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RECENT LEGAL LITERATURE

AMERICAN RAILROAD RATES. By Walter Chadwick Noyes, a Judge of the Court of Common Pleas in Connecticut; President of New London Northern Railroad Company; Author of "The Law of Intercorporate Relations." Boston: Little, Brown & Company, 1905, pp. 277.

Considering the present widespread interest in railway rates and railway regulation, this book appears at an opportune time. Occupying the position of judge of the Court of Common Pleas in Connecticut, as well as that of president of the New London Northern Railroad Company, its author is fitted through his experience to approach the subject from the standpoint of a publicist as well as from that of a railway manager. While it is easy to see that the author's views are colored by his railway interests, the book is a fair and temperate discussion of the subject and one well worthy of consideration by shipper and consumer as well as by railway advocate.

Judge Noyes limits his discussion of rates to freight rates, observing in his preface that "the fundamental principles governing rates and fares are the same." He distributes his discussion under ten chapters: I, Underlying Principles; II, Limitation of Rates; III, Making Rates; IV, Classification and Tariffs; V, Discrimination; VI, Competition and Combination; VII, Movement of Rates; VIII, Comparison of Rates; IX, State Regulation of Rates; X, Federal Regulation of Rates.

In the first chapter are considered briefly the legal and the economic principles to which railway operations are subject. Judge Noyes, like most writers upon the subject, especially those who approach the subject from the lawyer's standpoint, is unable to steer clear of the timeworn statement that a modern railway is a public highway, whereas the fact is that the modern railway is a purely private way used by a common carrier. It may be asserted beyond possibility of successful contradiction that even tho a railway corporation should acquire title to all its lands by purchase of the fee and should hold these lands subject only to the burden of the public's right to travel on the common highways crossing them, the railway problem would not be a whit different from what it is today. The railway would present precisely the same monopolistic features as at present. Left free to barter in the market, and subject only to purely economic control, its rates and charges would be governed by precisely the same principle as now controls them—that the charge must be adjusted to what the traffic will bear,—and there would be then, as now, the same inequitable adjustment of the burden between the shippers and consumers at non-competitive points and those at competitive points. There would be then as now the same necessity for the intervention of the state to secure to its members an equitable distribution of the benefits arising from the economies of railway transportation. The railway problem arises from the double fact that a railway is, as to a large proportion of its users, a monopoly, and that being an enterprise involving a large fixed capital it is correspondingly liable to be abused where subjected to competition. The fact that the earliest legislators who sought to regulate railways looked on them as analogous to turnpike roads, and tried to analyze their charges into

two components, the one of which should be a toll determined upon consideration of the value of the commodity transported, and the other of which should be determined upon consideration of the cost of carriage, is neither of any particular significance nor of any particular service in determining upon what principle railway operations shall be regulated by the state. Aside, however, from the devotion of a disproportionate amount of space to a consideration of the alleged analogy, the first chapter states fairly and clearly the two principal features of railway operation—a heavy fixed charge entirely independent of operation and of the operating expense a large proportion practically independent of the extent of operation. Especially commendable is it in the author, when it is remembered that he is a railway president, to recognize and to state that "A railroad is an economic monopoly in many "places. Most localities have only a single line and are without water com- "munication. Here there is no such thing as competition. The possibility "of building a parallel line is of little benefit to the shipper. If not a capital- "ist he cannot build; and if he is, the building proposition is likely to be "unattractive. Traffic sufficient to enable one railroad to pay large dividends "may not be enough for two to make any dividends. Moreover, a new road "can compete with difficulty with an established line. * * * The more "business a railroad does the cheaper it can do it. The old road, with two "or four tracks and large tonnage, can make lower rates than the single "track road with small tonnage. * * * *

"A railroad is a practical monopoly, from the point of view of the small "shipper, even in those places where there are competing roads. He is not "in a position to bargain. He cannot deal on even terms. He must pay the "rate charged by one of the railroads or not ship his goods.

"Now, while monopoly is the opposite of competition, and while with- "out competition the laws of trade cannot operate, it does not follow that a "railroad monopoly is injurious to the public. Industrial competition tends to "low and equal prices. Railroad competition * * * * generally tends to "discrimination and unequal rates. Railroad monopoly—its opposite—ought "to lead to low as well as equal rates, and this because the railroad is subject "to the law of increasing returns. If one railroad between two cities be able "to attend to all present traffic, and have room for more, how is the public "benefited by the construction of another road? One road with the increas- "ing profits attending an increased business, should either give the public "better facilities or lower charges. If it will not do so voluntarily it should "be compelled to do so by public authority. Two roads dividing the traffic "may be obliged to keep up charges and economize in facilities in order to "make anything at all. The railroad should be recognized as a monopoly and "treated as such.

"A monopoly under governmental supervision may better promote the "public interest than the freest competition. But it must be closely watched. "How closely, is the important question. Governmental regulation cannot "become governmental control without a shifting of responsibilities."

The chapters of most interest to readers of the MICHIGAN LAW REVIEW will probably be found to be—V, Discrimination; VI, Competition and Combination; and X, Federal Regulation of Rates.

In the discussion of Discrimination, the author classifies it with regard to discrimination between commodities, between localities and between persons. Concerning the first, he concludes with the statement, "The value of "the service is the controlling factor; * * * * classification upon the "basis of value, modified by the elements of cost and risk, is reasonable and "proper, and does not constitute unjust discrimination, or discrimination at all "unless it affect similar articles." Concerning local and personal discriminations he says:

"(1) A discrimination in charges is unjust when the same service is "rendered to different localities and the circumstances and conditions do not "warrant it.

"(2) A discrimination in charges is just when the same service is ren-"dered to different localities and the circumstances and conditions [do] "warrant it.

"(3) A discrimination in charges is unjust when the same service is "rendered to different persons."

The author might well have extended his statement so as to say that an unjust discrimination exists where the difference in the charges is disproportionate to the difference in the services. There may, for example, be an unjust discrimination between shippers in respect of carload rates and less-than-carload rates. After laying down his general principles upon the subject of discrimination, the author proceeds to a very satisfactory discussion of the various devices through which unjust discriminations have been effected and of the different circumstances and conditions which, according to the courts, warrant discriminations and deviations from the long and short haul principle.

In the chapter on "Competition and Combination" is presented an interesting discussion of direct competition and of indirect competition. The author shows very clearly the inequitable distribution of the benefits of railway transportation which is brought about through the operation of direct competition, and in comparison with this the beneficial effect of indirect competition, by which the author means that between carriers supplying the same market from different sources. In this latter case, the carrier and the shipper, instead of being antagonistic elements in the distribution of a substantially fixed sum, are component parts of an economic unit competing with other like economic units in supplying a common market. Under such competition, while the carrier and the shipper together get a somewhat less return than they would if they monopolized the market, the carrier is bound to allow to the shipper something in excess of his bare cost of production, enough more to make the shipper an economically efficient producer. In the discussion of combination the subject of railway pooling is somewhat fully considered. The author shows clearly how the opposition of the public to railway pooling has succeeded only in replacing it with a much more inimical form of combination, viz., actual consolidation.

The last chapter, "Federal Regulation of Rates," is the one of greatest present practical interest. In it the author asserts: "The power of the "federal government to regulate rates is subject to no limitations other than

"those contained in the Constitution. The limitations which are applicable "are three:

"(1) The division of the functions of government into three depart- "ments—legislative, judicial and executive.

"(2) The Fifth Amendment.

"(3) The provision against port preferences." Under (1) he reaches these conclusions: "(a) Making rates for the future is purely a legis- "lative function; (b) Congress may exercise this power to make future rates "either directly or through a commission; (c) Rates made by a commission "have the same effect as if made by Congress directly; (d) Determining in "a controversy the reasonableness of an existing rate is a judicial function; "(e) Judicial and legislative functions cannot be combined; (f) And—drawn "from the federal Constitution by itself—judicial functions can only be exer- "cised by judges holding their offices during good behavior and receiving a "compensation which cannot be diminished during their continuance in office." Under (2), he says "(a) Rates made by Congress directly or through a com- "mission have the force of law. Making a rate in effect is making a law that "such shall be the rate. (b) The courts can alone determine whether law- "made rates conflict with the Fifth Amendment. (c) Law-made rates only "conflict with the Fifth Amendment when they deprive the railroad of its "property without just compensation or due process of law, i. e., when they "are confiscatory. (d) Schedules of rates may be confiscatory. Theoreti- "cally, individual rates may be confiscatory; practically, they cannot be. (e) A "rate may be unreasonable, and therefore an unlawful charge, when made by "a railroad. The same charge as a law-made rate may not be so unreason- "able as to be confiscatory. (f) Courts can only pass upon the constitution- "ality of law-made rates. They cannot exercise supervisory power over such "rates and thereby participate in the exercise of the legislative power of "making rates." Under (3), he concludes that the port-preference provision, while it might invalidate specific acts of a commission would not invalidate an Act of Congress conferring the rate-making power upon a commission. The question in this case would always be whether or not a particular regulation made by the commission does in fact constitute a preference of the ports of one state over those of another.

With Judge Noyes doubtless few will take issue upon the foregoing propositions. Some of his deductions from them cannot, however, be so readily admitted. When he comes to the practical application of them in devising effectual remedies for unjust and unreasonable rates and charges, he maintains that only a branch of the federal judiciary can pass in the first instance upon the reasonableness or the unreasonableness of a rate complained of, and such rate having been found by a court to be unreasonable, the rates which shall thereafter be held to be reasonable shall be determined by some legislative agency. It is to be apprehended, however, that Judge Noyes does not here sufficiently distinguish between the determination of the reasonableness or unreasonableness of rates for the purpose of adjudicating the rights of litigants flowing from such rates in the past, and the determination of such question of unreasonableness or unreasonableness for the purpose of declaring what the future rate shall be. Manifestly to promulgate a different rate for

the future is in itself a declaration that the past rate has become unreasonable. Such declaration thus involves a finding of fact. The mere finding of a fact cannot be considered an exclusively judicial act. Every branch of the government, whether legislative, executive, or judicial, must in essence find the existence of certain facts before it can act. It is for the purpose of ascertaining facts that we have frequent and extensive inquiries conducted by legislative committees. The law prescribes that under certain circumstances the executive branch shall act thus and so. How can it act or refuse to act, without first passing upon the existence or non-existence of the requisite facts? The finding a rate to be reasonable or unreasonable is not a judicial function. Such finding becomes a judicial function only as it is incidental to the determination of the rights of one or both of parties litigant. The truth of the matter would seem to be that the legislative act is complete when the Legislature declares that railway rates shall, for example, "be reasonable and just," and that a designated official body shall from time to time upon certain facts being presented to it according to prescribed form ascertain and declare in precise numerical form what rates are under the circumstances then existing legal because "reasonable and just." Such ascertainment and declaration is not legislative but executive, and is on a precise parallel with the determination by a customs officer of the amount of duty to be paid upon the importation of a specific parcel of merchandise. Where the law leaves matters to the discretion of the executive, whether rate-making commission or customs officer, the court will not attempt to control such discretion further than to require that it be exercised honestly and in the form prescribed by law. But a commission empowered to adjudicate the rights of parties litigant under a statute requiring rates to "be reasonable and just" would undoubtedly be open to the objection that it is a hybrid if the statute attempted to empower it to promulgate rates for the future, and as such hybrid compound of judicial and executive functions it would be unconstitutional.

Of possibly even greater force than these technical considerations is the fact that a court is by its very nature incapable of considering the facts that really determine the reasonableness or unreasonableness of a specific rate. As was well pointed out by Mr. Victor Morawetz, general counsel for the Atchison, Topeka and Santa Fe Railway Co., in his testimony given in May last before the Senate Committee on Interstate Commerce, there is a considerable range between a rate so low as to be confiscatory and one so high as to be extortionate. Those who advocate the determination of the reasonableness or unreasonableness of a rate by a court in the first instance have not so far, I believe, pointed out any cases where the court, acting under the common law, has determined a rate to be unreasonably high. It is true that in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, Judge Speer intimates (118 Fed. Rep. 623) that a rate is unreasonably high when it is so high as to be prohibitory of the traffic between certain points while the same carrier makes rates between other points substantially similarly circumstanced sufficiently low to move the goods, but this decision was made after the matter had been passed upon by the Interstate Commerce Commission, so that under the statute its findings were made *prima facie* true and correct.

Where a rate shall be placed in the frequently broad interval between the unreasonably low, or confiscatory, and the unreasonably high, or exorbitant, is to be determined by considerations which courts are not by their nature well adapted to weigh. The matter is a question of general expediency in which the interests of the producer, the carrier and the consumer ought all to be considered and duly weighed. The consumer cannot well be a party before the court. Where the final determination of the rate is left to the carrier, the sole consideration acting upon the carrier, save in so far as it assumes the role of benevolent despot, or save in so far as the officer of the carrier neglects the carrier's interests—the sole consideration by which the rate is determined is the monopolistic principle of maximum profits. The carrier is capable of seeing that a rate may be so high as to be restrictive of profits, and that such a rate is unreasonably high. The consumer, however, is frequently of the opinion that a rate which yields the maximum profit to the carrier may yet be unreasonably high and the small shipper is interested in the establishment and maintenance of a proper relation between rates. The weighing and balancing of these various interests can be done only by a tribunal not more closely connected in interest with one than with another of these three parties, and the character of the consideration demanded requires that the tribunal be legislative or administrative in its nature rather than judicial.

WM. J. MEYERS.

WASHINGTON, D. C.

RAILWAY LEGISLATION IN THE UNITED STATES, by Balthasar Henry Meyer, Ph. D., Professor of Institutes of Commerce, University of Wisconsin. New York: The Macmillan Company. London: Macmillan & Co., Ltd., 1903, pp. xiii, 329.

Doctor Meyer in this little volume, one of the Citizen's Library series, gives a "condensed analysis of the private and public laws which govern rail-"ways in the United States, and of the important decisions relating to inter-"state commerce." Especially interesting is the introduction, consisting of four chapters and comprising about a sixth of the book. In this portion the author gives a compendious sketch of the history of railway legislation, comparing with that of the American States that of England and the continental countries. Part II, The Progress of Railway Legislation, is in large part a working over of matter submitted by the author to the United States Industrial Commission and published in Vol. IX of the reports of that Commission. The present treatment differs from the report to that Commission in that specific references have been indicated wherever practicable. In this part are to be found some very instructive examples of the early methods of promoting and constructing railways. They suggest that not all of the principles of "high finance" have been discovered within the ten years last past. Part III, The Past and Future of the Interstate Commerce Commission, will probably be found the most interesting part of the book to the present-day reader. Therein is given a brief history of the agitation leading up to the enactment of the Act to Regulate Commerce, passed in 1887, and of the abuses out of which this agitation grew. This is followed by a chapter dis-

cussing the leading principles of the decisions of the Interstate Commerce Commission, showing how the Commission has in the brief period of its existence evolved a tolerably complete and well rounded body of principles defining just and reasonable rates, just and unjust discrimination, dissimilarities of conditions and circumstances which warrant deviations from the long and short haul principle, and so on. Another chapter is devoted to the interpretation and construction placed by the courts upon the Act to Regulate Commerce and the various amendatory acts, showing how the power over rates originally claimed by the Commission has from time to time been whittled down by the courts until now nothing remains but the shavings. Along with this, however, has gone a recognition of the Commission's powers of inquiry, so that the Commission has by no means been reduced to a condition of impotence. The attitude of the courts toward combinations in restraint of competition, whether the restraint be reasonable or unreasonable, is also discussed. The final chapter is devoted to a discussion of proposed amendments to the Interstate Commerce Act and to proposed extensions of the powers of the Interstate Commerce Commission. The appendix contains copies of the charter of the Baltimore and Ohio Railroad Company, passed by the General Assembly of Maryland in 1827, the charter of the Southern Railway Company, filed in accordance with the statutes of the State of Virginia, June 18, 1894, the Massachusetts Commission Law, and the Interstate Commerce Act together with its amendments and a letter of the Interstate Commerce Commission relating to the so-called Elkins Law of 1903.

The attitude of the author is that of most students of economics, and it may be judged from one of his concluding paragraphs: "In the light of the "facts presented in this book it would seem both desirable and necessary that "the increase in power contemplated in the Cullom Bill should be granted. "However, if Congress does not see fit to do this, it is to be hoped that an "end will be put to the present delay in the execution of orders, and that the "unscrupulous manager will no longer be permitted to impose his code of "ethics upon the great majority of conscientious and just railway officials."

The book contains a mass of information likely to be much in demand this winter among those interested in railway legislation now under consideration by Congress.

WM. J. MEYERS.

WASHINGTON, D. C.

LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY. By A. V. Dicey, K. C., B. C. L., London: Macmillan & Co., New York: The Macmillan Co., 1905, pp. xx, 503.

This latest work of the Vinerian Professor of English Law, at Oxford, is said by its author to be not 'a work of research but rather a work of inference or reflection.' We wonder if the term "research" has acquired in Oxford the connotation that seems to be the current one in some other quarters of the learned world; namely, a work resulting in a product which is true, new and—no account? This book certainly shows a marked absence of the last of these characteristics. Perhaps the author would allow us to call it an original

contribution to knowledge. It possesses in a high degree that rare quality of power to grasp, with a firm hand, a multitude of details and to present them in such a way as to show essential fundamental principles. It shows this quality of the author's mind even more strikingly than does his "Law of the Constitution," and in this regard is to be put in the same category with another classic of the Oxford School; namely, Bryce's "Holy Roman Empire." If the young men whom we send to Oxford can bring back to our law schools in America a little of this spirit, we of the west shall feel that Cecil Rhodes did not live in vain.

The substance of the book was originally presented as a course of lectures at Harvard, in 1898, and in its final form it is dedicated to President Eliot and the professors of the Harvard Law School. After a preliminary clearing away of the ground in the opening lectures, on the relation between law and public opinion, the characteristics of law making opinion in England, and the influence of the development of democracy on legislation, the author presents his theme by considering the three main currents of public opinion: (I) The Period of Old Toryism or Legislative Quiescence (1800-1830). (II) The Period of Benthamism or Individualism (1825-1870). (III) The Period of Collectivism (1865-1900). The term "collectivism" is used by the author in place of the term socialism "as a convenient antithesis to individualism in the field of legislation." This main thesis of the book is followed by a very interesting discussion of counter-currents and cross-currents of legislative opinion, the counter-currents being those that actually oppose, the cross-currents those that deflect the reigning legislative faith from its natural course. Not the least interesting part of the book is the final chapter on the relation between legislative opinion and general public opinion, showing the influence of convictions of individuals, such as Harriet Martineau, Charles Dickens and John Mill.

The book throughout has the charming eye-opening effect characteristic of a work that has the touch of genius about it. It states our unexpressed thought for us and makes us wonder why we have not uttered it before. This is shown in the discussion of the relation of the Benthamite period to the Blackstonian period. To one reading the law books of the last century, the virulence of utterance of the Anti-Blackstonians seems somewhat surprising. One hardly understands why Bentham's "Fragment on Government" should have had any great influence, insisting as it does upon a meaning in Blackstone's unfortunate bit of verbiage in regard to the social contract, when there was nothing in it but a rhetorical flourish, and nothing other than this meant by its author. The almost spiteful treatment of Blackstone by John Austin and his followers seems, too, quite without justification. While we may think with Austin that Blackstone was wrong in discussing what he calls "Rights of Persons" before the "Rights of Things" and may even think it is a mistake to use as a fundamental of classification the distinction between "Rights" and "Wrongs," still we can hardly see why Austin shows so much heat in the consideration of mere questions of classification, or why Bentham should get so virtuously indignant at Blackstone for stating theories of the origin of society in somewhat obscure terms and covering up the obscurity by rhetorical commonplaces. Professor Dicey shows that this violent antag-

onism to Blackstone is a deep-seated one of principle, that Bentham hates Blackstone because Blackstone is the defender of the old Tory optimism as to the laws of England, while Bentham is a true child of the Revolution in his desire to destroy the old and build up the new on the ruins, though Dicey makes it plain that the Benthamite doctrine finally prevailed not because of Bentham's iconoclasm but in spite of it, because Bentham's principle of utility offered a safe guide for law reform and kept the reformers from running aground on the revolutionary shoals of the French extremists. Bentham's opposition to Blackstone is of the spirit and not of the letter alone, and this feeling leads him into extravagance of statement when dealing with Blackstone even in the non-essentials. Austin as the follower of Bentham of course catches the acrimonious spirit of his master.

Dicey's portrayal of the trend of legislation explains, too, a number of apparent anomalies in the growth of law during the latter part of the century. Sir Henry Maine, in his Ancient Law, published in 1861, says, "the movement of progressive societies has hitherto been a movement from *Status to Contract.*" Maine was of course speaking at a time when the individualistic movement, which had expanded freedom of contract and correspondingly restricted the realm of status, was at its climax. Professor Dicey shows us that at the very time Maine was writing, the counter movement of collectivism had begun and during the last third of a century we find the direction of the general movement is reversed, and status has been growing at the expense of contract. How extensive the change has been in this direction is shown by the summing up in Chapter viii, on the trend of collectivist legislation, beginning with the Ten Hours Bill of 1847 and extending down to the legislation projected for 1904, until—to cite a passage from Morley's "Life of Cobden," quoted with approval by Dicey—we reach "the rather amazing result that in the country where socialism has been less talked about than in any other country in Europe, its principles have been most extensively applied." It may be noted that this tendency is not less evident in America than in England, though our rigid constitution seems to present a more unyielding barrier against progress in this line than does the flexible constitution of England.

The book throughout is filled with the most suggestive generalizations: "that public opinion not only creates law but that laws foster or create law-making opinion;" that "any deviations from the ordinary course of legislation correspond at bottom with some peculiar, it may be transitory fluctuations in public opinion;" that "the vices of compromise are as marked as its merits. Controversies, which are deprived of some of their heat, are allowed to smoulder on for generations and are never extinguished."

One of the most interesting sections of the book is the one on the "Effect of Judge-Made Law on Parliamentary Legislation," as illustrated by the history of the law of property of married women, showing how the struggle of the equity court to mitigate the severity of the common law concept, that the personality of the wife is merged in that of her husband, was finally crowned with success by the device of marriage settlements in trust. Then how parliamentary legislation adopted the principle governing the wife's "separate property" in the technical sense which that term had acquired in the

courts of equity, and thus secured for the daughters of the poor those rights which the court of chancery had secured for those women who enjoyed the advantage of a marriage settlement.

The book is one to be read through from cover to cover, including the appendices, by every one interested in historical or legal questions. Professor Dicey is another "lawyer with a style" of the type of his great predecessor in the Vinerian chair, or of Sir Henry Maine. His work, like that of Bryce, Pollock and others of the Oxford School, shows us, what we are so apt to forget, that high scholarship and clearness of expression are not necessarily incompatible.

JOSEPH H. DRAKE.

THE LAW OF CONTRACTS by William Herbert Page, of the Columbus, Ohio, Bar, Professor of Law in the Ohio State University. Author of "Page on Wills." Three volumes. Cincinnati: The W. H. Anderson Co., 1905, pp. ccccIxv, 3083.

This work is divided as follows: Volume I, Formation of Contracts; Volume II, Construction of Contracts; Volume III, Operation and Discharge of Contracts. It is an exhaustive treatise of the subject of contracts in the entirety. In his preface, which is exceedingly modest, brief and to the point, the author acknowledges his indebtedness to Sir William Anson for the general outline of the subject and then expresses the hope that "This work may be of value to the legal profession, that it may make the lawyer's unremitting toil somewhat lighter, and that it may, even in a slight degree, tend to what should be the ultimate goal of every sincere writer on legal subjects—that is, to place our American jurisprudence on a broad, scientific and natural basis."

While the author has adopted Anson's grand divisions of the subject and has treated most thoroughly the fundamental principles of contract law he has also done more than this. He has written at length on the various special topics, such as agency, partnership, negotiable instruments, common carriers and corporations. The chapter on contracts with public corporations is of special value. Every step essential to the making of such a contract is carefully considered, as well as the various conditions precedent to the fixing of corporate liability and the rights arising out of estoppel ratification and curative legislation.

The law of joint and several liability is considered under Construction of Contracts whereas partnership is considered under Parties to Contract. Just why this is done is not clear. Both subjects are generally treated under the subject of parties. This much is true, however, that whether the liability under a contract is joint or several is always a matter of construction.

There are a few topics in the law that for a long time have baffled scientific treatment. They are mistake, misrepresentation and fraud. Then in applying the law to them the courts sometimes use the terms warranty and condition carelessly and in the end there is nothing definite but the final judgment. Professor Page has assayed assistance in clearing up the confusion and with considerable success. This he does at the beginning of his work. His treatment of what he calls "Fraud and misrepresentation in the

inducement" is clearer and more satisfactory than anything heretofore written on the subject. Non disclosure in *uberrimae fidei* contracts he considers in a chapter on "constructive fraud." This is easily understood but Anson regards such non-disclosure as a kind of misrepresentation. The author recognizes the condition of things when he calls attention to the fact that an eminent writer has included illegal contracts under the head of fraud. The confusion arises from the fact that there is no generally accepted terminology of the subject. Perhaps it is well that there is none. If courts should frame a definition for fraud the wrongdoer might escape liability by evading the definition. Courts aim to right wrongs without regard to names of things. In his introduction the author well says: "It may be added that in one sense accuracy of nomenclature is very important. Since ideas are expressed by words, misuse of words is likely to result in confusion of thought. In another sense it is of no importance if the idea to be conveyed is clearly understood. Discussion of the language in which it should be expressed usually involves time and energy that might be better employed. It must be confessed that the nomenclature of our law is defective. Such technical terms as it has are for the most part borrowed from popular language. It is, therefore, rare to find them possessed of that accuracy of meaning that the more artificial terms of science enjoy. Still, as the courts are unwilling to accept suggestions for a more artificial and accurate nomenclature, we must strive to use the terms actually employed with such accuracy as is possible."

The author writes on quasi contracts somewhat at length but more particularly of obligations arising independent of and disconnected from any agreement. One chapter, however, is given to the quasi contractual right of recovery on discharge of pure contract, quite another subject, and very properly treated simply as a remedy for breach of contract. We are pleased to note that he observes in quasi contract a substantive obligation, something more than the legal fiction allowed for its enforcement. The various sources of this obligation are fully presented.

The last part of the work is devoted to what he chooses to call "Place of Contract in Law." Under this heading there are three valuable chapters on conflict of laws, the impairment of the obligation of contract and the constitutional right of contract. The last chapter contains a careful consideration of the many decisions upon recent statutes affecting hours of labor and rate and method of payment in various occupations. Attention is called to the numerous conflicting decisions on the subject. The courts have much to do in this field before the rights of the individual become well enough defined to be of any appreciable value as against legislative encroachment. Professor Page says: "With the exact nature of the police power in doubt, and with further doubt as to whether the power of the Legislature to prohibit future contracts is any wider than the police power, it follows that it is practically impossible to lay down in advance rules which will determine whether the Legislature possesses this power in reference to specific types of contract." The decision of the Supreme Court of the United States in *People* v. *Lochner,* handed down last spring and after this book was published, holding that the New York statute in restriction of the hours of labor

for bakers to sixty hours a week, was unconstitutional, may help to dispel some false notions regarding legislative functions; but the decision is too heavily burdened by conflicting opinions to be very decisive of anything. It is a turn in the right direction, however, and may end well.

In preparing a table of contents, a table of cases and an index for the book the author has shown uncommon faithfulness. The index covers over three hundred pages and is both a topic and syllabus index with full cross references. The table of cases cited numbers over thirty-five thousand and gives the official and the unofficial reports in which the cases may be found. Where a number of cases are cited in the notes to the same point the cases are from foreign reports, then from federal reports and then from the state reports, arranged in alphabetical order. In his book-making the author has been very methodical. In every department of his work he has adopted some simple method and adhered to it rigorously. This is very helpful to the practitioner. After a few moments' acquaintance with the work one will know where to look for a point decided, and having looked will find it and the cases upon it, if it pertains to contract law. Nothing more than this can be asked for.

The publishers are to be commended for what they have done, but the volumes are too bulky and the paper too heavy. The work in four volumes and on lighter paper would be more convenient. Perhaps, however, this is not a fault. It certainly does not detract from the intrinsic merit of the book.

We must say that the author has made a contribution of permanent value to the science of jurisprudence and that during many years of practice and teaching in law, no better book on contract law for the practitioner of today has come under our observation. J. C. KNOWLTON.

THE ENCYCLOPAEDIA OF EVIDENCE. Edgar W. Camp, Editor-in-chief, Los Angeles, California: L. D. Powell Co., 1902-1905. Vols. I-VI., pp. 1020, 1000, 961, 1017, 971, 936.

Never before in a single year has the law of evidence been so enriched as in the year just passed.

Almost simultaneously were announced the publication of Professor Wigmore's great work, in four royal octavo volumes, and that of Byron K. and William F. Elliott, also in four volumes. And then come at least three volumes of the Encyclopædia of Evidence. The publication of the volumes of this series began somewhat earlier, but the past year three out of the seven volumes already published were brought out.

There is indication here that the real importance of this branch of the law is coming to be appreciated in better measure. There certainly is no other subject of the law upon which the practitioner needs to be more generally or more accurately informed, nor one, as to which, there is greater need that the law of the subject be more readily accessible.

The past decade and a half has witnessed great accomplishments in the explorations of this field, and in the setting forth of the law of this subject, particularly in this country.

For more than a half century the work of Professor Greenleaf held this field practically unchallenged. About fifteen years ago the work of Professor Thayer came to be known to the general public through articles of his published in the *Harvard Law Review*. These were followed in 1898 by the publication of his book, *A Preliminary Treatise on Evidence at the Common Law*. This work of Professor Thayer was new in its method of treatment, and while, as its title indicates, it was but the foundation for the work he thought to accomplish later, it marked him as a master of this subject, and the profession looked anxiously for his more general treatise, which never was published by reason of the author's death. The logical sequence of this work of Professor Thayer was the treatise of Professor Wigmore, his pupil, previously referred to. This bears convincing evidence, as do the other works upon this subject published since the work of Professor Thayer, of the very potent influence of his scholarly treatment.

On first thought it might be questioned whether the field was not so well occupied with the great text works referred to that this *Encyclopædia of the Law of Evidence* was unnecessary. It is to be answered that too much cannot be known about so important a subject; that no one author will exhaust the learning of it, and the information of all will still leave something to be known.

The encyclopædic treatment of the law and various of its branches, has become so familiar to the profession, and seems to have been so generally approved, that the character of this work will be understood from its title: it is an *encyclopædia* of the law of evidence.

This work is not a treatise in which theories are advanced and sought to be established, but is an effort "to present the rules of evidence, with the decided cases in such form that they shall be ready for instant use when wanted." The editors of this work aim to avoid the inconvenience which arises from the statement of general propositions, and the citation of a great number of authorities in support of them, by making their statements of propositions more specific, embracing a single precise question only and supporting these with citations of cases bearing directly upon them. While it is true that the work is an *encyclopædia*, and not a *treatise*, it bears evidence all through that it has been prepared in the light of the best results of modern research.

This method of treatment results in increasing very much the magnitude of the work beyond what would be required for the statement of general principles and the citation of supporting authorities. There can be no question regarding the value of this treatment to the busy practicing lawyer. While it is true that there is not the same need for a work of this kind where one has *Wigmore* or *Elliott*, as where these are not at hand, still the up-to-date practitioner will scarcely feel that he can afford to be without this work if it proves to have been well done.

The work is under the general editorship of Edgar W. Camp and is expected to be completed in about twelve volumes. The first volume was published in 1902, the second in 1903, the third and fourth in 1904 and the fifth, sixth, and we understand the seventh, in 1905. Mr. Camp is assisted by various other persons who write on particular subjects. The danger in a work so constructed is that it may lack unity by reason of laxity in the

Editor-in-chief. So far as the writer is able to observe from the volumes at hand there is little occasion for criticism on this score. Another danger, which comes from the association of many persons constructing independent portions of a work of this character, that of finding some portions overwrought, as related to other, seems to have been well avoided. The work of these earlier volumes seems well balanced. It is impossible for the reviewer to speak of the accuracy of the work as a whole, or of the care and judgment used in the selection and citation of authorities throughout all parts of even the volumes published, but to judge from a somewhat careful examination of certain titles, to which the reviewer has had occasion to give some special attention, the work is very meritorious when judged from these points of view.

To give an idea of the scope and character of the work, it may be noticed that the title of "Admissions," edited by John D. Works, occupies 267 pages of the first volume and is prefaced with an analysis of the subject covering nine pages. The subsequent treatment follows this analysis and the matter is made the more readily available through cross references and the use of bold-faced type both in the text and in the notes.

Where there are any great number of authorities for a given proposition, the authorities of the several states are grouped together in separate paragraphs, thus enabling one to find at a glance the authorities in any particular state upon the particular proposition. The writer has at hand only the first six volumes. These bring the work down to and including the title "Identity." The remaining volumes are expected to be published within the next twelve or eighteen months, and if the succeeding volumes are to be judged by those published, the work will prove a great boon to the practising lawyer and the student of the law of evidence. V. H. LANE.

FIRE INSURANCE AS A VOID CONTRACT AND AS AFFECTED BY CONSTRUCTION AND WAIVER OR ESTOPPEL, including miscellaneous provisions and an analysis and comparison of the various standard forms, all reduced to rules with the relevant statutory provisions of all the States. Volume II by George A. Clement, of the New York Bar, Editor of the New York Annotated Code of Civil Procedure and Fire Insurance Digest. New York: Baker, Voorhis & Company, 1905, pp. cxvii, 807, 8 vo.

The author has treated the subject of Fire Insurance in a work of two volumes aggregating upwards of eighteen hundred pages, including tables of cases and indexes. The first volume appeared in 1903, the second in the latter part of 1905. In the first volume the subject is treated on the basis of the valid contract; in the second on the basis of the void contract. The plan of treatment is the same in both volumes and consists in the statement of propositions of law in the form of brief rules and the support of those rules by cases applicable to them. In this manner the author refers to about six thousand cases.

The first volume was carefully and critically reviewed in the February, 1904, number of this Review (Vol. II, pp. 424-5) by Mr. Mark Norris of Grand Rapids, Michigan, an extensive practitioner of, and acknowledged

expert in, the law of Fire Insurance. As to the plan and scope of the work and the undertaking of the author what Mr. Norris said of Volume I applies with equal force to Volume II; it is adapted "to the use of insurance agents and adjusters rather than to lawyers." Yet it cannot be doubted, in the writer's opinion, that the brief rules of law as set down by the author, supported and illustrated as they are, by numerous cases, will afford the lawyer ready and valuable aid in the determination of questions which will come to him as a practitioner. The work is built upon large and in some respects upon superfluous scales. For example there is an index to the first volume, and an index to the second volume followed by an index to both volumes. So much of index is superfluous and in the writer's opinion will be found to hamper rather than to aid the lawyer in his search for pertinent statements and authorities. The lawyer wants a complete index, it cannot be too complete, but he wants only one.

In his preface the author makes large and perhaps extravagant claims, but this does not detract from the merits of the work, which will be measured not by its author's claims but by its helpfulness to the individual practitioner—and that it will be found helpful to the practitioner in many respects, the writer is well assured. ROBT. E. BUNKER.

A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS. By Edwin H. Woodruff, Professor of Law in the College of Law, Cornell University. Second Edition. New York: Baker, Voorhis, & Company, 1905; pp. xv, 624.

This is the most recent collection of cases on this subject which has come to our notice. The subjects treated are Marriage (including Contract to Marry, Contract of Marriage, Husband and Wife, and Divorce and Separation), Parent and Child, Infancy, and Insanity, with a few cases on Drunkenness and Aliens, but leaving untouched two subjects usually included in works on domestic relations, viz., Guardian and Ward and Master and Servant. Probably all will agree with the editor that the relation of master and servant should be omitted from a consideration of the domestic relations of today, however it may have been a century or more ago. But whether there will be the same concurrence as to the omission of guardian and ward may admit of some doubt though conceding that this relation is less intimately domestic than formerly.

The cases have been selected with care and discrimination and admirably illustrate the propositions which they were selected to illustrate.

Where the present doctrine is not that of the old common law this fact is usually shown by some recent case which considers in a careful and somewhat exhaustive manner the old cases, the departure therefrom and the reasons for the departure, and concludes with the rule of today. This seems to be less likely to confuse or mislead and so is greatly to be preferred to the method of using an old case which states what has long since ceased to be the law and then following this case with one showing the present rule without, perchance, anything to bridge the chasm.

The most serious fault, if indeed it be not the only one, seems to be in

using too many cases, however excellent those cases are. It is well nigh if not quite impossible to use all of the cases in the time usually allotted to this subject, coming, too, as it commonly does, rather early in the course. That some cases may be omitted does not meet the objection, as this work should not be left to the teacher but should be done by the editor, as in this way the substance of the cases may appear in the notes and thus be brought to the attention of the student and be subject to his reference as they might not be otherwise. For this reason we believe that it would have been better had the second edition been no larger than the first. FRANK L. SAGE.

JURISPRUDENCE LAW AND ETHICS. By Edgar B. Kinkead, M.A., Professor of Law, Ohio State University. New York: The Banks Publishing Co., 1905, pp. vii, 381.

The author tells us that "the lectures comprised in this volume were prepared for the class room, with no thought of their publication. They appear in the form, substantially, as given to classes." The book is a somewhat ambitious attempt to present in narrow compass a discussion of the principles of Law and Jurisprudence and their relation to Ethics, a consideration of the leading facts of Historical and Comparative Jurisprudence, and a cursory treatment of Legal Ethics. The first two themes are treated by giving copious citations from the standard authorities: Holland, Pollock, Lorimer, Bryce, Amos, Markby, Hammond and others, with a running commentary by the author; in the last lecture he discusses some of the stock problems of professional ethics. The book shows evidence of the hasty preparation, to which the author pleads guilty, in the carelessness of quotation, discursive argument, and occasional lapses in English. A more careful proof-reading would doubtless have corrected the statement on p. 327, "It would seem that the discretion of the court should be more laxative in cases where it appears difficult to extract the truth."

Although such a compilation may be useful to the author for work with his own students, the publication of a book confessedly not a contribution to the subject seems hardly justifiable, unless sufficient pains had been bestowed on the preparation to make elegance of form compensate in some degree for lack of originality of content. JOSEPH H. DRAKE.

LAW OF THE DOMESTIC RELATIONS Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy and Master and Servant. By James Schouler, LL.D. Boston: Little, Brown & Co., 1905, pp. xxxix, 421.

In this book of some four hundred pages, consisting rather largely of notes, we have an excellent outline of the law on the subjects enumerated above. As the author says, he has followed closely the arrangement and treatment of the topics which he adopted in the fifth edition of his Treatise. In the very copious notes are found many of the recent cases, which fact gives some foundation for the author's hope that the book may be of "practical use" to

the "professional lawyer" as well as to the student. Any work of the learned author can scarcely fail to be of use to all interested in the subjects of which he treats, and yet it may well be doubted whether any designed for the use of student and practitioner can accomplish, in any very satisfactory manner, these very different purposes. It is certain that this book will be very helpful to the student, but it is hardly probable that the practicising lawyer will make frequent reference to it if larger works, such as the author's treatise, are accessible.

The index is carefully made and quite complete, the mechanical work is good, and the book is attractive and valuable. FRANK L. SAGE.

REPORT OF THE COLORADO BAR ASSOCIATION. Volume 8, edited by Lucius W. Hoyt, Denver, 1905.

There is much matter in this volume of unusual interest and value. In the first place there is a report of the ceremonies attending the convening of the *re-organized* Supreme Court, for during the year the Court of Appeals passed out of existence—after a life of fourteen years— and was merged into the greater Supreme Court, the number of whose members is now seven, instead of three, as formerly. Upon this occasion addresses were made by members of the bench and bar reviewing the judicial history of the state.

At the subsequent regular meeting of the Association the annual address was delivered by George R. Peck, of Chicago, on *Governmental Regulation of Railway Rates,* in which are presented very forcibly and clearly the objections to the Esch-Townsend Bill.

The volume contains several other papers of value: one on *Inheritance Taxes,* by James W. McCreery; on *Compulsory Arbitration,* by James H. Pershing; on *Government by Injunction,* by Thomas H. Devine. The Committee on Grievances and the Committee on Law Reform have always been active and useful committees of the Colorado Bar Association and much of the good work done by the Association has begun with them. During its life of eight years the Association has set an example in suggesting legislation and in elevating the standard of the profession that might well be followed by some of the older, but seemingly moribund, associations of other states.