cases of general value and authority" decided by the courts of last resort of the several states should make just six volumes a year is of course obviously impossible. Moreover, that the six volumes of AMERICAN STATE REPORTS should contain any large percentage of the total number of cases decided in the court of last resort in the United States within a year is likewise obviously impossible. The present volume, for example, contains 160 cases selected from 17 volumes of state reports; and, taken as a whole, the volumes of AMERICAN STATE REPORTS average about one volume to sixteen of the original volumes. The determination of what are the cases of general value and authority is a matter upon which no two lawyers could easily agree. Any series of selected reports must necessarily have arbitrary and disappointing limitations. But while it cannot be said that these volumes contain all the valuable cases to be found in the reports from which they have been gleaned, it is at least safe to say that all the cases selected are valuable cases. Access to all the reports is for most lawyers an impossibility, and selected cases are for such lawyers the most valuable substitute which has yet been devised.

Every case is annotated at least to the extent of referring to the previous cases in the same series upon the same subject, while to many of the cases there are appended notes so full and comprehensive as to constitute complete monographs upon the point selected for annotation. In the main, the cases are well reported. Briefs of counsel are always omitted, and this in many instances is a serious drawback. The statements of fact, moreover, are occasionally so meager that the full significance of the case is difficult to determine. The volumes are generous in size, not unreasonable in price, and the mechanical execution is in general fair. In many instances, however, the press work is poor and the printed page often has a cheap appearance, attributable probably to machine composition. Notwithstanding these defects, however, these volumes, regarded as a part of the entire series, are, as has been stated, one of the most valuable working tools available to the average practitioner.

FLOYD R. MECHEM

Since the foregoing was written, volumes 83, 84 and 85 have been received. These volumes maintain the high standard established in the earlier volumes. Each of these contains monographic notes upon live subjects in the law which are alone worth the price of the volume to any one having occasion to investigate them. It is due to the publishers to say also that the typographical appearance of these volumes is excellent. A number of minor improvements

have, moreover, been made in the more recent volumes, such as preserving the original paging, running the volume number at the head of each left-hand page, and adding the "Reporter" citations to the cases. These are labor-saving devices which are much appreciated by the busy user. F. R. M.

THE RIGHT TO AND THE CAUSE FOR ACTION, both civil and criminal, at law, in equity and admiralty, under the common law and under the codes. By Hiram L. Sibley, Circuit Judge in the Fourth Circuit of Ohio. Cincinnati: W. H. Anderson & Co. 1902.

This is a monograph of somewhat less than a hundred and fifty pages, in which the author undertakes to analyze and define the fundamental terms, "right to action" and "cause for action." Although the courts continually use the terms, they have seldom attempted a comprehensive analysis of their essential elements, and while text-writers have discussed them with considerable care, a great divergence exists in the conclusions reached. To develop a clear conception of the precise meaning properly attachable to these terms, is the purpose of this essay.

Any adequate discussion of the nature of a "cause of action" must necessarily reckon with the well-known analysis of Pomeroy in his pioneer treatise on Remedies and Remedial Rights. And the alleged imperfections in that analysis, form in fact the groundwork of this monograph. A cause of action consists, says Pomeroy, in the combination of two essential elements, (1) a primary right possessed by the plaintiff and a corresponding primary duty devolving upon the defendant; and (2) a delict or wrong done by the defendant which consists in a breach of such primary right and duty. The author makes two criticisms of the view thus outlined; first, that the analysis is unsound; and second, that it does not go farther and differentiate "cause of action" from "right of action." Passing the first point for the present, it is not true that Pomeroy failed to distinguish these two terms, for he expressly states (§453) that what he terms a "right of action" is identical with "remedial right," and (§454) that a "cause of action" is plainly different from a "remedial right," the latter being the consequence or secondary right which springs into being from the breach of the plaintiff's primary right by the defendant's wrong. And he goes on to say that, in many cases, from one cause of action two or more remedial rights or rights of action may arise. Without discussing the merits of this distinction, it undoubtedly exists in the pages of Pomeroy, and he does not, as the author says, quoting a criticism of Phillips to the same effect, use the terms "cause of action" and "right of action" interchangeably.

Two specific aims appear in the essay, one to indicate the proper basis of distinction between a "cause for action" and a "right to action," the other to develop a true theory of the nature of a "cause of action." Confessedly the cases are silent upon the first point, and his reference to text-writers is limited to Pomeroy, Bliss and Phillips, who, he says, are about equally authoritative. After dismissing Pomeroy with the criticism indicated above, and leaving Bliss out of account, for he makes no use of the term "right of action," the author cites Phillips as in a measure suggesting and supporting the views he announces, though he thinks Phillips stopped short of a thor-

oughly logical outcome. But there is in fact, nothing in common between his view and that adopted by Philfips. Phillips says, following Pomeroy exactly, that upon the infringement of a legal right there accrues, *ipso facto*, to the injured party, a right to obtain a remedy, and this secondary or remedial right is called a "right of action" while a 'cause of action," and here he differs from Pomeroy, is the formal statement of the operative facts which give rise to such a remedial right. The former, he says, depends npon the substantive law, the latter upon the law of procedure. In direct conflict with this view, the author contends that the substantive law has nothing whatever to do with either the right to action or the cause for action; but the former consists in the conjunction of a wrong with the law of remedy, while the latter is solely the wrong. The text is not free from obscurity, but this *seems* to be the author's position. Clearly Phillips lends it no support.

The brief discussion of this distinction between a right to action and a cause for action, is followed by a detailed consideration of the nature of a cause for action, which occupies the major part of the book. The author's definition is essentially that of Bliss, making the cause of action equivalent to the wrongful act, but his conception of the complete isolation of the cause of action from the substantive law, is one which Bliss nowhere suggests. It would seem to be an elementary principle of logic that a negative has meaning only by reference to its corresponding positive, and that a negative term absolutely separated from its correlative, is a logical impossibility. An act can be wrongful only in relation to a right which it violates, so that the right and the act, taken together, must logically constitute the wrong.

But aside from this disregard of the entire substantive law, there are many statements to be found in the cases which seem to support the author's view that the wrong itself constitutes the cause of action. And yet, his argument from the cases is open to criticism. Many of his cases were based upon the operation of the statutes of limitation, but it is evident that statutes of limitation are concerned primarily with the *completion* rather than the *constitution* of a cause of action, with its *last* necessary element rather than the *combination* of *all* its elements. Many others arose upon questions of jurisdiction, and here again it is the wrongful act which is chiefly important, for the reason that, ordinarily, it alone, as distinguished from the primary right, is susceptible of localization. In none of these cases is the question squarely presented as to what constitutes an *entire* cause of action. The exact question has been raised, however, in a nnmber of cases involving the invasion of different rights by a single wrongful act, bnt the author, while asserting an exhaustive investigation of the cases, fails to mention some of the most important of them. Thus the case of *Brunsden* v. *Humphrey*, decided in the English Court of Appeal in 1884 (14 Q. B. Div. 141), containing a most careful and learned analysis of this precise question, and settling the English law on the subject, is not referred to In this case the plaintiff, while driving his cab, was run into by defendant's van, and both his person and his cab were thereby injured. He had first sued the defendant for the injuries to his cab, and had recovered. Subsequently he brought this action for the injuries to his person. The question presented, therefore, was whether there had arisen one cause of action or two; or, in other words, whether the wrongful act alone, or the primary right and the act together, constituted the cause of

action. The court decided in favor of the latter view, thus sustaining Pomeroy's analysis, although a short dissenting opinion by the Chief Justice approved the other theory. This, then, disposes of the numerous English cases cited by the author.

In this country there is more uncertainty. The case of *King* v. *Chicago, M. & St. P. Ry. Co.*, 80 Minn. 83, cited by the author, is directly in point, and fully sustains his position. *Hazard Powder Co.* v. *Volger* (1888), 3 Wyo. 189, not cited by the author, is a case of precisely the same nature, and was decided the same way, while on the other hand, *Smith* v. *Warden* (1885), 86 Mo. 382, also not cited by the author, held, under exactly the same facts, that there were two causes of action. So in the recent case of *Watson* v. *Texas, etc., R. R. Co.*, (1894), 8 Tex. Civ. App. 144, which the author seems not to have found, an injury to both person and property by the same wrongful act, was held to give rise to two distinct causes of action. And the case of *Chicago N. D. Ry. Co.* v. *Ingraham* (1890), 131 Ill. 659, which he cites without comment as supporting his own view, will be seen upon examination to incline rather to the position of Pomeroy. But none of the American cases upon the point can be termed well-reasoned. Even *King* v. *Chicago M. & St. P. Ry Co.*, rests the decision upon the ground of simplicity and directness, and makes no attempt at a comprehensive analysis.

It would seem that a simple reference to the wording of the Codes would be conclusive upon the matter. Most of them provide that the complaint shall contain, among other requisites, "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." And a demurrer may be filed to a complaint which does not contain these facts. Any facts, then, the absence of which from the complaint will give ground for a general demurrer, are essential to a cause of action, and it is clear that the two classes of facts which must be stated are: (1) Those showing the plaintiff's primary right (except in those cases where the law presumes it); and (2) those showing the infringement of this right by the defendant. The cause of action, as the term is employed to the American codes, must then consist of these two elements.

The author has made a serious study of the subject, and his monograph contains many illuminating suggestions and new points of view. While, therefore, we do not think his logic faultless or his research exhaustive, he has thrown much new light upon a subject which is at once fundamental and elusive, and his book is well worth perusal.

EDSON R. SUNDERLAND

"CYCLOPEDIA OF LAW AND PROCEDURE." Edited by William Mack and Howard P. Nash. The American Law Book Company: New York. Butterworth & Company: London.

The impossibility of giving, within the limits ordinarily set to a review, anything like an adequate idea of so extensive a compilation as the "Cyclopedia of Law and Procedure," will be at once apparent to the reader. The work is of large proportions. Four volumes have already been issued, the first three of which are before us. Some idea of the extent of the work in complete form may be gathered from the fact that the subjects (in alphabeti-

cal order) treated in the first three volumes reach only the title "Assignee." The first three volumes contain 3365 imperial octavo pages. In size and clearness of type, in quality of paper, in indication of subjects so as readily to catch the eye, and in all that pertains to the bookmaker's art, nothing could be desired beyond what is exemplified in this work, save only that the volumes are too large. If each volume had been divided into two, the utility of the work, in the writer's judgment, would have been greatly enhanced—so greatly as to offset entirely the extra cost of doubling the number of volumes. The objection to ponderous volumes is not captious, nor is it peculiar to individual practitioners. Lawyers want a lawbook which they can take into their hands and use without providing a desk or table to lay it upon. The size of these volumes—the only blemish upon their bodily appearance—cannot fail, in and of itself, to limit their use.

The special feature of this work—that which, it is claimed, distinguishes it from works of similar character and aims—is the method of treating the subjects discussed. Concerning this feature, the editors declare: "With reference to the particular titles, there will be no splitting up of the law along the arbitrary line alleged to divide pleading and practice from substantive law; but the whole of each topic, including pleading, references to suitable forms, evidence, and questions of law and fact, will be treated under a single head." The plan of treating the whole of each topic in a single work, without reference to the frequently fanciful division between substantive law and adjective law, will commend itself to the profession. The practitioner has little if any occasion to discriminate, while making his investigation of a practical question, between these arbitrary and fanciful divisions of the subject. What he is seeking is what the law is and what the remedies are in his particular case. To him it is economy of time and saving of expense to be able to find in a single cyclopedia what he is seeking, and not to be compelled to go to two or three cyclopedias to accomplish his purpose. The volumes before us are comprehensive enough to enable him to make his preliminary examination of the whole subject under investigation, and for such purpose they seem well adapted. The function of such a work does not extend beyond the field of preliminary examination of legal questions. For such purposes the "Cyclopedia of Law and Procedure," measured by the first three volumes, is a work of merit which will not fail to prove a valuable addition to the working library of the practicing lawyer, whose time it will save and whose readiness and efficiency it will promote; but to expect that such a work will result in furnishing to members of the profession a complete working library, is to expect what will not be realized. Such a work is at best only a tool in the set. To the law library such a work is something akin to what dictionaries and encyclopedias are to the general library.

The glossary of legal maxims appearing throughout the volumes in the alphabetical order of other subjects, and "presented in both the original and vernacular tongues," will be a convenient aid to all users of the work, and an indispensable aid to many practitioners to whom maxims and phrases of the law expressed in the "original tongue" are meaningless. This feature of the work is in conformity with the general purpose of the editors to "treat the whole of each topic."

The analysis of the subjects preceding their treatment seems to justify the

promise of the editors that it shall be logical and minute, and, coupled with the cross references with which it is accompanied, affords the means of examining particular phases of the subject without waste of time.

In competing for a place in a field already pretty well occupied by works of the cyclopedic type, the peculiar plan of the "Cyclopedia of Law and Procedure" of treating each topic in its entirety, as heretofore pointed out, ought to be, and the writer believes will be, a valuable aid. Whether the promise of the editor that "many of the articles shall be written or examined and approved by men of marked learning and skill in the particular subjects edited by them," will be an additional aid, depends upon the scope of the promise, which as expressed may mean much or little, and the fidelity with which the promise in its enlarged sense is kept.

ROBT. E. BUNKER

PAGE ON WILLS—A concise treatise on the Law of Wills. By William Herbert Page, Professor of Law in Ohio State University. 1 Volume. W. H. Anderson & Co., Cincinnati, Ohio. 1901.

The writer of this work states in its preface that it is written both for the student and the practitioner. A review of any literary work which loses sight of the object for which it is claimed to have been published would be unsatisfactory, and, if a general criticism, very unfair.

From the view point of the writer, then, his work will be briefly considered.

The branch of the law treated by Mr. Page is one, which, considering its importance, has attracted few great law writers. A first-class text-book upon this subject will be appreciated by the profession. Within the last twenty-five years there has been large growth along certain lines in this branch of the law, particularly in respect to the law of devises and legacies, powers and testamentary trusts. It is to be greatly doubted whether the entire subject of wills can now be satisfactorily condensed into one volume which will be received as standard authority by the profession. For this reason alone, the work under consideration, taken as a whole, does not fulfil the claim of its author for the general use of the practitioner. Although this is true of the book as a whole, yet in introducing some excellent chapters on the subject of probate and contest of wills, the author is entitled to great credit. About two hundred pages are devoted to this branch of the subject, which, with the well-considered notes and numerous citations, make up the most useful and practical portions of the book to the active practitioner. In no other volume on wills will the probate lawyer find so great an amount of this valuable material collected and classified. To such a lawyer, for this feature, Mr Page's work will be acceptable and very valuable.

In the matter of the primary object of the work, to provide for the student a satisfactory text-book upon the subject, the writer has been very successful. That the author is also a teacher is in evidence throughout the work. All who are actively engaged in teaching in the law schools, understand that a principle cannot be stated in language too simple and concise, or be too often repeated to the students. With the text-writer, the first of these accomplishments makes his work most acceptable, while the second renders it tiresome. This author as to the first is to be congratulated upon his ability to make

statements of principles in language clear, concise and accurate. In the matter of repetition, however, he has been unable to put the lecture room entirely out of sight. The fault is one which experience in book-writing will doubtless cure.

The student will find the subject matter of the book arranged satisfactorily. The injection of the chapters on probate and contest into the middle of the work is not confusing, although it would have been more artistic if they had been placed as the closing chapters.

The chapter on the history of wills is too condensed for a text-book. Twice the space devoted to this subject would have been better, and of great service to the student and general reader. No criticism of what this chapter contains is intended. After reading it there is something of a feeling of dissappointment, because it is so suggestive of what the literature of the subject contains.

The work of the author throughout the book shows no spurts of effort, nor bursts of fluency for effect. The book has been produced by hard and sustained work.

If a general criticism were offered, it would be that the work was performed in too great haste. Products of the brain, as well as of the factories, require thorough seasoning before being put upon the market. This work will fill a place among the text-books of the student, and fill it well. It is in fact a product of the work of the law school. The student recognizes the forms of statement familiar to the lecture room. His friendly attention is gained from the start, and he reads the book with an interest which is spontaneous.

The arrangement of the subject matter is such that it can be studied as a whole, or taken up by topics. The law of wills has been defined as an aggregation of rules of construction, applied by the courts for the astonishment of the bar. No student after reading this volume will ever be tempted to repeat this definition in earnest.

A. V. McALVAY

Judge's Chambers, Nineteenth
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THE LAW OF INSURANCE AS APPLIED TO FIRE, LIFE, ACCIDENT, GUARANTY AND OTHER NON-MARITIME RISKS.—By John Wilder May. Fourth edition, revised, analyzed and greatly enlarged by John M. Gould. Two volumes. Boston: Little, Brown & Co., 1900, pp. xciv, 1510. 8vo.

A TREATISE ON THE LAW OF INSURANCE, INCLUDING FIRE, LIFE, ACCIDENT, CASUALTY, TITLE, CREDIT AND GUARANTY INSURANCE IN EVERY FORM.—By Charles B. Elliott, Ph.D., LL.D., Judge of the District Court of Minnesota, author of "Public Corporations" and "Private Corporations." Indianapolis: The Bowen-Merrill Company, 1902, pp. lvi, 531. 8vo.

To paraphrase a well-known quotation, "Of the making of many books on Insurance there is no end, and much study of some of them is a weariness to the flesh."

The past ten years has afflicted the lawyers of the United States with seventeen octavo volumes of text-books on this highly specialized subject, ten of which have appeared since 1897.

Some of these volumes, having apparently been made with a paste pot and a pair of shears, are of no use except as bad digests.

Two octavo and five duodecimo volumes of digests are a further addition to the mass of insurance literature produced within the last five years.

The vacillations and vagaries of the courts in deciding insurance cases are, in the main, responsible for this torrent of printer's ink. The effect of conflicting, illogical and ill considered opinions has been the practical annihilation of the insurance policy as a written contract; and the subsitution therefor, under the guise of "waivers and estoppels" of a verbal contract made by the assured after the loss.

Where astuteness in construction and distinction could find no loophole to evade the written contract, plain refusal to enforce its terms has frequently been employed; and this alike with the statutory standard policy and the older uni-lateral form.

The net result is a mass of conflicting decisions which the Infinite Intelligence itself could not reconcile, while of the law of insurance as a general subject naught can certainly be said save that the last decision in each jurisdiction may be supposed to be the law until it is overruled, and that the last decision will be overruled whenever the plaintiff's "equity" demands.

The mass of late text works and digests on this subject is but the manifestation of the effort of an intelligent, hard-working profession to keep abreast with the courts.

It is to be expected that the book mill will continue to grind its insurance grist until the doctrine of "*stare decisis*" is once more applied to insurance law.

Of the late works on this subject "May" and "Elliott" are, each in its sphere, of the best. May is the better for the general practitioner and the insurance lawyer; Elliott for the student.

Perhaps, more than any other, "May" deserves to be styled the standard American text work on non-maritime insurance law. It first appeared in 1873 as a single volume. The edition of 1882, still one volume, presented the development of the subject as evidenced by two thousand additional cases. The edition of 1891, under the able editorship of Mr. Frank Parsons, doubled its size; while in the fourth edition Mr. Gould cites us to three thousand additional cases.

For nearly thirty years the work has been well and favorably known. Originally prepared with great care by its able author, its subsequent editors by equal care, diligence and discrimination, in their additions to the text, and by adding a better index, chapter headings, and black letter catch heads, have largely increased the usefulness of the work to the busy lawyer. The practitioner who limits his library to a single work on each subject can have no more useful book.

Judge Elliott's work, while not claiming that distinction, in a sense may be said to be in its third edition, as it is evidently the outgrowth of his previous work, "Elliott's Insurance—An Outline with Cases," the second edition of which appeared in 1896 from the press of West Publishing Company. The present work contains large additions, on the standard policy, life, accident, indemnity, and the other common non-maritime forms of insurance, making more than double the matter contained in the previous

work. In condensing this broad subject within the limits of a single volume, the author necessarily has omitted many details and minor points of interest to the trial lawyer.

The work has been done with judgment and discrimination in the selection of the cases cited and care in condensation and presentation. For the student, or the lawyer who wishes to refresh his recollection of general principles, this work is an excellent one.

The difficulty of keeping up with the courts in insurance cases is well illustrated in several instances in this work. A single example must suffice. In section 183, page 152, *Cleaver* v. *Traders' Insurance Co.*, 65 Mich., 527 (1887), is cited and quoted as to the binding effect of policy limitations on the power of agents. The doctrine of this case was adhered to by our supreme court for more than eleven years, and then, without so much as a reference to a dozen cases which had followed the Cleaver case, was suddenly overturned by the decision in *Cronin* v. *Fire Association*, 119 Mich., 74, (1898) The only court with Michigan in this ruling is Missouri. Judge Elliott has noted the Missouri rule but has failed to note the last Michigan case.

Both these works deserve commendation as specimens of the printer's art.

MARK NORRIS

GRAND RAPIDS, MICHIGAN

PROBATE LAW. By M. D. Chatterton, member of Ingham County Bar. In two volumes. Lansing: Robt. Smith Printing Co. 1901. Pp. lxxvii., v., 1117.

Judge Chatterton has rendered the Bar of Michigan a valuable service by his work on probate law. He came to this task well prepared having had eight years experience as probate judge and having given as many more years of study to the subject.

Our probate court is a creature of the statute. The settlement of the estates of deceased persons is, as a matter of course, as old as the law or custom which enabled an individual to acquire and hold property. Since no one can take anything with him out of this world, what he leaves behind must necessarily go to another, and the peace and good order of every community has always required that some individual or some tribunal should determine to whom such property belonged under the written or unwritten law. These powers and prerogatives were exercised in England for centuries by the manor and by the ecclesiastical courts. Massachusetts at an early day created by statute probate courts and conferred upon them the general powers of the old manor and ecclesiastical courts. This statute of Massachusetts was adopted substantially by the territory of Michigan and has been maintained since.

Some portions of the probate law are as well settled as any part of the common law. This is true of the law governing the execution and construction of wills. The difficulty in administering that branch of probate law does not arise from any uncertainty as to the rule of law, but in the application of the rule to the facts in a given case. But since most of the probate law and procedure depends mainly upon the statute and is regulated by the statute, the difficulties which confront a writer upon this subject are nearly unsurmount-

able. The utmost he can do is to point out to the practitioner the statute and for his aid and assistance he may copy it. As a further aid the author may be able to cite some decision rendered by some court in another state construing some other statute of similar import but differently worded. He may even venture a conjecture as to the true construction of a statute not yet passed upon by the courts, but if he is wise he will leave all such conjectures to the reader and to the practitioner.

Judge Chatterton has followed in his treatise the only course permissible, and has covered the whole subject in an orderly and methodical manner. He has discussed with sufficient fullness, as an introduction, the jurisdiction and powers of the probate court. This is followed by a discussion of the law governing the execution and revocation of wills, the probate of wills, the interpretation of wills and the powers and duties of executors. He then takes up the subject of the settlement of the estates of intestates step by step, from the filing of the petition for the appointment of an administrator to the final distribution of the estate. This is followed by an examination of the law governing appeals and other proceedings taken to review the action of commissioners on claims and the orders and decrees of the probate court. When the law governing any probate proceedings has been construed by the courts such decision is cited and the gist of the finding stated with sufficient fullness. When the statute has not been construed by any court and its true meaning is therefore unknown, the language of the statute is given and nothing more. In short we have in these volumes the result of the labors of a conscientious student of the subject who has carefully and clearly stated what is thought to be known and has discreetly left to the practitioner to discover what is still hidden. In addition to the decisions of our own courts a few of the leading decisions of other courts have been cited. The work will materially lessen the labors of the practitioner.

The importance of this branch of the law is manifest. The life of a generation is only thirty odd years and all the property of each generation passes through the probate court. Unfortunately the statute law governing the settlement of estates is being continually changed and modified by the legislature and is therefore left in doubt and uncertainty. The bar of the state are fortunate in having an author of Judge Chatterton's experience and learning furnish them with a practical manual of this important branch of substantive and adjective law. We commend the work to the profession.

B. M. THOMPSON

ABBOTT'S TRIAL EVIDENCE.—The Rules of Evidence Applicable on the Trial of Civil Actions Actions at Common Law, in Equity and under the Codes of Procedure: Second edition, revised and enlarged. Baker Voorhis & Co., New York.

The second edition of Dr. Austin Abbott's book on Trial Evidence, the first edition of which came from the press of the present publishers in 1880, has recently been issued with Mr. John J. Crawford, of the New York bar, as its editor. This work would scarcely be called a "treatise" upon the Law of Evidence in the best sense in which that term is used. It does not purport to be a scientific treatment of the law of evidence through a discussion of its theory and the principles which underlie it. On the other hand it is intended

as the hand-book of the practicing lawyer who is "assumed to be familiar with the general principles of legal evidence." This edition does not depart from the plan of the first edition in any particular. Mr. Crawford lays no claim to anything new in his method but only that he has "revised and enlarged." Indeed there was little new in the plan of Dr. Abbott in the first edition. Professor Greenleaf in the second and third volumes of his great work on the Law of Evidence, as well as others who have written on this subject, had given us substantially the same treatment of it.

The editor of this edition has not revised the text of the work in the sense that there is any general new statement of propositions, but he does seem to have modified or made additions to the text in most places where the courts in the twenty years since the publication of the first edition have made it desirable or necessary.

It has been said of this edition that no cases are used in it which are more recent than the publication of the prior edition and that one has gained nothing by getting this if he had that edition. While the practitioner may sometimes be disappointed at not finding more of the recent cases used in support of some portions of the text in this edition, yet the foregoing criticism is certainly too sweeping and lacks that accuracy so generally characteristic of the journal in which it is found.

A more serious objection to the use of cases in this work which will occur to the practitioner, outside the state of New York particularly, is that so often the authority cited is that of some court of inferior jurisdiction of that state, when some decision of a court of last resort outside of New York, could be used if not one by the court of appeals of New York itself. But this objection is less patent in the present edition, not because the citations from reports of decisions of inferior courts have been eliminated, but because of the addition of other decisions from courts of last resort.

As a practitioner's book it will be welcomed as a convenient aid to the suggestion and solution of those questions so continually presenting themselves in connection with the trial of causes. The book is quite satisfactory on its mechanical side and will doubtless gain many new friends by the time a new edition is called for. V. H. LANE

A TREATISE ON CHATTEL MORTGAGES FOR MICHIGAN. By Louis L. Hammon, 1 vol. pp. viii., 442, St. Paul, Minn., Keefe-Davidson Law Book Co. 1901. ($3.75).

A TREATISE ON CHATTEL MORTGAGES FOR ILLINOIS, 1 vol. pp. viii., 424: (same author and publishers). 1901. ($3.75).

The author states in the preface to each of these works that he has "attempted to present an analytical and comprehensive statement of the more general principles of the modern law of chattel mortgages."

It seems that he has succeeded in his attempt to make a summary of leading principles, with more especial reference to local peculiarities. As concise statements of the existing law of these states respectively, the works are certainly useful manuals. The citation of decisions is thorough, and each volume contains in an appendix the statutory provisions concerning chattel mortgages in the state for which it is especially designed.

The existence of conflicts of opinion on many points in the law of chattel mortgages, together with the marked differences in the statutory requirements of the several states as to execution, filing or recording, etc., justifies, perhaps, the making of books of this character, and the plan adopted by the author has been well executed.

It may be suggested, however, that this method of treating a subject may be disadvantageous in the long run because of its tendency to emphasize local peculiarities and to prevent the ultimate harmonizing of the law. Such a plan of treatment results in giving but a partial view of a topic.

A mortgagor of a stock of merchandise in Michigan may remain in possession and sell the chattels in the ordinary course of trade, by an agreement to this effect in the mortgage, and the mortgage is not for this reason deemed fraudulent; while in Illinois such a mortgage is considered fraudulent as to third persons.

In these works the law on this point seems correctly stated as to each of these states. No suggestion, however, is made in either work that there is a difference of opinion and practice in this regard, and the plan of the works precludes a discussion of the question. One obtains, therefore, from either book alone, an incomplete view of this practical matter, and is not even made aware of the fact that there are divergent views held on it in these and other neighboring states.

Had these two works been combined in one treatise, much that is common to both need not have been repeated in each, while, at the same time, a broader view of the law would have been given and comparisons could have been made where conflicts occur, with brief statements of reasons, not only interesting in themselves, but of practical importance and value to the lawyer and business man in particular instances.

The author has so well done his work as he designed it, that it is apparent he could have made a treatise of more general value had he aimed to do so.

JAMES H. BREWSTER

VOID JUDICIAL SALES. By A. C. Freeman. Fourth edition, February, 1902. One vol., 8vo., pp. 345, Sheep, $4.00., delivered. Central Law Journal Co., St. Louis, Mo.

The work is divided into seven chapters: 1. Introduction; 2. Sales void because the court had no authority to enter the judgment, or order of sale; 3. Sales void because of errors or omissions subsequent to the judgment of order of sale; 4. Proceedings after sale; 5. The legal and equitable rights of purchaser at void sales; 6. The constitutionality of curative statutes; 7. The constitutionality of statutes authorizing involuntary sales. This edition is well printed on good white paper, the text in small pica, the notes in brevier, all leaded. The first edition appeared in 1877, in 144 pages. That text appears in the present edition substantially unchanged. In the second and third editions new matter was added by inserting paragraphs under the original sections, of which there were sixty-nine. In the present edition the same practice has been followed; but several new sections have been inserted, numbered 9a, 9b, 19a, etc. The index refers to sections, several of which cover eight or ten pages each. The author cites the official reports and gives parallel references to the American Decisions, American Reports,

and American State Reports, which are very rich in decisions on this branch of law. But he does not cite the L. R. A. at all, nor the West Reporters, unless the case is not officially reported. The propositions of law are clearly and accurately stated, as all acquainted with the other works of the author would expect. The title is a narrow one, and even that does not seem to be exhausted. One thing may be said of this book, which I am sorry to say has not been found true of all law books in these days: the reader may depend on finding the cases cited to be in point.

JOHN R. ROOD

TABULATED DIGEST OF THE DIVORCE LAWS OF THE UNITED STATES.—By Hugo Hirsch of the New York Bar. Second edition. New York: Funk & Wagnalls Co. 1901.

This is a chart, about three feet nine inches long by two feet three inches wide, giving in parallel columns, under the names of the several states, a brief digest of the grounds for divorce or separation, the effect (as to right to marry again, etc.), the period of residence required, and the chief points respecting jurisdiction and the service of process. Its purpose is stated to be "to enable lawyers and laity to see at a glance what are the laws of each state and territory, to be able at once to compare those laws, and to ascertain all this without any trouble or research into many volumes of statutes, codes, and general and special acts." Much labor has doubtless been expended upon this chart, and it shows much ingenuity in classifying and arranging the matter, but it is certainly questionable whether such an abridgement is useful to the lawyer or safely to be relied upon by the laity.

FLOYD R. MECHEM