

appears that the infant has committed a wilful tort, entirely distinct from the contract of bailment, the reason for such a protection should cease. "Where the infant stipulates for ordinary care in the use of the thing bailed, but fails from want of skill and experience and not from any wrongful intent, it is in accordance with the policy of the law that this privilege, based upon his want of capacity to make and fully understand such contracts, should shield him." (*Eaton v. Hill*, 50 N. H. 235, 1870.) But when the property is bailed to the minor for a specific purpose, and he uses it for a different purpose from that for which it was bailed, the bailment is thereby determined; and if the wrongful act determines the contract, why can tort not be maintained for the act, which is entirely independent of the contract? Truly the tort, though concerned with the subject-matter of the contract, is such that, but for the contract, there would have been no opportunity for committing it; yet it is, nevertheless, independent of the contract in the sense of not being an act contemplated by it, or being an act expressly forbidden by it. (Pollock, *Contracts*, p. 55.) Only for the purpose of measuring the duties between the parties is the tort related to the contract, and only so far can it be "an attempt to disguise the contract."

BOOK REVIEWS.

A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW.
By JAMES BRADLEY THAYER, LL.D., Weld Professor of Law at
Harvard University. Boston: Little, Brown & Co. 1898.

Stephen's Digest of the Law of Evidence is so popular with the profession in this country and its use in American law schools is so general that, when a new book on evidence appears, one almost unconsciously compares it with the work of the distinguished Englishman. In the present instance, however, the comparison becomes a contrast because the two books are so unlike. Stephen tells us in his preface that a study of Mill's *Logic* furnished the starting point for his attempt to state the law of evidence. He deliberately undertook to treat the subject as "one case of the general problem of science, namely, inferring the unknown from the known." His book, therefore, is the result of undertaking to "point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law." It is dangerous to conduct an historical investigation with a view to the establishing of a striking and attractive analogy. The investigator is almost certain to "force a balance," as the accountants say. It is not surprising, therefore, to find that Stephen has failed to lay due stress upon the fact that, at the common law, it is *the jury* that is seeking to ascertain the unknown. Stephen confounded the logical processes of the individual with the operation of that body

of rules which was suggested to our ancestors by experience and designed by them to aid and control the jury in its work. To Stephen the law of evidence is applied logic. To Thayer, on the other hand, it "is the creature of experience rather than logic" (p. 267). "Evidence," in Stephen's view, means that one fact is or is not a premise from which the existence of another is a logical inference. In Thayer's view the chief characteristic of the law of evidence is the rejection, on *practical grounds*, of matter which is logically probative. After observing that this branch of the Common Law is "the child of the jury system" (p. 266), he says: "It is here that Mr. Justice Stephen's treatment of the law of evidence is perplexing, and has the aspect of a *tour de force*. Helpful as his writings on this subject have been, they are injured by the small consideration that he shows for the historical aspect of the matter, and by the over-ingenious attempt to put the rules of evidence wholly into terms of relevancy. It is to be observed that by relevancy he always means logical relevancy; the common but uninformative distinction between legal and logical relevancy is not made by him. This attempt goes far to deprive his work of permanent value; it is impossible thus to take the Kingdom of Heaven by force. One who would state the law of evidence truly must allow himself to grow intimately acquainted with the working of the jury system and its long history." That Professor Thayer has allowed himself the intimate acquaintance of which he here speaks, no one who reads the first five chapters of his book can doubt. These chapters deal with "The Older Modes of Trial," "Trial by Jury and its Development (three chapters), and "Law and Fact in Jury Trials." Realizing, as Stephen did not, that the study of the Common Law is in its nature historical, Professor Thayer has betaken himself to the original sources, and the work that he has done upon them is in the best sense scholarly. It is interesting to scan his list of citations of "Year Book and Other Early Cases" (p. 29), and to note his table of Laws, Statutes and Ordinances consulted" (p. 34). When the reader discovers that every institution, every doctrine, every rule, is traced step by step from its first manifestation until it has attained its final form he feels that he is in the hands of a searcher after historical truth, and not of one who is manipulating history in the interest of a preconceived notion.

Stephen's book was the work of a brilliant lawyer who had practiced actively and had had a wide experience upon the bench. Professor Thayer's is the product of the university life. The author has, indeed, had large experience at the bar, but we cannot be wrong in supposing that this book is the result of labors in the library and the class room. It is sometimes said that those who spend their lives in law school work are dreamers—theorists, upon whom the "practitioner" may properly look with suspicion. No good thing, it is supposed, can thrive in such an atmosphere. Yet Stephen's Indian Evidence Act, on which his book is based, is an

utter failure in practice. It is productive of much uncertainty and great confusion. It is condemned alike by the bench and by the bar. The book before us, however, is eminently practical, for it exhibits the law of evidence as it has been and as it actually is—and nothing is as practical as *truth*.

The author has done the profession a service in Chapter VII, "Judicial Notice." The true nature of the subject is discussed and some valuable suggestions are thrown out as to the way in which a judicious development by the bench would result in shortening jury trials. Chapter VIII deals with "Presumptions." Presumptions do not belong to the law of evidence; to confuse them with questions of evidence is to invite error. They "are aids to reasoning [see Chapter VI] and argumentation which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind, or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted, by assuming its existence" (p. 314). The treatment of this subject is one instance of many in which the author has succeeded in detaching from the law of evidence (to use his own phrase) collateral matters "which overlie and perplex the main subject." Another instance is the treatment of "Burden of Proof" in Chapter IX. The different senses in which the phrase is used are pointed out and it is detached from evidence and classified under the heads of pleading and legal reasoning.

To the practicing lawyer the discussion of the "Parol Evidence Rule" in Chapter X and of "The Best Evidence Rule" in Chapter XI, comes as a welcome relief after the perplexing and misleading dissertations which one is wont to find in the text books. If the reader of this review is disposed to test the validity of the opinions here expressed he will do well to read these two chapters. The prediction may be hazarded that a hundred octavo pages will give him a clearer conception of these two much-misunderstood "rules" than any amount of reading and research which he can indulge in elsewhere. As to the former "rule," the conclusion is reached that the greater part of the subject is matter of substantive law expressed in terms of evidence. As to the latter, the temptation to allow the author himself to speak is too strong to be resisted. At page 506 he sums up Chapter XI, as follows: "Upon the whole, then, it may be said that the Best Evidence Rule was originally, in days when the law of evidence had not yet taken definite shape, a common and useful phrase in the mouths of judges who were expressing a general maxim of justice, without thinking of formulating an exact rule; and that Gilbert, in his premature, ambitious, and inadequate attempt to adjust to the philosophy of John Locke the rude beginnings and tentative, unconscious efforts of the courts, in the direction of a body of rules of evidence, hurt rather than helped matters. By holding up this vague principle as the 'first

and most signal rule' of an excluding system, and imparting to our law at that period such systematized and far-looking aims in the region of evidence, he threw everything out of focus. A cheap varnish of philosophy took the place of an ordered statement of the facts. In Gilbert's attempt to deal exactly with the question, he was driven to take away from the large principle of the Best Evidence a chief part of its natural and intended reach, and to turn it into a narrow declaration that you must not offer anything which itself imports that it is a substitute for something better. Such a reduction was necessary, if one would have an exact rule. But it was not necessary for those larger purposes which thus far it had served. The judges, as often happens, knew what they needed better than the book-writers, even if the book-writer was himself a judge, as Gilbert was. Gilbert's definition was, indeed, one application of the larger principle that they used in licking into shape their new bantling of a law of evidence; but that was all. And they kept on applying maxims of sense and justice, and this one, among others, in its wide, natural sense, until these hardened into one and another definite and specific rule of *nisi prius* practice, and became our present law of evidence. Lord Hardwicke's utterance about there being 'but one rule of evidence, the best that the nature of the case will admit,' had no such limited notion as the followers of Gilbert sought to put upon it. It was that same broad, untechnical declaration of a general principle of justice, impossible to be reduced into a definite rule of exclusion, with which Holt and his contemporaries began. The attempt to use it, on the one side, as a denial of the existence of any excluding rule at all, and, on the other, as in itself a definite working rule of wide reach and significance, were both dealt with justly by Christian, a hundred years ago. Our experience since then may show us, I think, that we shall help to clear the subject, and keep our heads clear, if we drop the name and the notion of any specific separate rule of the Best Evidence. In doing that, we need not dismiss the great maxim of fair dealing that animated the judges who brought in this phrase and, in many applications, used it for a century in shaping the law; a principle which says, not that one must always furnish the best evidence, and, in the absence of it, have all else excluded; or, that if one does the best he can, this will always be enough, but that always, morally speaking, the fact that any given way of proof is all that a man has, must be a strong argument for receiving it, if it be in a fair degree probative; and the fact that a man does not produce the best evidence in his power must always afford strong ground of suspicion."

The reader will now understand exactly why Professor Thayer calls his book "a *preliminary* treatise." His exposition of the true nature of the law of evidence and the discrimination by him of topics improperly absorbed into it have left him free to present to us "a concise statement of the existing law of evidence." This, in his Introduction, he leads us to look for before long. In the

meantime he outlines the subject in Chapter XII—"The Present and Future of the Law of Evidence." A study of this chapter cannot but be helpful to judge or practitioner. To the student it is invaluable. In Appendices A, B and C, the author has reprinted a suggestive article on "Presumptions" from 6 Law Mag. 348 (Oct., 1831), a portion of a lecture delivered by the author on "The Presumption of Innocence in Criminal Cases" and Hawkins's Essay on "The Principles of Legal Interpretation."

When Pollock and Maitland wrote the introduction to their History of English Law they named Thayer among those whose work in certain fields made it necessary for them to pass over that ground in cursory fashion in order to avoid "vain repetition." It is safe to say that the work which he has now placed before the profession has likewise been done once for all.

G. W. P.

THE LAW OF TRADE AND LABOR COMBINATIONS AS APPLIED TO BOYCOTTS, STRIKES, TRADE CONSPIRACIES, MONOPOLIES, POOLS, TRUSTS, ETC. By FREDERICK H. COOKE, of the New York Bar. Chicago: Callaghan & Co. 1898.

The author has treated this comparatively new subject, on the whole, in an interesting, logical, and as thorough a manner as can be expected in one volume. He works his way with a forceful, fair, and masterful hand through "the deplorable confusion and conflict of decisions" to principles and their application.

His classification of Combinations Producing Private Injury and Combinations Producing Public Injury, while apparently new, is entirely satisfactory. He entirely discards the *intent* to injure as an element of civil liability, and claims to present, for the first time, the fundamental and universal test of civil liability for an act of a trade or labor combination; his test being, *whether the act is the natural outgrowth of some existing lawful relation*. The difficulty of applying the test to some cases is frankly recognized by the author, and he is often met with decisions opposed to his test.

For instances of the difficulty in applying such test one needs only to refer to the passages of the book dealing with the matter where there is only the general relation, as members of society, existing between the parties. Also in the matter of Boycotts, as is seen in the latter part of section nine, on page forty-three, and a few following pages. The difficulty is here met, in a manner, by the author's definition of boycott.

Section three, and the authorities there given, are frequently cited to support the test stated as the true one to determine whether or not an act creates civil liability, and to show that the act is not made an illegal one by an intent to injure, and this section might well be supported by more leading cases. It is interesting and profitable to compare sections three and ten, especially, with the view of considering the well established doctrine of civil liability

there referred to (§10) and to observe that it is traced to its origin through the dissenting opinion of Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 216 (1853). That well established doctrine being in conflict with the author's test, and claimed to be mischievous in its results, he suggests that the best way to get the needed relief against it, is by legislation.

It is well worth the trouble to compare thoughtfully the recognition, at the foot of page sixty-two, that "acts producing a fear of violence to person or property" create a liability, with the statement on pages sixty-six and sixty-seven that the idea that the doctrine also applies to fear of injury to business, is not well founded; because, for the reason, that a *fear* of an injury to business, and an *injury* to business have no independent existence. They have no independent existence, as distinct from an injury to persons or property.

Section fifteen, containing a discussion of acts producing a reasonable fear of unlawful injury, and acts producing fear of lawful injury, is of peculiar interest.

An examination of the cases cited on the point seems to justify the remark that the word "written" should be inserted before the word "words" in the following statement on page eighty: "the remedy by injunction has been extended beyond mere bodily acts producing injury, to the use of words producing injury."

The author has faithfully adhered to his purpose, in the second division of the treatise, to point out and support by authorities the existence and value of the two tests of liability where combinations cause public injury.

Section twenty as to the scope of legislation by Congress and by the states; section twenty-two as to the test of legality of restriction on competition; and sections twenty-eight, twenty-nine and thirty discussing the criminal liability and the civil remedies in case of such restrictions are all carefully written and as usual well supported by leading cases. The last section in the book deals ably with the subject of restrictions by corporations upon competition.

A valuable feature of the volume is the appendix containing constitutional and statutory provisions relating to the topics treated under the first classification.

Mr. Cooke has certainly given to the student and practitioner a valuable work.

W. C. J.

THE LAW OF MINES, QUARRIES AND MINERALS. By ROBERT FORSTER MACSWINNEY, M. A., Barrister-at-Law. Second Edition. London: Sweet & Maxwell, Ltd.

The author has given us a complete work of 900 pages covering the law as applied to mines and minerals in England.

The preface contains a brief review of the recent changes in the law by decisions of courts and by statutes. There is a well-arranged

and complete table of contents, a full table of cases and a table of statutes.

The text, covering 743 pages, is an exhaustive treatise of the law pertaining to mines and mining, and is divided under such sub-heads as Property and Possession, Workings and Uses, Contracts, Sales, Leases, Licenses, Neighbors, and Local Rights and Customs.

The book is peculiarly applicable to England, but the general principles discussed and pointed out makes it of general interest to the profession.

H. W. M.

BOUVIER'S LAW DICTIONARY. Rawle's Edition, Vol. II. Boston: The Boston Book Company. 1897.

The second volume of Mr. Francis Rawle's revision of what has long been the acknowledged head of legal dictionaries, is fully up to the high standard set by the first volume. It includes words of art and phrases from and including "Jacens" to "Zoll-Verein." The volume contains 1254 pages of double column, closely printed matter, consisting of all the terms appearing in the former editions of the work, together with many additions.

That the book is brought thoroughly up to date appears from the fact that, on page 1174, *et seq.*, title "United States Courts," is found an abstract of the Bankrupt Act of Congress, approved July 1, 1898. The editor has copiously annotated each statement by references to very recent decisions, many of them appearing from courts of the highest authority within the last two years.

The effort has been made, and successfully, to make the revision more than a mere definition of terms. To that end the general rules of law on any particular subject are arranged in proper place. For instance, the title "Pledge," to which a half column only is devoted to definition, occupies ten columns of the book, setting out the various rules of decision. Again, the title "United States Courts" is enlarged to cover seventeen full pages.

Another particularly meritorious part of the book is found under the title "Maxims'." Forty pages are filled with legal maxims and their meaning. The list comprises all the legal maxims, at least all that any practitioner will find time to learn.

Many other points of merit might be picked out, but it is deemed sufficient to refer the book itself to the profession as the best proof of its excellence.

B. D. R.

THE LAW RELATING TO BUILDING AND LOAN ASSOCIATIONS, WITH FORMS AND SUGGESTIONS. By WILLIAM M. THORNTON and FRANK H. BLACKLEDGE. Albany, N. Y.: Matthew Bender. 1898.

Prior to the appearance of this volume, the best known work in

this country on building associations, was that by Thompson, published in 1892. The second edition of the well-known treatise of the Hon. G. A. Endlich appeared in 1895. The present work is in two parts: *First*, an extensive discussion of the legal aspects of building associations; *second*, appendices of over four hundred pages. One of the novel, and perhaps the principal feature of the book, is the use that the authors have made of the excellent treatise of Mr. Scratchley on Building Associations, a work but little known in this country. From such examination as we have been able to give to the appendices, we have every reason to believe that anyone having a practice among building associations will find many useful hints and aids from the forms published. A specially valuable portion of the appendices is the publication of all existing state laws on the subject of the work conveniently arranged. The discussion of the case law appears to be complete and accurate.

A GUIDE TO THE LAW OF LICENSING. By B. STEPHEN FOSTER.
London: Waterlow & Sons, Limited. 1898.

Those in this country interested in the regulation of the sale of intoxicating liquors will derive many valuable suggestions from the perusal of this work. It is an exhaustive examination of the system of liquor licensing existing at the present day in England and Wales. All the sections of acts which relate to a particular subject have been collected and grouped under their appropriate headings. Under each section of the act the prior acts rendered obsolete or affected by the section are referred to. There is also a complete annotation of all the cases in which the section has been construed by the courts. The whole, therefore, forms what we would call, in this country, an Annotated Digest of the License Laws.

B. F. V.