

BOOK REVIEWS.

POMEROY'S EQUITY JURISPRUDENCE. in four volumes. By JOHN NORTON POMEROY, LL. D. (Third Edition) Annotated and Enlarged. and supplemented by a TREATISE ON EQUITABLE REMEDIES. in two volumes. by JOHN NORTON POMEROY, JR. San Francisco: Bancroft-Whitney Company. 1905. Pp. lviii. 1-859; xiii. 860-1806; xv. 1807-2626; viii. 2627-3525; xxx. 932; xix. 933-1875.

It is generally true that a new edition of a law book requires less extended comment than is due the first publication. Particularly is this so in the case of Prof. Pomeroy's work on Equity Jurisprudence. Since its first publication in 1881 it has steadily gained in acceptance as an authority upon this portion of the law and in recognition as an illuminating exposition of an important subject. The profession is accordingly already familiar with its general scope and character, and the frequency of its citation by the courts throughout the country has impressed it with an authoritative character attained by few legal treatises.

In some measure the present edition resembles the second edition published in 1892, for the original text of the first four volumes is almost unchanged. There have been added, however, extensive notes covering the cases which have been decided since the former publication of the work. These are referred to in separate notes so as to distinguish at every point the results of the elder Pomeroy's work. Volumes V and VI are really an expansion of Volume IV. They give professedly a restatement of the matter contained therein, but altered and elaborated so as to include in the text the results of the later cases. In great part the original text of Volume IV has been retained where possible, and this has been supplemented in the body of the work by the additions of the present Prof. Pomeroy. A difference of style is noticeable in view of this method of composition, but this, we incline to think, would open the author to but little criticism. More doubtful, however, is the wisdom of publishing the same material in the fourth volume. In our judgment this volume might well have been omitted.

It is difficult to appraise the beneficent influence of this treatise on Equity Jurisprudence. It has doubtless been very great. Fortunately it was given to a man to understand the dangerous tendencies of the reformed procedure, who was of

sufficient mental strength to make a statement of equitable principles at once comprehensive and scientific, and yet lacking in that rigorous inelasticity, which rendered the common law in need of the modifying influence of equity. That the consolidation of legal and equitable principles and their administration together might result to the disadvantage of the latter, and in consequence diminish the capacity of the principles of law to develop with the necessity for their application to new conditions, was lost sight of by many profound jurists. Prof. Pomeroy, however, fully realizing this possibility endeavored to meet it by an exposition of the nature of equitable jurisprudence which should set forth its relation to the general body of the law, and indicate the true operation of the Code Procedure. The effect of his work can best be understood by those familiar with the results of the reformed procedure, for it is not, we believe, too much to say that its success has depended on the degree to which the courts have, consciously or unconsciously, followed the theory of this learned author. Even in England, where a special provision was inserted in the Supreme Court of Judicature Act to the effect that, "Generally, in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail," the tendency which Prof. Pomeroy anticipated has appeared in some of the later cases. That this same tendency has not been more seriously felt in this country, in those jurisdictions where the consolidation of legal and equitable actions has occurred, is due in large measure to this treatise.

In our judgment it is accordingly entitled to a high meed of praise, for a study of code procedure in its operation throughout the States, under the varying theory of its scope and purpose, has convinced us that in the mode of operation advocated and explained by Prof. Pomeroy it represents the actual and natural tendency existing at the present day, and is in reality, despite assertions to the contrary, the scientific form of procedure.

To realize this form of procedure, then, and at the same time to preserve unimpaired the essential principles of equity, and to see that they are, as they should be, controlling in the decision of controversies is the goal towards which the author worked. The acceptance which has been accorded his book is ample proof of the quality of that work.

It need hardly be said that these volumes have almost equal importance in States which have not adopted the reformed system of procedure, for Prof. Pomeroy desired to give such an exposition of equitable principles already estab-

lished as to prevent their weakening or submergence where legal and equitable actions had been consolidated. Obviously, therefore, the treatment of the subject is adapted to a jurisdiction in which equitable principles are still applied by a separate tribunal or in a distinct form.

As in the original work, the very valuable introductory matter is followed by a chapter on jurisdiction including a treatment of the exclusive jurisdiction, the concurrent and the auxiliary. Then follows a discussion of the maxims and general principles of equity, certain of its distinctive doctrines, as, *e. g.*, Penalties and Forfeitures, Election, Notice, Priorities, Estoppel, &c. Under the head of "facts and events which are occasions of equitable primary or remedial rights," the important topics of accident, mistake and fraud are considered, the last being divided into actual and constructive fraud. The so-called "Part III" includes "Equitable Estates, Interests and Primary Rights," and hereunder Trusts are extensively treated, also the topics of Conversion, Mortgages, Equitable Liens &c. The volumes on Remedies concern themselves with the well-known forms of equitable redress. We have spoken thus at length of the subdivisions of the other part of the work only to indicate the general form of classification.

In a work of the comprehensive character of this treatise on Equity Jurisprudence, and particularly in view of the nature of its subject matter, it is to be expected that the author's theories of the basic principles underlying certain branches of his subject should not meet with universal acceptance. No doubt there are instances in which the position taken may be questioned, as has been done for example with regard to the explanation of the equitable lien and of the jurisdiction with respect to multiplicity of suits, which latter topic has been especially expanded in this new volume. But while we admit the weight of these criticisms, and ourselves find certain points of disagreement in the rationale of some few topics, yet the exposition as a whole must be conceded to be masterly. Furthermore the unsatisfactory character of the explanation does not prevent the statement of the actual results of the decided cases from being accurate.

It is unnecessary to refer to the excellence of style which characterizes the work of the elder Pomeroy, an excellence to which his accomplished son cannot and does not lay claim, We believe, however, that for convenience sake there might well have been a general revision and rewriting of the notes, leaving the text in its original form except for supplemental paragraphs distinguished as such.

In what we have said of Prof. Pomeroy's professed purpose, we could not be understood as implying that his work is written with any bias or distortion of principles. On the other hand, the treatment is clear, cogent and correct, depending on its own lucidity and accuracy to preserve the great system of Equity Jurisprudence unimpaired where it comes under the administration of the same judges who apply the principles of the common law. Whether in such a jurisdiction or in a jurisdiction still preserving the ancient distinction, it can well lay claim to being in its field easily first.

H. W. B.

DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION.

By LUCIUS POLK McGEHEE, Professor of Law in the University of North Carolina. Northport, Long Island; Edward Thompson Co. 1906. Pp. x, 451.

This book is one of a series of "Studies in Constitutional Law" limited in its scope, as indicated by its title, to a consideration of the limitations on State and Federal activity enforceable under the "due process of law" restrictions of the United States Constitution. The subject has, of course, been isolated for special study by other text writers, notably by Mr. Guthrie in his book on the Fourteenth Amendment, but it is a branch of the law in which the cases constantly arising are increasing so rapidly that frequent revision of the principles applicable is necessary. In Mr. McGehee's book the material available, so far as contained in the decisions of the United States Supreme Court, is collected with thoroughness. Decisions from the State courts are also utilized quite as frequently, we believe, as their importance requires.

In the division of the subject the author accepts the classification which for some time now has seemed in fair way to meet with general acceptance; for after considering the history of the clause, the elements of due process, the general principles involved, the questions of jurisdiction, and the rights and persons protected by the limitation on governmental activity, he discusses the restriction in its relation to the three great powers of Taxation, Eminent Domain and the Police Power. Procedure, which has not infrequently been employed as a sub-title under which to group various decisions is classified with the "Rights" protected by due process and treated in the chapter devoted to that subject.

The style is commendable for its clearness and excels so much in this particular, that the book is easily within the appreciation of the lay reader, and could no doubt be used to advantage as a text book for students of social science.

At the same time the treatment is not elementary in character, but sufficiently comprehensive to entitle the work to an acceptable place in the lawyer's library.

The author defines Due Process of Law, as implying the administration of established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. The most casual thought discloses at once that though some degree of definiteness is to be found in this definition, in most important respects it is general and indefinite. This Mr. McGehee freely admits, pointing out that courts have wisely refused to bind themselves to hard and fast tests, but by the "process of judicial inclusion and exclusion" have developed some certainty in important specific instances in which the protection of the due process clause has been invoked. Obviously, with changing conditions, new considerations for the application or non-application of the constitutional limitations will arise, and there is probably no other clause in the Federal Constitution, whose possible operation can be less certainly predicted. It is therefore to be expected that the rules which have been established shall be sufficiently general to allow the courts to decide cases of novel impression unhampered by criteria ascertained before the case in question was thought of.

With this underlying theory the subject is then discussed under the divisions heretofore indicated. The cases are analyzed and classified with but little favorable or adverse comment thereon, though occasionally with an interesting prevision as to their possible tendency. To *Haddock v. Haddock*, however, the author in his preface gives severe criticism. But this case has been subjected to so much comment favorable and adverse that it seems unnecessary to refer in this review more at length to the criticism accorded it in this book.

Mr. McGehee's work not only deserves praise for itself, but leads us to look with interest for new books in this series.

H. W. B.

THE LAW GOVERNING NUISANCES; with Particular Reference to its Application to Modern Conditions and covering the Entire Law Relating to Public and Private Nuisances, Including Statutory and Municipal Powers and Remedies, Legal and Equitable. By JOSEPH A. JOYCE and HOWARD C. JOYCE. Albany; Matthew Bender & Co. 1906. Pp. cvi. 866.

In view of the increasing complexity of modern life, the established rules of law are constantly finding new application, but this form of legal development is much more dis-

tinctly noticeable in some than in other divisions of the law. It finds special illustration in the case of the law of Nuisance, depending as this law largely does on the proper understanding and application of the maxim *sic utere tuo* &c. in solving the rights of individuals as members of an organized community. It is with due regard to this important fact that this book has been written, and its satisfactory character attests the care and accuracy of the author's work.

The book is distinctly a book for the profession rather than for the law student. It presents in orderly fashion, each chapter complete in itself, the principles of law falling within the subject of the chapter, fortified by numerous authorities collected in the footnotes. The effort is made to have the principle in the text summarize the cases cited in the notes, so that in relatively few instances are the cases analyzed with respect to the facts upon which the decision is rendered. This we cannot but regard as detracting from the general merit of the work.

After introductory chapters in which Nuisances are defined and classified, and the fundamental and general principles of the subject analyzed, there follows a discussion of prescriptive right, and legalized and statutory nuisances. Then the different kinds of nuisance are considered in order *e. g.* the various forms of business which may become nuisances, smoke, fumes, gases, smells, noises, jars, vibrations, animals, &c. Particular attention is given to nuisances affecting highways and waters—and wisely so, since it is here that there is more distinctly in evidence the increasing number of decisions applying the principles of the law of nuisance. Following these topics a chapter is devoted to municipal powers and liabilities, and the work is concluded by a study of the remedies, legal and equitable, the parties entitled, defenses and damages. To these last matters ample consideration is given, and excellent judgment has been shown in the adequacy of their treatment.

The authors have recognized the increasing part that legislative action (State and municipal) is taking in respect to this part of the law, and as well in the chapter on legalized nuisance as in that on the powers and liabilities of municipal corporations, care has been taken to work out fully the most modern phases of the application of the principles of legal development here at work. In the latter chapter, after pointing out the nature of municipal authority as a form of state activity through a subordinate agency and its consequent limitation in view of its delegated character, the authors consider the extent of the power over nuisances when delegated, how far certain forms of business may be

declared nuisances, how far they may be regulated, what action may be taken with respect to structures and in general under what circumstances and in what manner nuisances when found to be such may be dealt with. A mere reference to the topics considered reveals their present-day importance and evidences what is true throughout the book, that the authors have realized the need for a treatise on this subject which shall be written with full appreciation of existing conditions. This need they have met in this book, which is certain to prove of practical value to the legal profession.

H. W. B.

THE LAW OF HOMICIDE. By FRANCIS WHARTON, LL. D. Third Edition, by FRANK H. BOWLBY, of the Publishers' Editorial Staff. Rochester, N. Y.; The Lawyers Co-operative Publishing Co. 1907. Pp. clvi. 1120.

The different editions of this work have appeared at intervals of such length as to require in each instance important modification of the text and extensive addition thereto. Dr. Wharton first published the book in 1855, and not until twenty years later did he consent to bring out a new edition, and then only, apparently, because changes and developments had occurred to such an extent that dependence on the text of the original edition would have resulted in the application of rules no longer in accord with the more accurate psychological knowledge and humane sentiment accepted by the ablest courts. It is in this second edition that malice and intent appear to have become inferences of fact rather than presumptions of law, that insanity is recognized as a condition susceptible of infinite gradations, that to sustain an averment of an intent to kill the deceased, evidence of intent to kill a human being must be produced, and so on. This second edition was written along lines similar to the first edition, and the subject was developed in logical and philosophical fashion. The eminence of Dr. Wharton, and the respect commanded by his productions are everywhere conceded.

The present edition differs in many more respects from its predecessors than new editions are wont to do. Certain portions of the old text are retained, but in large measure the whole subject has been rewritten, and a number of new chapters have been added. The cases are exhaustively cited, but the method evidences the type of the modern law book intended for use by the profession, approaching as it does towards the digest form of composition, rather than the

philosophical treatise of the old-fashioned school. Doubtless this is the prevailing tendency, and the orderly presentation of the principles of concrete cases well classified is more in line with the desires of the practicing attorney than a profound rationale of the underlying principles. But we confess to a feeling that the extensive changes in method of treatment are such as make it doubtful whether this volume can fairly be regarded a new edition of Dr. Wharton's work. Our inclination would rather be to consider the book the work of Mr. Bowlby than of Dr. Wharton, while necessarily Mr. Bowlby is deeply indebted to Dr. Wharton, as he would be the first to confess himself.

Naturally in a book devoted to a single topic of criminal law, subjects of general bearing must be treated in limited manner and their full exposition left to the more general work. So we find frequent references to Wharton's Criminal Law, and occasionally, as in the case of drunkenness and insanity to Wharton & Stille's Medical Jurisprudence. While this is true, still, the book can well lay claim to being a complete treatise on its subject since even in these instances, the rules referred to are considered so far as to make clear the more important phases of their operation in relation to homicide.

The division of the subject matter is in its most important part not novel, but several topics of increasing interest are treated in separate chapters. After an introductory study of who may commit homicide, the subject of the crime, the causal connection between the act and death, the participants in the crime, and the difficult subject of malice, the author takes up murder at length and then manslaughter. The law of self-defense follows, and after intervening chapters of less importance, homicide by abortion or attempted abortion is treated, and also homicide of officers of justice or in resisting arrest, or in carrying out conspiracy to do an unlawful act. To negligent homicide, homicide by officers of justice, and homicide to prevent criminal or unlawful acts separate chapters are devoted, and the book closes with chapters on insanity and drunkenness, pleading, &c. evidence, verdict, judgment and execution.

The principles are clearly stated, and the examination of the authorities is apparently thorough. The book is to be commended to the practicing attorney whose labors may require him to consider this branch of the law.

H. W. B.