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Book Reviews

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BOOK REVIEWS

DUE PROCESS OF LAW under the Federal Constitution. By Lucius Polk McGehee, Professor of Law in the University of North Carolina. Northport, Long Island, N. Y.: Edward Thompson Co., 1906, pp. x, 451.

Professor McGehee's volume in the series of "Studies in Constitutional Law" is the result of an undertaking to present the law of the subject as developed in the opinions of the Supreme Court of the United States.

The author is quite justified in the statement in his preface to the effect that "No richer or more interesting field could offer itself to the student." Here opens for investigation that most fascinating topic of *jurisdiction* as involved in due process of law, both of the person and of the *res,* including that most troublesome class of cases for the dissolution of the marital bond.

Here must be discussed too, the subject of *rights* embraced in this protecting clause of the constitution. What is it to have a right to "life, liberty or property" which can be disturbed but by *due process of law?*

The power of *taxation* and the procedure for its exercise involve submission to the requirements of this constitutional guaranty, and the principles which underlie this power and its exercise must be sought out, defined and applied.

And again, the power of *eminent domain* is an element of sovereignty often disturbing the rights of the citizen and one who would treat of *due process* must point the way for the taking of private property for a private use against owner's objection and must define a "taking," a "public use," "compensation" and extract the governing principles which must be regarded if the power is lawfully exercised.

The *police* power of the state recognizes no right so sacred that it may not be invaded in the interest of the general welfare if only *due process* be observed, and one who points the way clearly in this field must needs be a careful and discriminating teacher. Here is involved the right of the state to determine the character of one's employment, the length of his daily service, the limitation of his compensation for services in many fields of endeavor and many other problems scarcely less intricate and difficult of solution.

Professor McGehee has not exhausted these fields or any of them, nor does he claim to have done so. The last word has not been spoken by any one on these subjects or any of them, nor will it ever be spoken. As an illustration of the brevity of his treatment of particular topics might be noted this paragraph which embraces what he has to say on the subject of the state's regulation of *hours of labor:* "The hours of labor may be limited. (Citing *Holden* v. *Hardy,* 169 U. S. 366). The legislative action may extend no further than the limitation of working hours for certain classes, as women and children, to whom prolonged employment at labor otherwise harmless is considered especially dangerous. (Citing, *Com.* v. *Hamilton Mfg. Co.,* 120 Mass. 383). And the state may absolutely interdict certain employments to children although

their parents approve of such employment for them. (Citing, *People* v. *Ewer*, 141 N. Y. 129).

This treatment is not primarily for the practitioner, though instructive to him, but presents the results of the studies of a student of the law for the benefit of students of the law. The emphasis is on the theoretical rather than the practical, though the discussion is founded in the decisions of the courts.

The book as a whole is well written and instructive, and Chapters II, on the "Elements of Due Process," and IX, on the "Police Power" are particularly good. V. H. L.

THE CONTROL OF PUBLIC UTILITIES in the form of an annotation of the Public Service Commissions Law of the State of New York and covering all important American cases. By William M. Ivins and Herbert Delavan Mason of the New York Bar. New York: Baker, Vorhies & Co., 1908, pp. lxxvii, 1149.

This book is intended primarily for those who desire to make use of the Public Service Commissions Law of the state of New York, a law, it will be remembered, which perhaps is the most significant and carefully devised of those state enactments designed to secure adequate control over public service industries. It contemplates a certain degree of administrative supervision over water, gas, electric and power companies, as well as over urban, inter-urban and commercial transportation. Provision is made by the law for securing to the public adequate facilities and service at a reasonable price and on the basis of a reasonable capitalization. It is claimed by its friends to be the latest word on government by Commissions. The act received the approval of Governor Hughes June 6, 1907.

It is natural that the passage of an act of such moment as the one creating the Public Service Commission of New York should attract the attention of the legal commentator. The appearance of some book covering the ground of the one under review was inevitable. As stated in the preface, it is designed as "a working volume, adequately indexed, which will bring together in their relation to the New York law the important cases decided by our American Courts in the matter of the regulation of public utilities corporations," and from this point of view there is, so far as I am able to judge, nothing to criticise and much to commend. Its table of contents is comprehensive and its indices are clear and devised according to a simple plan. Assuming one to be acquainted with the phrasings of the act, or of the general provisions of its several sections, the book will serve as an easy and a safe guide to the study of any particular problem. What is astounding is the amount of material which the authors have brought together. The Federal Act of 1887 for the regulation of interstate commerce called forth a little book by Dos Passos. It was a small octavo of 125 pages, coarse print and wide margins. The book under review, published twenty years after, contains 1149 pages of the usual law-book size, and makes considerable use of small type. The significant fact being that a large part of material presented is the result of court decisions and commission opinions of the two decades since the passage of the Federal

Act. No better illustration is possible of the rapid development of rules and principles for the control of corporations of a quasi public character.

Had this book been written without a preface, our review might very properly have been brought to a close with the above comments, but unfortunately such is not the situation. The book contains a preface of XVIII pages written by Mr. Ivins, which deserves a moment's notice for the reason that it well illustrates the cavalier manner in which lawyers are inclined to treat the facts of history. The lawyer is your true pragmatist. For him that is true which is useful in an argument. From the preface of this book one reads the following: "In the United States to the close of the Civil War the doctrine of *laissez-faire* had been adopted very generally as the result of the teaching of the encyclopedists and of Adam Smith, as well as of those of the later Manchester school." It would be difficult to crowd into a single sentence a larger number of misreadings in history. To speak of one only; what is the fact relative to the rôle played by the doctrine of laissez-faire in the development of transportation? The fact is, that it was not until the middle of the century that government in this country withdrew from the policy of building and operating turnpikes, canals and railways, and it was not until 1870 and the years following that the argument which appeals to the doctrine of *laissez-faire* for support became significant in the discussion of railway and corporation problems. The excursion which the author takes into the field of political science is scarcely less fortunate. He says: "The economic State, however, is primordial, and from the beginning of history invariably, and without exception always dominated, controlled and dictated the ultimate form of the Political State." Such a generalization, so big that it can be neither proven nor disproven, is too big to be scholarly, and what makes it especially repugnant is that it is wholly unnecessary for the argumentative purpose which the author had in view.

Possibly I have placed too great emphasis on this preface, and yet one who believes, as I believe, that the only safe basis for constructive legislation is modest scholarship, must deprecate unwarranted generalization whenever and wherever they may appear. This book would have been greatly improved had its preface been omitted.

HENRY C. ADAMS.

THE PRINCIPLES OF THE LAW OF EVIDENCE, with elementary rules for conducting the examination of witnesses. By W. M. Best, A. M., LL.B. Third American Edition from the Eighth English Edition. By Charles F. Chamberlayne. Boston: Boston Book Co., 1908, pp. lxxxii, 703.

We have the key to the author's discussion when we put the emphasis upon the word "Principles" rather than upon the term "Law of Evidence" in his title. In his preface to the original edition he says: "The design of the present work is not to add to the *practical* treatises by which the subject has been illustrated, but to examine the principles on which its rules are founded." The aim of the treatment is to point out what the law of evidence *ought to be* rather than to define what it is.

An examination of Mr. Chamberlayne's preface to the present edition indicates that he has prepared this edition from the point of view of one who believes that there are remediable faults in our administration of justice connected with the proof of facts, and who would attempt, in some measure at least, to point them out and suggest remedies, following in this respect the author's original thought. It may be that on reflection he would not contend that there is now the same cause for criticism of the law of evidence as furnished Jeremy Bentham the opportunity for that most interesting attack upon it in his Rationale of Judicial Evidence, and yet Mr. Chamberlayne says he "is impressed with the conviction that the need for insistence upon a dominating influence for scientific principle in the treatment of evidence, was seldom, if ever, greater than at the present time."

His indictment charges the confusion of the law of evidence, which is a branch of the adjective law, concerned only with the establishing of facts judicially, with rules of substantive law which themselves are concerned only with the definition of rights and obligations. And it involves further the charge that the judge in our modern practice has become subordinated to the jury in the sense that for an error of the court in the application of some empirical rule during the progress of the trial the judgment may be overturned, where for a like fault on the part of the jury there is no redress. In other words he objects to the doctrine that a litigant has a right as matter of law "to the observance of a precedent in connection with the administration of the rules of evidence" which an appellate court will protect. His criticism goes still farther and insists that "confusion is worse confounded" through the careless and inaccurate use of terms in the law of evidence itself.

Whether all of us see as clearly these defects as does the editor, most of us are willing to accede to these charges as not wholly groundless. Not all are appreciative of the distinction between a fact to be proven and the proof of that fact. To speak accurately rules of evidence have to do with ways and means of proving a fact. Rules which are concerned with determining whether that fact need be proven, are not rules of evidence, but rather rules of substantive law; rules which determine the essentials of the right or obligation involved; in other words, define the right or obligation. And yet it is true, that much of the material which makes up the bulk of many of our treatises on the *law of evidence* deals with questions of what are essential elements of particular rights and obligations.

As Mr. Chamberlayne says, "To say, as is commonly done, that evidence is or is not admissible to prove a given fact, when the meaning is, not that the fact can or cannot be proved in the *particular* way suggested, but that it is or is not within the issues, or is or is not an element of the right or liability as defined in substantive law, and, therefore cannot be proved in *any* way, is quite adequate to deposit the whole *corpus juris* within the apparent boundaries of the law of evidence."

Again Mr. Chamberlayne is quite right in saying that principles are often obscured in this branch of the law through the careless and inaccurate use of terms. No better illustration is at hand than one suggested by him. The accurate use of the term "burden of proof" would apply it to that obligation

which one who brings an issue to the court assumes, to establish his contention by the appropriate weight of evidence. And yet the cases are full of illustrations of its use to indicate that condition where one party or the other, at a particular stage of the trial, is called upon to produce evidence at the risk of being defeated. The last, a "burden" which shifts back and forth during the progress of the introduction of evidence, and the first a "burden" which never shifts. And this distinction is fundamental, and failure to regard it is certain to confound.

The American notes, while not exhaustive, serve well to illustrate the various propositions of the text and to indicate differences between the English and American view wherever such distinctions are found.

To the serious student of the law of evidence the book is invaluable. Much has been written upon this branch of the law in these modern days which is really illuminating and which tends toward eliminating much of that which is unscientific, and it is to be hoped that the editions of this book, under as able editorship, will not cease to appear periodically until "Words and phrases now used in confused and interblended meanings shall be employed in a single sense"; until "the rules of evidence now constantly mingled with, or mistaken for, those of substantive law, or other branches of procedure, are relegated to their proper sphere," and until "the conception that a litigant has a vested right in the application of a rule of evidence to the facts of his case as a matter of law;—in other words, that the doctrine of *stare decisis* extends to the application of a principle of administration—shall be abandoned."

V. H. L.

IDEALS OF THE REPUBLIC. By James Schouler, LL.D., Boston: Little, Brown & Co., 1908, pp. xi, 304. Price $1.50 net.

Dr. Schouler is well qualified by experience and training to "trace out" as he does in these chapters, "those fundamental ideas, social and political, to which America owes peculiarly her progress and prosperity, and to consider the application of those ideas to present conditions." The volume seems to be the work of one who has lived much in the simple past and cherishes it, and who yet appreciates the good things of the more complex present while recognizing certain dangerous modern tendencies. Throughout the book the suggestion is made—generally with a dignified mildness—that, in dealing with the problems of today, we need to recur frequently to the fundamental principles which guided the conduct of our fathers. Many readers will doubtless conclude that the author is too old-fashioned, and will not agree with him that the ideas of the old times have any application to present political and social conditions.

Such a variety of subjects is treated that full discussion of few is attempted, but the author states briefly the chief reasons for his conclusions. He would apply the old and simple principles whether in deciding what are "excessive fines" (and while admitting that "excessive" is a relative term, he thinks that a fine of twenty-nine millions is excessive—p. 63), or in considering what shall be done to curb the recklessness of many drivers of automobiles: "This

costly toy, which only the few can afford to keep and own, is the symbol and epitome of obtrusive arrogance towards the multitude, offset only by the danger it brings to those themselves who use it." (p. 277).

He thinks there may be too much brandishing of the "rod of discipline": "Nor is it needful in the public interest that our chosen executive should, with his many important functions to perform, be always intent or keep the people intent, upon pursuing and punishing. Administration is not a steeple-chase, for a constant tally-ho, in running foxes to cover." (p. 284). He commends in general the initiative and referendum (p. 84), though he believes they may more admirably apply to constitutional changes than to ordinary legislation as to which "voters are not so readily informed, so interested or so capable of discriminating among the mass of proposed measures, as honest and intelligent representatives such as any constituency may have put forward on its behalf" (p. 197). There are brief but suggestive discussions of most of the questions now attracting attention: the advantages and disadvantages of the corporation; government ownership or government regulation of public utilities; public servants and civil service methods; rigidity or elasticity in the construction of constitutions, &c., &c.

The work is valuable in that it states in attractive form the conclusions of a thoughtful and mature student of our history on questions of interest to every intelligent American. J. H. B.

CORRESPONDENCE.

*Bender-Moss Company, Inc.
Law Book Publishers

San Francisco, Cal., 12-15-'08.

Editor Michigan Law Review,
Ann Arbor, Michigan.

Dear Sir:—Before sending you "Martin's Mining Law and Land Office Procedure" for review, I wrote you fully regarding the hesitancy of my house to send out books for review in the law magazines, and that this work was being sent to you only at my earnest solicitation.. The book was sent out generally, and the reviews are satisfactory, and have been beneficial, with the exception of the one in the Michigan Law Review, which was not a review at all, but a "roast" by a writer who is evidently a novice at such work, and produced an article,—through lack of a sufficient and well-grounded knowledge of the subject treated in Mr. Martin's book,—untrue and vicious, if not purposely malignant.

We do not hold you personally responsible for the shortcomings of the

*Note—This letter is published at the special request of its writer, Mr. James M. Kerr, and refers to a review of the work mentioned that appeared in our issue for November, 1908.

The Michigan Law Review has made an especial effort to have all reviews appearing in its Book Review department prepared by competent and impartial reviewers. We leave it to the profession to say whether Mr. Martin, the author, Mr. Kerr, the Editor-in-Chief of the publishers, or Mr. Clayberg, the reviewer, is correct.—Ed. M. L. R.

writer, or for the inefficiency, misrepresentation and malice of the article. We know that you, in your capacity as editor, sent Mr. Martin's book to "J. B. C." for the purpose of having a review written. By internal evidence, we recognize "J. B. C." to be Professor John B. Clayberg, of Helena, Montana, "Lecturer on Mines and Mining Law in Montana School of Mines, sometime lecturer on mining law in Columbia University School of Law, and non-resident lecturer on mining law in Law Department University of Michigan," and who, by reason of positions he has held in the past, and work he has done on the "Cyc.," should be a competent person to write a review of Martin's Mining Law.

Mr. Clayberg takes exception to what he is pleased to term the cyclopedic method of treatment, and to the failure of the author to cite some particular cases. The method of treatment is a matter for the author to determine, and where, as in Mr. Martin's case, there is an avowed *selection merely* of cases cited, it is a matter of editorial discretion to cite only the more important cases which fall within the plan of treatment. To have given the matter the ordinary text-book treatment, and have cited all the cases, would have required two volumes, and thus have defeated the purpose of the author,—which was to furnish in one volume all the law and the *leading* late cases on the subject.

In his article Mr. Clayberg repeats the errors made in the article on "Mines and Minerals," written by him and appearing in 27 Cyc., pp. 515-792, and which he sought to give additional currency to through "Clayberg on Mines"—which consisted merely of sheets from the Cyc. bound up without a title page or an index, and sold through Barthell's book store, of Ann Arbor, at $3.00 or $3.50 per copy.

Mr. Clayberg overlooks, or seeks to belittle, all the good qualities of Mr. Martin's book. To be frank, I am confident he wants the requisite knowledge of the subject and experience in the practice to enable him to recognize or appreciate these good qualities. The article bears on its face, in more instances than one, incontestible evidence of this want of knowledge and experience. For instance, he says (p. 93): "In Part 2 may be found all existing statutes on mines, whether Federal, State or Territorial, together with present rules and regulations of the land office, and contains a number of forms relating to mining law, in its different phases, *the correctness of which*" [forms] *"we are at present unable to test."* The italics are mine. Why unable to test the correctness of the forms? Mr. Clayberg admits that he had before him, in Mr. Martin's book, all the statutes and all the rules and regulations on the subject of mines and mining, and yet was unable "at present to test" the forms! By what, pray, does he expect to test "correctness" of the forms if not by the statutes and rules and regulations governing "all the different phases" of mines and mining—which he had before him? The reason of "inability at present" to test the correctness of the forms is patent to the average lawyer or law editor.

The burden of Mr. Clayberg's criticism is devoted to an effort to pull down Mr. Martin's book and bolster up the errors in his article on "Mines

and Minerals," 27 Cyc., and particularly those on pages 553 and 570 of that article. That article appeared in 1907, and the case upon which Mr. Martin bases the text in § 86 (p. 58),—which section is so severely criticised by Mr. Clayberg,—(the case of *Creede & C. C. Min. & M. Co.* v. *Unita Tunnel Min. & T. Co.*, 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266) was handed down January 30, 1905, is the highest authority in the land, and has never been criticized or modified on this point.

Speaking of this decision, Mr. Morrison,—who has been a recognized authority on mines and mining law for the past 30 years, relied upon, and quoted and approved by all the courts in the land,—in his 13th edition of his "Mining Rights" (which appeared since Mr. Martin's book), on page 253 says: "In that case it is expressly held that the tunnel is a means of exploration 'in the hope of finding a mineral vein. When one is found he (the tunnel owner) is called upon to make a location of the ground containing that vein, and thus creates a mining claim, the protection of which may require adverse proceedings.'* We never could conceive that, as might be inferred from the Ellet case" [*Ellet* v. *Campbell*, 18 Colo. 510, affirmed 167 U. S. 116], "a discovery in a tunnel would hold indefinitely without defining the surface lines of the claim, and the ruling above cited from the Creede case by the National Supreme Court sets the matter at rest. Under this decision, as we understand it, the discoverer by tunnel has no greater rights than one who finds the lode on the surface, and after discovery so made has no greater time than any other discoverer to fix the length, width and surface lines which he will choose to inclose and protect his discovery."

Evidently it is Morrison, Martin and the United States Supreme Court against Clayberg.

Complaint is made by Mr. Clayberg that Martin "devotes much space to the consideration of miners' rules and customs" "which might have been used to better advantage in the extension of some other important subjects," —showing that Mr. Clayberg has not a proper appreciation or knowledge of miners' rules, regulations and customs in mines and mining throughout this country. It is not too much to say that these miners' rules, regulations and customs are of supreme importance in all mining districts, and in many respects are the highest law governing the matters to which they relate. Miners' rules and regulations are recognized and enforced by the Supreme Court of the United States and all state and other courts. A proper observance of the local "miners' rules, regulations and customs" for a particular mining district must be adhered to and complied with by all prospectors seeking to locate claims, and by all parties wishing to secure rights. These facts are recognized and acknowledged by every person who knows anything regarding mines and mining rights,—by every mining lawyer, and by every author who has written upon the subject—with the single exception of Mr.

*NOTE—It may be noted that one of the latest writers on the subject—COSTIGAN, HANDBOOK OF AMERICAN MINING LAW, says, p. 241, of this quoted clause: "This dictum, so at variance with the purpose of the tunnel act, and so inexplicably overlooking the previous decision of the court, cannot be regarded as law, if it means that a surface location must be made."—ED.

Clayberg and the Cyc. (Mines and Minerals, Vol. 27, p. 553). Mr. Martin has devoted to the subject 10 consecutive pages; Mr. Lindley devotes 15 pages, Mr. Snyder has 10 pages, and Mr. Morrison, in his condensed work, has 5 pages. Besides, the subject is repeatedly referred to and discussed in other portions of the works in addition to the chapter especially devoted to it.

The criticism of Mr. Clayberg is not only unfair and unwarranted, but it is unjust, and what is said therein is not law. By giving to it currency in the MICHIGAN LAW REVIEW you are liable to mislead students and lawyers who are not specialists on the subject. You also take up the cudgel for Mr. Clayberg and the Cyc. to propagate not only a misconception of the subject, but a positive misstatement of the law. I think you owe it, not only to the publisher of Martin's Mining Law and Land Office Procedure, but to yourselves, to correct this matter.

It is a matter of fact and of law generally known to miners themselves, to say nothing regarding the legal profession, that the federal statutes and the state statutes have *not* done away with or rendered miners' rules, regulations and customs unimportant anywhere in the United States. Miners can adopt and enforce rules, providing, for instance, as to whether or not any work shall be done upon a claim at the time of location, or as a part of the acts of location; what the work shall consist of; whether a shaft 10 feet deep or less, fix its dimensions, etc. They can provide how the claim may be monumented, whether by six monuments, or less; what these monuments may consist of; how they shall be placed; also what shall be stated in the notice of location, in addition to what is required by the federal statutes, and, in California, and in certain cases in Alaska, they can elect their own recorders and provide the number of days to elapse between the discovery and the time of recording the notice; whether a notice shall be placed upon the claim, etc. These rules and regulations have the force of statutes. For instance, in the county of Los Angeles, California, where the facilities for recording papers are probably as good as any place in the world,—there are at least two mining districts (oil) organized and in active operation; one is the Palomas, and the other is the San Fernando Petroleum Mining District. These districts both have, under the miners' rules and regulations (in addition to the county recorder), their own recorders, who charge $4.50 for recording a placer location which contains eight names and in which the description is short, as it only describes the land by the legal subdivisions, whereas the same document could be recorded with the county recorder at not to exceed $1.50. Notwithstanding this excessive charge, no mining lawyer should advise his clients to record their notices of location with the county recorder instead of with the miners' district recorder of the district in which the lands are located. Statutes recognize and enforce miners' rules and regulations in California, Nevada, Idaho, Utah, Washington, Wyoming, etc.

The remarks of Mr. Clayberg regarding the "Land Office Decisions" show that he is not familiar with their rank, and does not appreciate the peculiar merit of this part of Mr. Martin's work in giving, for the first time, full citation of and reference to a large body of cases, which rank in importance in

the mining world with the decisions of the Supreme Court of the United States.

There are many other things in Mr. Clayberg's article I might call attention to which are open to serious criticism, because either misleading or unsound in law, but the above will serve to show the unreliability, from a legal standpoint, of the article in question, and the want of comprehensive and accurate grasp of the subject by the writer of that article.

Yours very respectfully,

(Signed) JAMES M. KERR.

To the Editor of the MICHIGAN LAW REVIEW:

The Report to the American Bar Association, recently made by the Committee on Legal Education, is admirable and deserves to receive and doubtless will receive everywhere hearty support.

But, speaking for the Boston University Law School, I beg to make, through your columns, some remarks in regard to two or three oversights relative to that school.

1. The report touching buildings gives us no habitation. We have a building occupied alone by our law school (conspicuously located hard-by courts and state house), which cost $250,000.

2. In the Appendix of the Report our "instruction" is stated to be by "lecture and case." If by "case" is meant the current case method, the statement is incorrect. Our instruction is both a system and a method. As a system, it is based on and emphasizes unity as opposed to diversity, following as a model corporate administration, with the higher grades of work in sovereignty as the centre and objective of the entire curriculum. As a method, the work proceeds by the teachers severally laying down, by lecture and exposition, broad foundations from time to time, upon which, subject always to criticism by the teacher, the student is required to build by case, problem, and court work, equally required and taken into account.

3. The higher work in sovereignty, which is the centre of the system, is for the Master's and Doctor's degrees, and when I say that it is conducted by Brooks Adams no question can arise whether it is a serious part of the curriculum. Indeed, I venture to say that nowhere else is work carried on for the higher degrees which is as severe, constant and effective. That this work is appreciated is shown by the fact that we have each year about ten candidates for the Master's degree, which is apt to require two years' work after the Bachelor's degree, and from one to three candidates for the Doctorate, which is apt to take two years more. We have had, and have now, graduates of other law schools seeking these degrees; one of them, who received the Doctorate in 1907, was a graduate in arts and law of the University of Bombay, India. Attaining these degrees is with us a significant fact. I have the honor to be, Yours very truly,

(Signed) MELVILLE M. BIGELOW.

Boston University Law School, December 30, 1908.