

## BOOK REVIEWS.

THE PROBLEM OF PROOF. By Albert S. Osborn. Matthew Bender & Co., Albany, 1922, pp. xxi, 526.

This book contains an interesting discussion of the various phases of the proof of facts, especially in trials involving the authenticity of documents together with general comments on the conduct of trials.

Mr. Osborn's wide reputation as a handwriting expert and his long experience in testifying in cases involving disputed handwriting make him peculiarly fitted to write on this subject, and his suggestions and criticism in the handling of such cases are therefore of great interest and value to the practicing attorney, who is made to see himself as the jury sees him. "In fact," the author states in his opinion, "it would be a great help to the trial attorney if he could have a training from within the jury box. He would find it enlightening if he could observe law practice and, for a time, hear and weigh evidence from the effect side instead of from the cause side alone."

Chapter 12, on cross-examination, deserves careful study by every lawyer who has occasion to try a disputed document case. The author refers to a number of different causes for variance between the testimony of different witnesses, ranging from ignorance to deliberate perjury. He outlines the various points of attack upon such testimony, and then, by a series of questions, illustrates methods by which the true value of the testimony can be brought out in cross-examination. These questions reveal not only the knowledge of the author on the subject of handwriting, but his keen knowledge of human nature, and the motives and underlying causes which tend to make testimony unreliable. No lawyer, however experienced, can fail to obtain from this chapter suggestions which may prove of great benefit in the courtroom. Even the judge is not forgotten, and in Chapter 28 are found valuable suggestions for charging the jury in disputed handwriting cases.

The book also contains an interesting chapter on disputed typewritten documents, in which the various problems which arise in connection with such documents are pointed out. It is instructive and somewhat surprising to learn that even typewriters have individual characteristics which can be detected, and the identity of a particular machine can be established much in the same manner as we identify human beings, to wit, by description, measurements, marks and scars, the difference between machines being due to the fact that it is not commercially necessary to make machines so that they will write with absolute perfection, and it is mechanically impossible to make them so that they will continue to write perfectly.

Chapter 22 is devoted to a discussion of the testimony of non-expert witnesses concerning handwriting, and the danger of relying upon such testimony merely because the witness claims to be familiar with the handwriting of a certain person; it is shown how easily the witness can be deceived. Such witness necessarily relies upon the general similarity of the writing

in question to that of the person supposed to have written it, and, being without scientific knowledge, he is easily misled. He gives no reason for his opinion, in fact is not qualified to give any, and there is no opportunity to test his knowledge; whereas the value of the opinion of the expert lies, not in the mere opinion itself, but in the reasons which he gives to support it.

The author does not confine his discussion to documentary problems, but covers generally the principles governing proof of facts in the courtroom, from what he terms the general "atmosphere of the trial" to "advocacy" and "persuasion and practical psychology in courts of law." He emphasizes the view that one of the essential qualities of a great lawyer is that of being a gentleman, and condemns the lawyer whose tactics lead the observer to conclude that the chief object of a trial is to obstruct justice by trying to prevent the introduction of proper evidence. Among other requirements of a trial lawyer he includes a good working conscience, a strong personality, a knowledge of human nature, an analytical mind and a forceful command of language. He believes that a "law school would soon be marked that made all its students attractive, pleasing personalities; that added to knowledge, wisdom; to information, tact; and to intelligence, courtesy. The inherent gentleman carries with him something that gives him instant advantage wherever he may be. He receives a consideration and commands an attention that is somewhat difficult to analyze and understand."

No lawyer can fail to benefit from a careful reading of this book.

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THE SUPREME COURT IN UNITED STATES HISTORY. By Charles Warren. Little, Brown & Co., Boston, 1922. 3 vols., pp. ix, 540, x, 551, x, 532.

These volumes tell us the story of the United States Supreme Court most interestingly. They show us the early justices spending most of their time on the circuits, travelling back and forth over wretched roads, meeting accidents in overturned stage-coaches, living at inns and coming to the capital for only short terms in which few cases were argued—none in the first three terms and only about thirty-five a year at the end of Marshall's career. They show us the life of the justices in Washington, their many social enjoyments and their living together in the same boarding-house, without their families, until late in the 40's.

They describe the great arguments, where a week or more was often spent on a single case and the public interest was intense. They picture the crowded courtroom, men coming from distant cities, senators and representatives leaving the halls of Congress deserted, women crowding in front of the bar and even behind the bench until the justices were almost pushed from their seats; and against this background they describe the lawyers, the arguments and the court very effectively.

That was the age of oratory. Counsel were allowed unlimited time. As late as the *Girard Will Case*, Webster, with eyes on the presidency, spoke for three days in praise of the Christian religion; and in *Luther v.*

*Borden*, the lawyers needlessly talked for six days. The court then adopted a rule which prevented such squandering of its time. Because of this rule the arguments have gradually become less and less spectacular and as a consequence public interest in the words and the personality of the speakers has steadily waned.

On through the days of Taney and through Reconstruction times the author takes us, and we are still interested in individual cases and in personalities; but as we pass on to more recent years the narrative becomes crowded with such a mass of cases that we can only observe trends, and the individual opinion or judge or advocate no longer stands out as clearly as in the first sixty years of the court's history.

The book, however, is more than an entertaining story. It helps us to see what the court may do and what it may not do. We need not overvalue the introductory chapter, where the discussion of the power of the court to pass upon the validity of legislation is inadequate, strangely ignoring Thayer's writings, for instance; and the newspaper excerpts, with which the book is overburdened, merely show that until recent years there have been but few scholarly discussions of the subject. But from the story which is here told we may ourselves draw lessons and learn something of the actual extent of the court's power to set aside legislation.

Theoretically the extent of its power is clear. It may pass upon the constitutionality of a challenged state or federal law; but it has no general veto power, and it has no right to invoke any extra-constitutional restraints, any principles of the common law, any notions as to "natural justice" or "fundamental rights." Since 1688 we have had legislative rather than royal or judicial government, subject only to the limitations in our American constitution. Moreover, while the court may and should apply restraints upon legislation which are imposed by the Constitution, "Constitutional provisions must be administered with caution. . . . It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." (194 U. S. 270.) The state and federal legislatures must consider the constitutional extent of their powers in the first instance, and the respect which is due to them and the efficient operation of the government both require that where the initial decision rests with one body and a postponed and merely negative power rests with a second body, the latter should overturn the decision of the former only if it is clearly erroneous.

Substantially, however, the Constitution is simply whatever the court says that it is; and the limitations upon the court are practical rather than theoretical.

The power of the court is not appreciably limited by the principle that it has no right to apply any extra-constitutional restraints upon legislation. The court itself has pointed out, (216 U. S. 95), that it has rarely if ever been unable to find some remedy for acts which violated natural justice; and although in finding the remedy the court has not always considered the purpose of those who placed the invoked provision in the Constitution, yet the fact remains that the Constitution is so applied as to meet all needs for restraining governmental violations of natural justice. Professor Corwin

says (7 MICH. L. REV. 643), "Given a sufficient hardihood of purpose at the rack of exegesis, any document, no matter what its fortitude, will eventually give forth the meaning required of it."

So, also, while the court has repeatedly declared that every possible presumption is in favor of the validity of a statute and that this continues until the contrary is shown beyond a rational doubt, it has not uniformly applied this rule. In a number of instances it has declared legislation invalid by a vote of five to four or four to three, and while in some cases the doubt on the part of the minority justices may have been irrational, that cannot have been true in all cases. For example, it was not true in *Hepburn v. Griswold*. In reality the court has decided, and probably usually does decide, even constitutional questions according to the opinions of a majority of the justices, as it is obliged to decide other than constitutional questions, without giving weight to the fact that there were grounds for reasonable differences of opinion.

As the theoretical limitations upon the court are of doubtful efficacy, we must consider the history of the court if we would learn the real limits of its powers.

Warren shows that the early justices did not withdraw from politics until the tide of public opinion turned permanently away from their party. The deciding of *Hylton v. United States*, where it had no jurisdiction, may be ignored; and so may the dual office holding by Jay and Ellsworth. But Jay and Cushing were gubernatorial candidates without resigning from the bench; Samuel Chase and Bushrod Washington took active parts in the presidential campaign of 1800; Chase left the bench without a quorum while he electioneered, and later made a political speech to a grand jury; and Marshall remained an active member of the Adams administration throughout its last disgraceful month in office although he had already been appointed Chief Justice and his appointment had been confirmed. With the change of administration, however, the justices withdrew almost at once from their outside activities. Since then, almost without exception, the members of the court have recognized that it is their duty to abstain from party politics completely and that partisan considerations should have no influence upon their decisions. The author quotes from an article which appeared in this REVIEW shortly after the death of Chief Justice Fuller, in which it was pointed out that in eighteen years the justices had only once so divided that all the Republican members of the court took one position upon a question of constitutional law and all the Democratic members a contrary position, and in that single case such a division certainly did not reflect party feeling. The court has recognized the need of keeping free from partisan politics.

In the second place, the court has always been composed exclusively of lawyers, and its decisions as to the validity of legislation have been greatly influenced by this fact. The Constitutional Convention was not so composed. For example, Franklin, who was one of its most useful members, was not a lawyer. The Constitution was not adopted solely by lawyers. Nor may we suppose that it meant to all men what lawyers have seen in it. To paraphrase Dean Pound (*Spirit of the Common Law*, 98)

a large portion of the public has held a theory of popular sovereignty quite as firmly as lawyers have held the eighteenth century theory of law. But the validity of legislation has always been determined by a court composed exclusively of men who possessed the professional attitude towards the courts and towards legal theory, and, whether they were able statesmen such as Marshall, Taney and Miller or not, their training has materially influenced their decisions.

But the greatest limitation upon the court is the power of the people, acting through Congress and the state legislatures, to amend the Constitution. Twice they have enacted Amendments which the court has interpreted not literally, but as declaring that rules of law which had been laid down by the court were no longer law; and, of course, the *Dred Scott Case* and *Leisy v. Hardin* have been thrown into the discard by Amendments which were even more sweeping than any mere overturning of those decisions. In spite of absurd contentions that the Constitution could not be validly changed as provided in the Eighteenth and Nineteenth Amendments, the court has recognized them as parts of the Constitution. It is true that in the *National Prohibition Cases*, dissenting justices urged strained constructions which would have read out of the Eighteenth Amendment much of its significance, but they were merely dissenting opinions. Although the court has not frankly so declared, it is clear that it must treat as part of the supreme law of the land any principle which receives the overwhelming popular support which must be given to a proposed Amendment before it meets the procedural requirements of Article V.

The strength of the court depends upon the wisdom with which it performs its functions and not upon any grant of power in the Constitution nor upon any divine rights. If its "gradual process of judicial inclusion and exclusion" shows a gradual establishment of definite principles, supported by reasonable opinions and adapted to the needs of the country the court will unquestionably retain its present power even though heathen may rage. But the success and permanence of the court, as of other human institutions, must depend upon the men who make it a living force. It cannot simply rely upon worship of light ancestral. It must meet the needs of the present generation and convince us that it is doing so. Its problems are great and require for their successful solution justices who are men of unusual attainments and ability.

For the aid given to us in the study of this most interesting court and the justices who have composed it we must all be grateful to the author of this book.

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THE GREAT EXPERIMENT. By Thomas Dillon O'Brien. The Encyclopedia Press, New York, 1922, pp. 122.

Some of the thirteen chapters of this little book, which indicate its plan and content are: Reasons for a Written Constitution, Arbitrary Power Withheld, Safeguarding Individual Liberty, The Police Power, How the

Courts Maintain the Constitution, and The Supreme Court of the United States.

The author states that where the term "constitution" is used in the book, "it may be understood as meaning the American System of Law and Justice, prevailing in each state, and defined in either the Federal or State organic law, or in both" (p. 11).

There is practically nothing new in the book; rather, it presents the traditional legal view of the efficacy of the constitution in restraining the government from oppression of the individual and in assuring him the customary rights of life, liberty and property. Here the emphasis is placed. The author is satisfied to employ the accepted phrases and words and does not attempt to analyze their present validity.

Many constitutional provisions are said to "relate to mere forms or methods of procedure." Such a provision was the original method of electing senators, or that of selecting the president. These details may be changed without impairing the fundamental principle, which concerns the relations existing between the citizens and their government. "These truths are immutable and cannot be ignored nor even tampered with, if individual liberty is to be preserved" (p. 5). Some readers may protest that certain so-called formal changes have gone, or would go, a long way toward modifying the relation of the government to the individual, without perhaps encroaching on the sacred field of fundamental personal rights, if such there be.

In commending unreservedly the system of judicial review (p. 87), the security of private rights in other enlightened countries, especially England, in the absence of such a practice, is apparently lost sight of.

Mr. O'Brien believes in progress, however. He approves the regulation of corporations (p. 68) which became possible after a modification of the ruling in the *Dartmouth College* decision (without noting that the meaning of what was a fundamental principle of the constitution in the opinion of the court on that occasion was fundamentally modified by later decisions and constitutional provisions); statutes regulating hours of labor, especially for women and children (p. 77); regulations of the relations between capital and labor (p. 78); and the regulation of incomes and inheritances through the taxing power (p. 110).

The statement that "so long as the present form of the American Government exists no one class—rich or poor, city men or farmers—will be permitted to rule to the exclusion of the others," is difficult to follow, as is the assertion that "progressive legislation is not only possible; but inevitable, in America, for the reason that the fundamental law is based upon the natural rights of man" (p. 80). The latter sounds as if the parent who believes his child is being deprived of, let us say, the opportunity of an education, could go into the courts and appeal to the constitution to remedy the situation. The constitution, by the way, reads "life, liberty, and property," instead of "life, liberty, and happiness," and the principles of the Declaration of Independence, unless rewritten in the constitution, have not been applied by the Supreme Court, as one might easily infer from pages 81 and 95.

The author, in Chapter XII, "A Government Maintaining the Civilization Which Christianity Has Produced," moralizes on the dignity of labor, upon which the government is also based (p. 103); upon the maintenance of the Christian family, "which is a legitimate object of governmental care" (p. 106); upon the necessity of the right of private property upon which depend "the family, the incentive to industry, the successful life and the contented mind" (p. 110); upon the "spur of the necessity of earning by one's own efforts the means to live as other men." And here is an unfailing recipe for success: "The American boy who early in life is thrown upon his own resources, particularly if he has a widowed mother or younger brothers and sisters to support, and who manfully accepts the responsibility, if he is ordinarily intelligent, industrious and well-behaved, always succeeds, while the boy who inherits a fortune and has no incentive to work, succeeds but rarely" (p. 109).

The merits of the constitution stressed throughout the book are the merits of limitation, and negation, brakes and checks upon the powers of government, "guaranties of personal liberty," rather than the positive merits of providing a responsive, yet controllable means of co-operation among the citizens of the several states or the citizens of the United States.

The status of the negro in the South, the activities of the K. K. K., the prevalence of child labor, and other such departures from the ideals of the "American System of Law and Justice," seem not to have occurred to the author. At any rate, no notice is taken of them—the constitution is intact, all's well with the United States.

But the preceding paragraph is somewhat unfair. Although the essay may not bring nearer to solution some of the perplexing problems of the day, although the "great experiment" may not have been so conclusively determined as the author assumes, still, there is sobering thought for the too active advocate of change, an effective statement of the real advantages of a large sphere of individual liberty, and, for all but the most "fundamental" principles, a hope sustained that the constitution of the United States may be and will be peacefully modified to meet the demands of new conditions.

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HANDBOOK OF EQUITY JURISPRUDENCE. By James W. Eaton. Second edition by Archibald H. Throckmorton, Professor of Law at Western Reserve University, West Publishing Co., St. Paul, Minn., 1923, pp. vi, 711, and ILLUSTRATIVE CASES ON EQUITY JURISPRUDENCE. Second edition by Archibald H. Throckmorton. Hornbook Series, West Publishing Co., St. Paul, Minn., 1923, pp. 611.

Eaton on Equity is a well-known volume of the Hornbook series, and now appears in a new edition with some revision of the text and a few additional cases cited. Throckmorton's "Cases" is a brief collection intended to accompany the foregoing text. It, too, is substantially the same as the first

edition with some additional cases. The plan for the use of these books does not appeal to one convinced of the merits of the case method of instruction in law schools. To offer a brief textbook and accompany it with a set of illustrative cases to be used in connection with the text is putting the cart before the horse, and merely a travesty of the case method. Most of the cases selected are good cases as far as they go, but they attempt to cover too much ground, and in each particular topic are insufficient to develop the doctrines involved. As to the textbook, like most hornbooks, it is a collection of dicta rather than a discussion of principles, but it has a use for those who need a brief outline of the subject in tabloid form.

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THE LAW OF THE PRESS. By William G. Hale, Dean of the Law School and Professor of Law at the University of Oregon. West Publishing Co., St. Paul, Minn., 1923, pp. iv, 503.

In his preface the author states that this book is the fruitage of a course of lectures which he has given successively in two schools of journalism. Accordingly, the materials have been gathered with an eye to the needs of newspaper men. This prompted Professor Hale to devote considerable space at the beginning of his book to a general explanation of law, courts and legal procedure.

While "The Law of the Press" contains much which would be helpful to a lawyer who is representing one of the parties in a libel suit, its chief appeal is to the journalist. Most of the 503 pages are taken up with reports of libel cases. The statements of legal principles are comparatively brief. The various judicial opinions which occupy most of the book would have been made more useful to the lay reader had the author shown by abundant cross-references how these cases applied practically the principles which he sets forth at intervals throughout the book.

The cases are well chosen with a view not only to elucidating the principles of the text, but also to their human interest. A large number of leading cases in libel law are included, and these help make the book quite readable and breezy, which is in refreshing contrast to the curiously dead atmosphere enveloping many modern machine-made compilations.

There is a chapter on the "Right of Privacy," one on "Publications in Contempt of Court," and one on "Constitutional Guarantees of the Freedom of the Press," on "Miscellaneous Statutes" and on "Postal Regulations Prohibiting the Publication and Circulation of Pernicious Writings."

Moreover, there is a chapter on "Copyrights" and one on "Rights and Duties of News-Gathering Agents," as well as one on "Official and Legal Advertising."

In the above-mentioned chapter on "Constitutional Guarantees," the author unfortunately favors undue freedom of speech, and in the matter of the Espionage Act prosecutions he seems to side with the constitutional dissenters who would have emasculated that statute.