BOOK REVIEWS

THE POWER OF EMINENT DOMAIN. By Philip Nichols. Boston Book Company.

No better field can be found for studying in a practical manner the legal problems connected with the taking of private property for public use than service in the legal department of a great modern municipal corporation, and to no better use can such an invaluable experience be put than to give its results to the profession in the form of a book. The author of the "Power of Eminent Domain" has limited the scope of his treatise to the analysis and discussion of the underlying principles connected with the exercise of that power. The scheme is, as is candidly admitted, somewhat narrow, but the wide differences prevailing in the several states as to the practice in condemnation proceedings renders a coherent treatment of the procedural side of the subject well nigh impossible. In fact, it is in this very department that previous works have proved unsatisfactory, and, in the hands of the inexperienced, positively misleading. The author has dealt so lucidly with the few historical questions discussed that one may regret the absence of, at least, a chapter on the source of this procedure—the common law inquest of office, modified in the colonial period to meet the needs of each primitive commonwealth. On the other hand one must admire the self-restraint which has enabled Mr. Nichols to keep within limits set for his work. The topics discussed are the power of a sovereign state over persons and property within its jurisdiction; the limitations on that power arising out of the federal character of the government and the specific provisions in the constitutions, state and federal; what constitutes a taking; additional servitudes; the taking of water and water rights; what constitutes property, public use and just compensation; what is meant by due process of law; and the rights of the condemnor in the property taken. The author has treated these important questions with admirable clearness and candor, never losing sight of the fact that eminent domain was born before it was baptized and cannot be rationally considered without taking into account the nature and history of our political institutions. The criticism of leading cases, such as *Eaton* v. *Boston C. & M. Railroad,* 51 N. H. 504, and *Callender* v. *Marsh,* 1 Pick. (Mass.) 418, is instructive, while the conflicting doctrines prevailing in the various jurisdictions are impartially summarized. The typographical features of the work are excellent. It is to be regretted that the table of cases omits references to the reports. If intended to prevent rivals from making use of the table, the precaution is of small value, while the practitioner is delayed in finding the citations to familiar cases. Each chapter is preceded by an encyclopedic summary, somewhat like those used in the hornbook publications. The practical utility of such broad generalizations is doubtful, except in so far as they assist the author in defining the scope of the chapter and striking the keynote of his discussion. The work as a whole is a useful contribution to the literature on this important subject. *W. H. L.*

FEDERAL EQUITY PRACTICE—A TREATISE ON THE PLEADINGS USED AND PRACTICE FOLLOWED IN COURTS OF THE UNITED STATES IN THE EXERCISE OF THEIR EQUITY JURISDICTION. By Thomas Atkins Street, A. M., LL. B., Professor of Equity in the University of Missouri. Author of "The Foundations of Legal Liability," Consulting Editor of the American and English Encyclopedia of Law and Practice. In three volumes. Northport, Long Island, N. Y.: Edward Thompson Company. 1909.

This work will be verv useful to all practitioners in the Federal Courts of Equity. Since the appearance of Bates' "Federal Equity Procedure" there has been no attempt to deal exclusively with the same topic. One of the features of the work which should commend it to younger practitioners is the collection of forty-six forms in the third volume taken largely from quite recent cases. How far the experienced equity practitioner will appreciate the interjection of "illustrative cases" into the body of the text is by no means certain. No practitioner is likely to be satisfied with any text writer's condensation of the facts of decided cases without examining the report. If, therefore, the proposition of the text were merely accurately annotated without more than one illustrative case the experienced practitioner would probably get his hand on the desired material more quickly.

Of the many problems and difficulties which beset the practitioner, some at least are not adequately treated. The author, after quoting Revised Statutes § 724 in full remarks: "The statutory provisions extending the power to enforce discovery at law have had the result of about drying up the jurisdiction of the Court of Equity to entertain a bill of discovery in aid of an action pending in a court of law. As a consequence, this topic has been practically obliterated from our practice, etc., etc." (Vol. II, p. 1119.) No mention is, however, made of the contradictory constructions which exist as to the meaning of Section 724. In some Circuit Courts production may be had before trial, while in other Circuit Courts this section has been so construed as merely to give production *at trial* (See University of Penna. Law Review, Vol. 56, pp. 400-402.) In the latter jurisdictions an auxiliary bill for documentary discovery will still lie unless production before the jury is the equivalent of a bill for discovery which gives production before a clerk or master long before trial and with leave to take copies. Practitioners would probably agree that this distinction was vital. In Mr. Street's too narrow explanation of the basis of the right to discovery will be found the source of his idea that "this topic has been practically obliterated from our practice." In Vol. II, at p. 1117, he states that "the ground on which the Court of Equity originally undertook to exercise this jurisdiction is found in the erstwhile inability of the court of law to enforce discovery in any action brought in that court." The foundation of the equitable liability to give discovery, is thus put by Judge Wallace on a broader ground: "A party may maintain a bill in equity not only where he is destitute of other evidence than the oath of the adverse party to establish his case, *but also to aid such evidence* or *to render it unnecessary.*" *Colgate* v. *Compagnie Française,* 23 Fed. 82. This idea that economy is equity has also been well expressed by the English Chancellors. *Lord Montague* v. *Dudman,* 2 Ves. Sr. 398; *Brereton* v. *Gamul,* 2 Atk. 240; *Earl of Glengall* v. *Fraser,* 2 Hare 99) but by no one better than by Judge Wallace. The statement above quoted from Judge Wallace's opinion in a suit for auxiliary discovery will hardly coincide with the

following statement by the author: "Hence in such a bill of discovery the plaintiff should allege that he is unable to prove the facts in respect to which discovery is sought by any other means than by bill of discovery." (Vol. II, p. 1118.) The only authority cited by the author in support of this statement is *Brown* v. *Swann,* 10 Pet. 497 (1836). This case was not an auxiliary bill for discovery, but to enjoin collection of a usurious judgment. It is submitted that this case with its *dicta* cannot rightfully be understood without realizing that in 1836 usurpation by equity courts of purely legal controversies was the fashion. This fashion was loudly denounced by Mr. Justice Wayne. And read in connection with the fact of this prevalent abuse of the process of discovery the metes and bounds of the following language in the opinion becomes plain:

"The rule to be applied to a bill seeking a discovery from an interested party is: That the complainant shall charge in his bill that the facts are known to the defendant, and ought to be disclosed by him, and *that the complainant is unable* to prove them by other testimony. . . . Unless such averments are required, is it not obvious that the boundaries between the Chancery and Common Law courts would be broken down; and that Chancellors would find themselves, under bills for a discovery from an interested party, engaged in the settlement of controversies, by evidence *aliunde,* which the Common Law courts could have procured, under the process of a subpoena."

We certainly cannot subscribe to the author's proposition that "a suit cannot be maintained in a Federal Court for the purpose of enforcing discovery in aid of an action already pending in a court of law." The decision of many of the cases cited by the author (II, p. 1119, note 1) in support of this assertion are explainable on other grounds.

In this connection he omits *Colgate* v. *Compagnie Francaise, &c.,* 23 Fed. 82. See Merwin's Equity, p. 480.

Whatever differences of view we have suggested should not detract from the very favorable commendation which the reviewer desires to give to the book under review. It is by all odds the most comprehensive and valuable work on Federal Equity practice which has yet appeared.

THE EVOLUTION OF LAW. By Henry W. Scott. New York: The Borden Press Publishing Co. 1908. Pp. 153.

Only eighty-five of the one hundred and fifty-three pages of this book are concerned with a logical exposition of the evolution of law. The remaining sixty-eight are filled by a number of rather disjointed introductory remarks which, the reader cannot help but feel, are tossed into this volume because they could not conveniently be printed elsewhere. Even the legitimate eighty-five pages can scarcely be said to contain an essay on the Evolution of Law. It would be a bold author who would attempt to compress such a subject within such limits; and Mr. Scott has not essayed the impossible. He has merely made a sketchy historical survey of the legal histories of those nations which stand out most prominently in the world's history. The facts of these legal histories are set forth, but with little account of the evolution of the legal ideas which gave them birth. "The Evolution of Law" suggests a work on legal philosophy. "An Outline of the Laws of Various Nations" would be a more suggestive title for this book. Mr. Scott's two-volume "Commentaries on the Evolution of the Law" will, we hope, present better material to the thoughtful student than his "Evolution of Law."

S. L.

PERSONAL INJURIES ON RAILROADS. By Edw. J. White. 2 Vols. Pp. 1739. St. Louis: F. H. Thomas Co.

Personal Injuries on Railroads contains a storehouse of law upon a very important phase of the law of negligence. The discussions are confined to steam railways; the law of street railways is not touched. The author, Mr. White, has divided his work into two volumes. In the first volume he deals with personal injuries to employees. Of the many important chapters in this volume the best are those on Contributory Negligence and Independent Contractors. The second volume is devoted to injuries to passengers, to travelers on the highway, to trespassers and to licensees. In forty-eight chapters, under as many different captions, the various topics are discussed. The law regarding the railroad crossing forms an interesting and well executed portion of this volume.

In his aim to serve the practical man, the author has carefully avoided all drawn-out discussions. He has eliminated the personal ego as much as possible. The law as it is, is taken and compiled in an intelligible style.

The leading treatises on *Master* and *Servant* and on Personal Injuries are frequently cited. The American and English Railroad Cases, American State Reports, Lawyers' Reports Annotated and other reports which are accessible in almost any law library are found in the notes.

It is regrettable that the author has not seen fit to indulge in some theoretical discussion at places where it could not help but add to clearness. For instance, an admirable opportunity is presented under proximate cause. Nor is the situation handled altogether happily when dealing with the "stop, look and listen" rule, for it would be far more helpful had the author pointed out and compared with more precision the manner in which the various states have applied the rule.

The citations show a fair distribution throughout the country, but with Missouri in the plurality.

The chief value of Mr. White's book is that he has given us a compendious treatise on an important subject, and in such a manner that it is easily accessible for the busy practitioner, who has neither time nor inclination to wade through lengthy expositions of an author's views.

W. K. M.

BRIEF MAKING AND THE USE OF LAW BOOKS. By William L. Lile, and others. West Publishing Company. 1909.

The preface to this second edition announces that the first edition "marked an epoch in the history of legal education and literature," and that "the new edition is well adapted to use as a text book on brief making."

The volume is a compilation of a number of monographs by Law School Professors on subjects which are more or less connected with brief making. The longest chapters are printed under the name "Appendix," one of which is a condensed legal dictionary, and the other, an alphabetical list of abbreviations of law reports and publications. Any of the other chapters might also have been called an Appendix. In so far as the book contains reference matter it may be occasionally valuable. In so far as it attempts to point out the manner in which a brief should be prepared, it is an attempt to teach something which cannot be taught, but can only be learned. Fifty pages are devoted to the reprinting entirely of two briefs, one a preparation by

a law student in a contest on brief making, and the other, a real brief submitted by a prominent New York law firm in a case in the Supreme Court of the United States. While these selections are admirable briefs in their way, it is difficult to see how a study of them can assist the young practitioner.

A quotation from a paragraph headed "Duplication of Reports," throws some light perhaps upon the object of the book:

"It may happen, when a case is cited from the official State Reports only, it is desirable to find the case in the volumes of the National Reporter System."

In conclusion, it may be said that the really astonishing thing about the book is that it should have found its way to a second edition.

E. A. B.