would appear from the illustrations given above, and also from the express declarations to the contrary used in some, and to give a serious blow to the tendency now prevailing to restrict the doctrine of *ultra vires*, as far as is consistent with settled principles.

BOOK REVIEWS.

THE TRANS-MISSOURI FREIGHT ASSOCIATION CASE[1] AND RAILWAY POOLING IN THE UNITED STATES. By ALBERT D. COOKE. With an Introduction by the Hon. WILLIAM E. CHANDLER. Philadelphia. Press of T. A. Bradley. 1897.

This interesting little book does not altogether fulfill the promise of its title. It contains some trenchant remarks upon railway pooling in the United States, but can scarcely be regarded as a discussion of the Trans-Missouri Freight Association Case. The author speaks of that decision as having established "the validity of the Federal Anti-Trust Law of 1890." He comments upon the adverse criticism which the decision has provoked and undertakes to show that the question involved "has two sides." In point of fact, the validity of the act was not in question in that case, and therefore the decision did not "establish" it. Apart from the question of the jurisdiction of the court, two points were involved: (1) Does the act apply to and cover common carriers by railroad? (2) Does the agreement violate any provision of the act? This second question substantially resolved itself into the inquiry, Does the act apply only to such contracts as are unlawful at common law, or does it make unlawful all contracts, reasonable or unreasonable, which in any way operate to "restrain" interstate or foreign commerce? The court decided the questions of construction against the Freight Association. From the decision upon the second point four of the nine justices dissented. Neither of these questions is so much as mentioned by Mr. Cooke, so that his readers are deprived of the benefit of his views upon the very serious problems which divided the Supreme Court.

The author's efforts are mainly devoted to an exposition of the evils of pooling. He emphasizes the point that the Interstate Commerce Commission is not a tribunal calculated to hold the scales of justice even, in the presence of the pressure exerted by railroad capital. He levels certain poignant and well-deserved criticisms at those of our judges who are wont to travel on free passes furnished by the railroads which figure as litigants in their courts. The book is clever and readable. It is not profound, but many of its warnings are timely. It can scarcely be said to touch the grave economic questions which pooling involves. Unfortun-

[1] 166 U. S. 290 (1896).

ately, as already remarked, it throws no light on the Trans-Missouri Freight Association Case. *G. W. P.*

McKELVEY ON EVIDENCE. Hornbook Series. A Handbook of the Law of Evidence. By JOHN JAY MCKELVEY, M. A., LL.B., of the New York Bar, and author of "Common Law Pleading." St. Paul, Minn.: West Publishing Co. 1898.

Between Best, Greenleaf, Phillips, Rice, Starkie, Stephen, Taylor, Wharton, and others, the field of evidence has been pretty thoroughly threshed out. When one takes up a new treatise on this subject, he at once looks for an explanation of its *raison d'etre.* It seems that, as to this book, such explanation is to be found chiefly in "an attempt to restate the principles of the law of evidence in a manner easy of comprehension for the student, and, for the practitioner, easy of application, ... avoiding the meagreness of Stephen's Digest, on the one hand, and the unwieldy fullness of detail, characteristic of some of the larger works on the other."

In treating any subject of the law, in order that it may be the better understood, it is customary and, to a greater or less extent, necessary to treat many questions more or less closely allied to that subject, but which do not strictly form part of it. Just where the line shall be drawn depends largely upon the choice of the writer. And, in dealing with the law of evidence, one writer has included topics which another has omitted. No text writer, for instance, has dealt with this subject in the same manner as McKelvey. The ground covered and the general order, or classification, is much that adopted by Professor Thayer, of the Harvard Law School, in his collection of cases. And the author has referred freely throughout the book, in foot notes, to those scholarly historical sketches which Professor Thayer has published with his collection of cases and, from time to time, in the *Harvard Law Review.* In the concluding paragraph of his preface, McKelvey states that "acknowledgment is due, and freely given to that admirable collection of cases, ... upon which the author has drawn for very many of the illustrations cited, and to which he has very generally referred for the early cases."

Under "Hearsay" is included "statements, oral or written, made by persons not parties to the suit, and not witnesses therein." Of course "Admissions" and "Confessions" are not treated as exceptions to "Hearsay." This classification, departing from the course pursued by Greenleaf, Stephen, Taylor and Wharton, approaches rather to that of Best, who has one head for "Self-Regarding Evidence" and another for "Derivative Evidence."

The final chapter, "Demurrers to Evidence," contains a treatment of that class of cases which Professor Thayer includes under the general head "Law and Fact, Court and Jury, Demurrers Upon

Evidence." Just how the subject of demurrers to evidence is sufficiently intimately connected with the law of evidence to demand a separate chapter is not clear. McKelvey seems to have encroached upon the domain of his earlier work, "Common Law Pleading."

The chapter on "Opinion Evidence" is a simple treatment of a subject by no means free from difficulty.

Altogether, the book should prove useful to the profession and to students. It is printed in that clear type which characterizes the Hornbook Series and makes them so easily read, and has the bold head-lines which makes the Series so convenient for hasty reference.

W. B. B., Jr.

ESTEE'S PLEADINGS, PRACTICE AND FORMS. Adapted to Actions and Special Proceedings under Codes of Civil Procedure. By MORRIS M. ESTEE. Fourth Edition, revised and enlarged by CHARLES T. BOONE. San Francisco: Bancroft-Whitney Co. 1898.

This work is too well known to older members of the profession to render an exhaustive analysis of it necessary. Briefly, then, its object is to present to the profession the chief requisition of good pleading, with forms adapted to the modern practice, accompanied by numerous authorities sustaining them. It has principally taken the Code Pleadings and Practice of the several states and made a compilation of the material alterations by way of amendments, and the vast number of judicial decisions which have accumulated upon the subject, since the publication, over twelve years ago, of the third edition, edited by C. P. Pomeroy. The present work consists of three volumes, of over nine hundred pages each, beginning with the first inquiry made by a practitioner in bringing or defending an action, and then proceeding to the prosecution or defense of the same, to the final disposition of the cause. Citations are made from most all the American States and some English authorities. The work is particularly valuable to all members of the profession practicing in those states which have enacted a code.

Apropos of a recent paragraph in these pages as to the need of a code of practice containing rules sufficient for the guidance of the practitioner, this work is, in a measure, an answer to the suggestion.

The book is principally valuable for reference, its three bulky volumes rendering extended reading impracticable. The author does not claim this work to be a treatise upon the subject, nor could such a claim be sustained. If criticism be made on any ground, it will be that the work is too lengthy.

One is conscious of a peculiarly lost feeling in taking up one of these bulky volumes and searching for any particular point. While such a work as this is of value, nevertheless it seems futile to attempt to treat the decisions of the various states, under their several codes, in a work of this kind. It is demanded of a writer of

the present day that he should be brief and to the point. A work, the index of which alone contains over 260 pages, is apt to discourage the seeker for legal information and send him to a writer who may have less exhaustiveness, but who has a great deal more brevity. The most that can be said of the work is that it has fully come up to the claims of the author, and will, no doubt, prove of value to many in the profession.

The modern tendency towards paternal legislation and two recent decisions enforcing a form of such legislation (*People* v. *Sheldon*, 139 N. Y. 251; *United States* v. *The Trans-Missouri Freight Association*, 166 U. S. 290), are the objects of severe stricture in a book entitled STATE CONTROL OF TRADE AND COMMERCE. By ALBERT STICKNEY, Esq., of the New York Bar. New York: Baker, Voorhis & Company.

The object of the book, as the author indicates in his preface, is to direct attention to the two decisions referred to as seeming to conflict with a fundamental principle of the law of property, viz., the right of free user of private property, including the right to make contracts with reference thereto, and as failing to recognize the distinction as between private property and private employment on the one side, and public property and public employment on the other.

Three-fourths of the book is devoted to a history and detailed statement of the various Acts of Parliament in England and of the different legislatures in the United States, as affecting the use of private property and employment and public property and employment. The reference to the English Statutes, and their failure to practically accomplish anything, is used as a warning to the modern legislator, who desires to accomplish everything by legislation, even though such legislation be in opposition to the laws of economics. This detailed statement of the provisions of these statutes renders the book of value to a student of the history of such legislation.

In the Sheldon case certain coal dealers of the city of Lockport had entered into an agreement to sell coal at a price determined by five-sixths of the members of an Exchange. Such an arrangement, followed by a rise in the price of coal, constituted, in the opinion of the Court of Appeals of New York, "an act injurious to trade or commerce," and, therefore, in violation of the Statute prohibiting such acts.

The author objects to the result achieved in this case as declaring an act a crime, which act violated no right of an individual, in the absence of a statute fixing prices. How about the right of an individual to the benefits of free and unrestricted competition? Can it not be argued that such a right exists? and, as a matter of fact, the books are full of the judicial recognition of such a right. The criticism upon the decision of the majority of the court in the

Trans-Missouri case is, that in effect it declares as a crime a mere contract to fix rates for the user of the property of the parties contracting, and does not violate any right of any member of the community.

It is to be regretted that the author did not discuss at length the question as to how far such statutes as the New York one and the Sherman Anti-Trust Act, as applied in these two cases, are in violation of the fourteenth or fifth amendments to the Constitution. Neither does he seem to have picked out the weakest point in the armor of the Trans-Missouri case. However valuable the book may be as one of reference to the statute law which has existed on this subject, it is doubtful whether the arguments contained therein would prevail sufficiently to win over one of the majority of the court, upon a reargument of the cases criticised.

G. S. P.