BOOK REVIEWS


After finishing his monumental treatise on the admissibility of evidence, Mr. Wigmore turned from the law to the facts. He sought to determine the principles governing the probative effect and value of evidence,—"some method which will enable us to lift into consciousness and to state in words the reasons why a total mass of evidence does or should persuade us to a given conclusion, . . . If we can set down and work out a mathematical equation, why can we not set down and work out a mental probative equation?"

The result of this endeavor was the first edition of this book, published in 1913. This consisted of abundant extracts from trials and other books, arranged under various headings which were briefly explained by the author. It received a warm welcome and proved to be one of the most delightful books in a law library. Now, after re-editing the Treatise on Evidence (1923), Mr. Wigmore has returned to his neighboring field of investigation and produced the present volume. It is a thoroughgoing revision of the 1913 book. The author's own contributions have been much enlarged, so as to form a continuous treatise. Although brief abstracts have been substituted for many of the long extracts from trials in the first edition, many new examples are cited and recent developments in "testimonial psychology" are described.

Although primarily designed for aiding lawyers and law students in the analysis and presentation of facts, the book will be of much interest to other persons. Logicians and scientists will find here many striking instances of the processes of thought. Historians are supplied (Appendix IV) with a careful discussion of the application of principles of proof to general history, with a list of thirty historical controversies and references on each—Who beheaded King Charles the First? Did Marie Antoinette order the purchase of the Diamond Necklace? What caused the blowing up of the Maine? Prosecuting attorneys and detectives can profit by the consideration of the detective's viewpoint of evidence (Appendix V). And the large and apparently growing public which loves murders and legal mysteries may regale itself with many trials, and learn of the books where many others can be found.

Part I, The General Principles of Proof, presents the author's methods of analysis. An introductory chapter explains the use of the book, the distinction between the fact to be proved and the fact tending to prove it, the nature of inferences, and the three different types of evidentiary facts—circumstantial evidence, testimony, and the appearance of the objects themselves, for instance, a bloody knife. The emergence at this point of the author's interest in novel terminology in the phrase "autoptic preference" ought not to be allowed to scare away the casual reader, for Mr. Wigmore does not, like Immanuel Kant, make his terminology an integral part of his (author's) system.

Mr. Wigmore then takes up the Probative Processes Applicable to Judicial Evidence. Induction and deduction are distinguished, and the former considered to play the main part in legal trials. The reviewer confesses to a cynical doubt whether that famous deductive process—the syllogism—was ever employed in practical life to prove anything which was not already accepted as true. It bears

---

1 See a full review of this edition by E. R. Thayer, (1914) 27 Harv. L. Rev. 692.
an uncomfortable resemblance to a conjuror ushering the beautiful lady out of the dark cabinet in which he has secretly placed her. After considering inferences from the viewpoint of the proponent of evidence, the author takes up the three processes by which the opponent may attack such inferences. He may seek to explain them away; he may deny the existence of the evidentiary fact itself; or he may offer some new and rival evidentiary fact, tending independently to disprove the fact in issue. No matter how voluminous or complex the mass of evidence, the opponent's processes must take one of these three forms, and thus it is possible to think out such a mass with greater clarity.

The author then borrows from scientific logic several "occasional subordinate tests" of the validity of an inference. An inference may be supported (1) by the Method of Agreement,—to prove A was made ill by certain food, evidence is offered that B was also ill after eating the same food; (2) by the Method of Difference,—C, though otherwise situated like A and B, did not eat of this food and was not ill. An inference may be explained away by three special methods: (1) Inconsistent Instances,—the proponent's inference that fact X caused fact Y is dubious because the opponent's evidence shows fact X resulting in Z instead of Y. Thus, to prove that the vibrations of a railway bridge did not crack the plaintiff's buildings, the railway shows that buildings at the other end of the bridge were not cracked. Another example is furnished by Mr. Wellman's story of the victim of an accident who maintained he could no longer raise his arm; and then was trapped on cross-examination into showing the jury how high he had been able to raise it before the accident. (2) Dissimilarity of Conditions,—the proponent's inference that fact X caused fact Y is dubious because fact W was also present, and W may be the true explanation of Y. For example, the illness attributed to arsenical wall-paper may be due to the bad oysters the patient had eaten. (3) Cumulative Contrary Instances,—the same inference is dubious because fact Y has been observed in instances where W was present and X wholly absent. For example, the same symptoms of illness were shown by others who ate bad oysters without being near arsenical wall-paper.

As long as we are in this logical maze, it seems worth while to ask whether Mr. Wigmore's five tests do not really boil down to two. Would not a scientist regard Inconsistent Instances as an application of the Method of Agreement, which happens to yield a negative result? The test of Dissimilarity of Conditions seems to bear the same negative relation to the Method of Differences. So does the test of Cumulative Contrary Instances, which is only a variation of the preceding, in that the new factor exists alone rather than in association with the explanation originally proposed. The two logical methods pullulate into five only because the lawyer is endeavoring to reach a given result, whereas the scientist is only trying to find out what the result will be.

The last chapter of Part I explains how the foregoing processes are employed in the task of analyzing a mixed mass of evidence into its elements, and describes a set of symbols for plotting the evidentiary facts and the inferences on both sides of a case. Mr. Wigmore then works out two murder cases with these symbols. To the casual reader, this part of the book has something of the appearance of Whitehead and Russell's Principia Mathematica. Probably few persons will adopt precisely these symbols or go to the same elaborate processes as the author, whose own astounding energy leads him to underestimate human laziness. Still, those who are willing to make the effort will quickly understand his scheme, while the rest can disregard the symbols and yet get the general drift of the book.

Parts II, III, and IV contain the heart of the volume. Each is devoted to one of the three main groups of evidentiary facts—Circumstantial Evidence, Testimonial Evidence, Real Evidence (as it is commonly called). Each part is
BOOK REVIEWS

divided and subdivided according to a logical scheme—complicated because life is complicated—according to the nature of the fact to be proved, and the evidence offered for that purpose. Thus the first title under Circumstantial Evidence deals with the proof of the Doing of a Human Act. Inferences that the act was or was not done may be drawn from contemporaneous circumstances,—the opportunity which the given person had of committing it, his capacity, tools, clothing, etc.; from previous conditions of the alleged doer which rendered the act probable or improbable,—his character, emotions (motive), plans, etc.; from circumstances after the alleged act,—mechanical and physical traces, or mental traces like concealment of a body and flight to prove murder.

Under each topic Mr. Wigmore explains the process by which the inference is drawn from the evidence to the fact immediately in issue, and the dangers of incorrectness. Then he illustrates his reasoning by actual cases, some stated concisely with references, others given at length. For example, in considering the question of opportunity for the commission of an act, (time and place), he discusses alibis and supplies several citations of trials besides the three following extended illustrations. In an anonymous case, a woman had charged her husband with attempting to poison her with arsenic. Nine days after he had been put in prison, she died from arsenic poisoning. Since he could not have administered the fatal dose while in prison, and since the poison could not have remained latent in her body for a week, her death was obviously not due to him but to suicide. In the famous Durrant Case in San Francisco, which is elaborately analyzed, and the case of Abraham Thornton in England, the question was whether the accused could and did traverse a considerable distance in a sufficiently short time to put him at the scene of the murder during the period when it occurred.

The Mooney-Billings Cases in California present the same problem. The explosion occurred at 2:06 P. M. Some state witnesses testified to seeing the defendants three-quarters of a mile from the situs of the explosion as late as 1:35 and 1:50. This must have been before the bomb was deposited. Other state witnesses placed them at the scene of the explosion at times varying from 1:40 to a minute or two before the explosion. Mooney was undoubtedly a mile away at 2:01, as was proved by a photograph, and this must have been after the bomb was deposited. Could he have travelled a mile and three-quarters to and from the scene of the explosion in the time available, through streets unusually congested with paraders and spectators, and spent as much time at the fatal spot as the testimony of the state demanded? Unfortunately the enormous length of the records in these cases and their inaccessibility prevented Mr. Wigmore from giving us the benefit of his skill in analyzing the evidence, especially the variations of the same witnesses on questions of time when they testified in different proceedings.

The author’s material on Testimonial Evidence is especially full. There is a careful discussion, with numerous illustrations from writers and trials, of the peculiarities of witnesses due to race, age, sex, mental derangement, etc.; of the errors inherent in perception, recollection, and narration. Several chapters deal with the methods of detecting testimonial error,—demeanor, contradiction, cross-examination, and "experimental psychometry".

In presenting novel methods of proof, Mr. Wigmore is very interesting and furnishes useful pictures of bullet-scratches, finger-prints, the lie detector and the chart of a suspect’s examination by means of this machine. However, he seems a little uncritical in his acceptance of these recent devices. Thus the discussion of finger-prints makes no mention of Wehde & Beffel's "Finger-prints Can be Forged" (Chicago, 1924). The section on bullet-marks might have referred to the Milazzo murder case in Cleveland, where a leading fire-arms expert relied on
bullet-scratches to maintain that the fatal bullets must have been fired from a certain pistol belonging to the accused; but it was later proved that the accused did not purchase this pistol until a month after the shooting. Injections of scopolamin, formerly used to produce twilight sleep and sometimes called the truth serum, are described by writers quoted in the book as producing truthful answers from the unconscious person. There is no mention of the possibility that the drug might render him more susceptible to suggestions from the questioner; or of an article in The Lancet, an English medical journal, narrating a case in Hawaii where a Japanese defendant was subjected to scopolamin and confessed to a murder, the real perpetrator of which was afterwards discovered elsewhere. Since the publication of Mr. Wigmore's book, the Wickersham Commission has reported a Washington case where an injunction was issued against scopolamin injections and the use of the lie detector, which had already failed to achieve any practical results in this particular investigation. All this does not mean that these novel "scientific" methods of crime detection are necessarily useless. But the author, in discussing the older methods of proof, is always careful to point out the ways in which mistaken inferences are possible, and he might have pursued the same process to show that finger-prints, bullet-marks, scopolamin, and lie detectors are also fallible tests.

Part V, Mixed Masses of Evidence in Trials, for Analysis, contains material to which the reader may apply the previous detailed expositions of the different types of inferences. Nine cases are fully set forth, like the Borden murder, the Luetgert sausage-vat murder, and the Holt will.

There are five appendices, of which those on historical problems and the detective's viewpoint have already been described. Appendix I discusses the relation between the principles of proof and the legal rules of admissibility, thus connecting this book with the author's Treatise on Evidence. Appendix II contains solutions of some of the problems on the text. Appendix III is an exhaustive bibliography of trials useful for study, with an indication of the facts in each. This list alone renders the book indispensable to any large law library. The book ends with an Index of Cases, an Index of Authors and Books, and an Index of Topics.

The acuteness of the discussion, the interest of the material collected, the enormous range of reading displayed, all make this a very useful book. It is a marked advance on the first edition in all respects but one,—many of the long quotations from trials have had to be sacrificed to make space for the enlarged text. Thus the new edition is more instructive than the old, but less amusing. Of course, the references to the omitted passages show where they can be found, but this requires the reader to search for many different books, and not all of these are likely to be possessed by most libraries. When I run across a work on English prose style or the science of versification, I always ignore the text and delight in the quotations. In the same way I confess that Mr. Wigmore's own text in the first edition received much less of my attention than his extracts from trials. So, although not ordinarily a collector of first editions, I rather regret the change in this book, by which more industrious persons will profit. That lawyer is indeed fortunate who has both editions of the Principles of Proof side by side on his shelves.

Z. Chafee, Jr.

---


The interest of the American Historical Association in legal institutions, which in recent years has undergone a marked expansion, takes in this volume a cosmopolitan turn. Sponsored by this learned society, and published under their auspices, this scholarly book is a valuable contribution to the history of maritime and commercial law on the continent of Europe and in England up to the commencement of the sixteenth century, when in the period of discovery and colonial expansion the old mercantile society underwent a complete change, the middle ages came to an end and the modern era began. Therefore, although the discussion is confined to a period almost wholly antedating the discovery of America, it is indirectly a contribution to the history of our own institutions, which in the field of commercial law proper, as well as admiralty, insurance, and some phases of international law, such as the history of the establishment of consulates, can hardly be understood except through the study of their obscure beginnings in strange places and in periods remote from our times. The learned and carefully documented volume before us, is divided into a survey of early European Maritime law from Greek and Roman times down to 1500 A.D., followed by a study of European Mediaeval commercial law. This, roughly, occupies about two-thirds of the volume; the rest of the volume contains chapters dealing separately with English maritime and commercial law, a method resting on convenience rather than logic as the author concedes, since in a history of this kind dealing with the crude beginnings of commerce, topics overlap each other and institutions now separate may spring from a common source. The story is a long one, amazingly long to that school of thinkers who assume that nothing happened before the World War; it covers many centuries and involves many experiments and vast changes, as Europe slowly emerged from the stupor of the dark ages of barbarism and evolved a new order of society. In this development the itinerant merchants played a humble but essential part, the blood stream of economic life, travelling by land and sea from fair to fair, forming communities in alien lands, building up a universal cosmopolitan customary law of shipping, banking, insurance and merchandising resting its claims to authority on its intrinsic reasonableness, separate and apart from the feudal land law which was the subject of predominant interest in the royal courts. For the continental material the author leans heavily, as would be expected, on Dejardins, Goldsmith, Morel and Huvelin who long ago explored this field, and a summing up of these researches should prove most useful to the American reader whose knowledge of French and German is usually too limited for practical use, even supposing he has access to treatises little known on this side of the Atlantic. In the English sections the somewhat scanty material is assembled with patience and industry. Especially valuable is the material collected from the records on the efforts made by King and Council to suppress piracy and spoil of the sea, long regarded as a semi-legitimate form of mercantile enterprise. In regard to the fairs and markets the author points out that by comparison with similar institutions on the continent those of England were small and insignificant; indeed, during the Middle Ages English commerce was relatively unimportant and largely in alien hands. Economic supremacy was still enjoyed by the Mediterranean basin; the important centers of trade and industry were to be found in the Italian city states and the great fairs of Champagne.

1 "In the Mediterranean, piracy, until a much later period than the date of the Sea Law, was the resource of the young, active, and resolute among the seafaring population. The merchant service was manned to a great extent by pirates, who were getting too old for that honorable calling." ATHURNER, THE RHODIAN SEA LAW (1909) p. cclxii. Piracy and Wrecking might never have been suppressed if they had not been superseded by the less hazardous enterprise of corporate promotion.
As it was the sea-borne commerce that led to the development of maritime law, so it was the seasonal gatherings of merchants at the markets and fairs, the recognized and protected centers of international trade, that stimulated the growth of universal forms of credit and exchange and led to the adoption of those principles of commercial law more or less common to all civilized nations, unhampered by the technicalities in which the Mediaeval civil courts found themselves hopelessly enmeshed. How these principles were systematized into the great commercial codes of modern continental Europe and in England were assimilated by the Common Law is a story that remains to be told. Alone among the world's great systems, the Roman and the English possess no separate mercantile courts and codes but include commercial law as part of the ordinary law of the land. This is a subject much discussed by continental writers but it may be humbly suggested that Rome and England developed their commercial law normally and modern Europe abnormally. The excessive passion for systematizing that possessed the continental civilians and legists hardened their civil law into tight little codes based on late Roman institutional models with no room for the absorption of the new commercial law save in a separate watertight compartment. However this may be, one may join Sir William S. Holdsworth, under whose guiding influence this valuable treatise was commenced, in hoping that Dr. Sanborn will tell us the more recent history of commercial law in a further volume.

Wm. H. Lloyd.

University of Pennsylvania Law School.


During the meeting of the American Bar Association at Chicago in 1930 some hundreds of Harvard Law School alumni and guests assembled for an informal luncheon. Eminent lawyers of Britain and France came as guests. Among the speakers were Sir John Simon and Sir William Jowett, Attorney General of Great Britain. These speakers paid their tribute of respect to Professor Williston who was present. He was referred to as the great master of contract law, recognized as such by lawyers and judges of two hemispheres. More than any other man Professor Williston has shaped the modern law of contracts, in part through his teaching, in part through his writing. No other man has taught the subject of contracts to so great a number of students. His teaching has been done with materials of his own choosing and arranging. Scores of teachers have used these materials. In these ways Williston's influence has been potent. No other writer on this subject is today more frequently cited by the courts.

What shall a reviewer say about the latest edition of Williston's Cases on the Law of Contracts? It is a lineal descendant of the first casebook ever made for student instruction. In 1870 there came to the Harvard Law School Christopher Columbus Langdell, an explorer and discoverer (prophetic parents who named this child). He was to chart a new route to legal scholarship. I know not by what fortuitous circumstance the subject of contracts fell to the province of Langdell upon his arrival at Cambridge except that Parsons, having grown old, had retired from the faculty. In pursuance of his preconceived plan, Langdell immediately set about the making of a casebook on contracts to be placed in the hands of students—a compass whereby novices who follow the pioneer may find their way in the expanding ocean of precedent. In 1871, just sixty years ago, Langdell's volume appeared. A revision of this pioneer work came in 1876,
still battling its way to general recognition and acceptance as a method of legal study. But when Williston came to the Law School as a student in the middle eighties, Langdell's battle had been won, the case book method was a fait accompli, at least so far as the Harvard law faculty and student body were concerned. In 1890, two years after his graduation from the Law School, Williston returned as assistant professor. He taught the law of contracts, using Langdell's book, (later supplemented by himself), until the first edition of his own cases on contracts appeared in 1903—a long interval during which to pay respect to his unique teacher and that teacher's pioneer volume.

Professor Williston in the preface of his first edition states that in preparing the new book he would have found it impossible, had he made the attempt, to avoid deriving benefit from the selection and arrangement in Langdell's book, and that Dean Langdell permitted him to make such use as he wished of the older work. Therefore it may be said that the book now under review is in fact the fifth edition of the book which marked an epoch in legal education.

The second edition of Williston's cases appeared in 1922. In this the general plan and classification of the first edition were followed with no change except omission of much material on the Statute of Frauds properly belonging in other law school subjects. The classification of the third edition is identical with that of the second. Many of the footnote citations embodied in the first edition were omitted from the second on the theory that several exhaustive treatises on the subject which had appeared in the interim rendered such elaborate citations unnecessary. In the footnotes of the second edition will be found very frequent citations to Williston's treatise and not more than a half-dozen references to articles in law reviews. In the third edition about forty law review articles are cited in footnotes and the frequent footnote citation of Williston's treatise is continued. A valuable feature of the new edition is the citation and quotation of the Restatement of the American Law Institute upon controverted points. The reviewer wishes this citation had been more frequent.

Professor Williston has striven for general classification of the subject and, therefore, has avoided minute subdivision of topics. This is done because headings of sections are easily made the key to the results of groups of cases. Any thorough teacher of law would wish to have students work out these results for themselves. This is but illustrative of the fact that the law is not simply a thing to be memorized, but a thing to be analyzed, and that after it is analyzed its parts are to be compared and contrasted. The very general classification in this volume compels the student to supply his own minor subdivisions and to devise more minute categories to satisfy his own plan. The relatively mature student will do this: the immature student will not.

Although the major portion of the third edition is made up of cases contained in the second, a more severe editing and pruning is to be noted in the newer book. Many cases are reduced to two-thirds or even one-half of their former bulk. This is accomplished by re-writing the statements of fact, by omission of arguments of counsel, by omitting portions of opinions, and by reducing the number of concurring opinions. Departing from the practice in the second edition, names of counsel are in most instances omitted. When portions of opinions are omitted no indication of that fact is given except in footnotes. In some instances this proves a disadvantage. By these editing processes the volume has been made to include about twenty-five more cases than the second edition although it is seventy-five pages shorter. Nearly sixty new cases appear in the third edition while something over thirty of the old cases are dropped. Although this change at first glance may not seem substantial, nevertheless it does reflect material growth of the law of contracts during this potent decade, the decade which gave birth to the American Law Institute and witnessed the completion and ready acceptance of Williston's
treatise. It is worthy of note that the Restatement of the American Law Institute is cited with approval in a considerable number of these new cases and that Professor Williston's treatise is cited in a majority of the recent cases embodied in the volume. In several instances both the majority and the dissenting opinions contain citations to Williston in support of opposing views. In a few instances cases found in the older editions have been transferred to different subdivisions in the new because they now answer a different question.

In former times thousands of students were initiated into the formal study of the law of contracts with the case of Payne v. Cave. No longer is this to be the procedure for that case is not found in the new edition except by incorporation within the opinion in Anderson v. Wisconsin Central Railway Company, not so venerable as Payne v. Cave by twelve decades. But the newer case is a masterful exposition of the law of auction sales. It is the worthy progeny of the parent case and will give the initiate a clear insight into some of the processes by which the law has grown and is growing.

In the new edition the problem of contracts implied in fact is more adequately treated than in the second edition by reason of the inclusion of a very well reasoned additional case, Kellum v. Brownings. The vexing Anglo-American doctrine of consideration in all its phases is amply covered, occupying fully one-sixth of the book. Probably the most interesting and significant change is found in the treatment of the doctrine of charitable subscriptions. Although the problem is dealt with in each edition by the use of a single case and footnote, the time-honored case of Presbyterian Church of Albany v. Cooper gives way to another New York case thirty-eight years its junior, Allegheny College v. National Chautauqua County Bank. Here the Chief Judge, speaking for the majority of the court, reviews the New York cases on the subject of consideration in charitable subscriptions, finds that the New York court had adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with the law of charitable subscriptions, but in the case itself the Chief Judge finds a bilateral contract supported by consideration although the return promise of the promisee is an implied one. It is said that the older cases "will not be overruled to save the symmetry of a conception which itself came into our law, not so much from any reasoned conviction of its justice as from historical accidents of practice and procedure". There is a vigorous, well-reasoned, dissenting opinion. Again in the two opposing views we find frequent citation to Williston's treatise. Foakes v. Beer has disappeared. It was not even in the second edition. No other case is included to keep alive its doctrine unless it be Shanley v. Koehler. According to Dean Ames, the House of Lords gave this doctrine currency because it misunderstood Pinnell's Case. He deplored the fact that the case of Bagge v. Slade and other similar cases were not brought to the attention of the court.

Exactly one-third of the book is devoted to the "Formation of Simple Contracts". As early as the third case the editor introduces the student to the distinctions between unilateral and bilateral contracts by the use of an excellent new Iowa case in which the court cites not only Williston's treatise but also

---

1 3 T. R. 148 (1789).
2 707 Minn. 296, 120 N. W. 39 (1909).
3 231 Ky. 308, 21 S. W. (2d) 459 (1929).
4 112 N. Y. 517, 20 N. E. 352 (1889).
5 246 N. Y. 369, 150 N. E. 173 (1927).
6 L. R. 9 App. Cas. 605 (1884).
8 Ames, Two Theories of Consideration (1899) 12 Harv. L. Rev. 515, 531; Selected Readings on the Law of Contracts (1931) 329, 329.
9 G. Bulst. 162 (1614).
10 Port Huron Machinery Co., Ltd. v. Wohlers, 207 Iowa 826, 221 N. W. 843 (1928).
the American Law Institute's Restatement. No other casebook so clearly emphasizes this distinction. It is noted in various portions of the volume.

In such cases as *The Satanita* 11 and *Oil Well Supply Company v. MacMurphy*,12 the anomalous situation of offers being accepted by persons other than the immediate offeree is encountered and the Gordian knot is cut by the courts in Alexandrian fashion without much effort to untangle the vexatious complication. After reading these two opinions the student surely has an unsatisfied and baffled feeling like one who has clutched a will-o'-the-wisp.

The revocability of offers for unilateral contracts after part performance is exemplified in the recent case of *Petterson v. Pattberg* 13 and is in harmony with Professor Williston's personal theory as set forth in his treatise,14 in which he states, "It seems impossible on theory successfully to question the power of one who offers to enter into a unilateral contract to withdraw his offer at any time until performance has been completed by the offeree, though obvious injustice may arise in such a case. . . . If the offeree has begun to perform under such an offer he may unquestionably stop performance half way if he concludes that after all he does not care to enter into the contract, and if the offeror also may not revoke at that time he is bound by a promise for which he has not received, and may never receive the consideration requested, since the whole transaction is still optional with the offeree." He states that if it is desirable to change this rule the change should be made by statute and not by judicial decision. The opposite view is exemplified in two cases, *Raguc v. New York Evening Post Publishing Company,*15 and *Brackenbury v. Hodgkin.*16 However the opinions in these cases do not meet the issue squarely although the facts involve the problem of revocability of offers for unilateral contracts after part performance. The Restatement,17 which is quoted in a footnote, holds such offers irrevocable while the offeree is in the course of performance in response to the offer.

There is ample material distributed through the volume to make it clear that the formation of a contract can be an objective process, that it is not of necessity subjective and that parties are bound by what they say and do and not necessarily by what they think. Very few cases which use the phrase, "meeting of minds" are to be found in the volume.

The problem of contracts for the benefit of third persons is treated in fifteen cases, four of which are English, four from New York and one from each of eight other American jurisdictions. These cases span the period from Charles II to the present. The case of *Dutton v. Poole,*18 long since overruled, is among the fifteen and may trap the unwary. In fact its overruling swept away the only trace of the doctrine in modern English case law, necessitating legislation 19 to enable insurance beneficiaries to recover the proceeds of policies. Fifteen cases of varying types probably occupy as much of a single volume work as this subject deserves, but considerable collateral reading and classroom discussion will be needed to clear up the confusion in which this question has become involved.

Almost one-third of the volume is devoted to Performance of Contracts, including conditions, anticipatory breach and impossibility. On the subject of anticipatory breach two recent cases are included, *Federal Life Insurance Co. v.*

---

11[1895] P. 248 (Eng.).
12 119 Minn. 500, 138 N. W. 784 (1912).
13 248 N. Y. 86, 161 N. E. 428 (1928).
14 WILLISTON, CONTRACTS (1920) §§ 60-60b.
16 116 Me. 399, 102 Atl. 106 (1917).
17 CONTRACTS RESTATEMENT (Am. L. Inst. 1928) § 45.
18 2 Levinz 210 (1677).
19 45 & 46 Vict. (Married Women's Property Act), c. 75, § 11.
UNIVERSITY OF PENNSYLVANIA LAW REVIEW

Rascoe 20 and Hermitage Co. v. Levine. 21 In the former case a vigorous, well-reasoned dissenting opinion by Judge Denison is in line with the view of Professor Williston as expressed in his treatise, that is that there can be no complete breach of a contract to pay an annuity in advance of the date of payment when there are certain acts to be performed under the contract by the payee.

Relative to its bulk, there's a more thorough change of materials in the subject of implied conditions than elsewhere in the volume. In addition to bringing the materials up to date, the new cases are more vivid than some of the omitted older ones.

Here is a teaching tool, the outgrowth of the first casebook ever made for the purpose, which contains many of the original cases, tried and tested across the decades, found good and retained. In such edition there has been a sufficient infusion of fresh elements to quicken and reinvigorate the life current of the law of contracts as it is offered to each generation of students. While we write, the current flows on.

Robert McNair Davis.

University of Kansas School of Law.


The first (1924) edition of this book created considerable interest because of its unique arrangement. This second edition, considerably enlarged in size and improved in the details of presentation, contains the same unique plan.

This book is neither a textbook nor a casebook. It might be called an annotated form lease, but such a name would leave an entirely false impression as to the amount and make-up of its annotations. An entire chapter is given to each provision in the lease, the covenant or other clause in the model form serving as the introduction. The material constituting the bulk of each chapter and annotating the lease provision consists of digests of cases and quotations from law review materials, instead of the expected short propositions of law with citations.

A book prepared on such a plan, if carefully done, would seem to fill a real need. The draftsman of a new lease would be greatly helped by a good form, with cases pointing out the problems and dangers involved in each provision. The lawyer involved in litigation would welcome a collection of brief summaries of the important cases in the field; and the law review materials would be especially valuable as few practitioners have ready access to them.

Parts of the plan are well executed, but unfortunately some are not. Both the main form lease and the supplement of additional long term leases contain well-drafted provisions which will be of great value to the draftsman. But the annotating materials are almost completely lost to him as suggesters of problems, because they lack systematic arrangement within the chapters. Many of the chapters are long, four of them covering not less than sixty pages each; yet they are not subdivided or outlined, and the many digested cases (often covering several different points) are all thrown together, being arranged merely chronologically by jurisdictions.

This lack of classification within the chapters will not seriously interfere with the lawyer engaged in litigating a lease case, as he knows the point he is looking for and can locate it by the use of the adequate index and complete table of cases. However, he is apt to be disappointed with the materials included in the annotations. Unless he is in New York, he will find few local cases. And instead of a carefully prepared short summary of the New York or Federal case in point, he

20 12 F. (2d) 693 (C. C. A. 6th, 1926).
21 248 N. Y. 333, 162 N. E. 97 (1928).
will probably find one or more paragraphs of the reporter's headnote. This poor quality in the digests of cases is in part counterbalanced by the inclusion of quotations from law reviews. When any reference to law reviews is so rare, perhaps it is unfair to observe that the leading law review articles in the field were overlooked, and that quotations were almost exclusively limited to student notes appearing in three law journals.

It is indeed unfortunate that the lack of quality in many of the digests and their poor arrangement within the chapters dim the natural enthusiasm for the plan of the book and prevent its being called a truly valuable legal composition.

William L. Eagleton.

University of Chicago Law School.


The title of this treatise is somewhat misleading, for it is rather the Federal Anti-Trust Policy which is under discussion. The author has presented a clear and concise historic survey of public policy directed against trusts and monopolistic combinations in restraint of trade. He has carefully sifted the voluminous literature on trusts, which has made its appearance since the problem of industrial combinations first attracted nation-wide attention in the seventies and eighties of the last century. Chapter five sets forth the several theories of state policy toward monopolistic combinations which have from time to time been sponsored by legislative bodies, political scientists and economists. They may be summarized as: (1) the naturalness of competition; (2) the futility and destructiveness of unrestricted competition; (3) the adequacy of potential competition to curb unsocial practices of monopolies; and (4) the inevitability of combinations and the need for their judicious regulation. Each of these theories has had its proponents and opponents during the past half century, and the many controversies and debates which have centered around these divergent views are chronologically reviewed by the author. The results of his observations merely corroborate what is already well known to students of the Trust problem in the United States. “No agreement is found among critics of the Sherman Act. One important group advocates government control of prices and the abandonment of the theory of competition. An equally important class denounces such bureaucracy and demands further freedom for business men.” (P. 296.)

Throughout the entire study the author is objective and analytical, rather than critical. Only in his concluding paragraph does he somewhat naively confirm his faith in the efficacy of enforced competition under the Sherman Anti-Trust Law. Quoting President Hoover—“Competition is not only the basis of protection to the consumer, but it is the incentive to progress”—he concludes that “The Sherman Act has withstood every challenge for forty years”, and that “it lives because it exemplifies the American theory of individualism”. In the face of the ever-increasing concentration in American industry, and the growing recognition of the inevitability of integration, such a confession of faith in the soundness of enforced competition, from a professional economist, comes somewhat as a surprise. Nor is this feeling alleviated by qualifying the advocacy of competition by invoking the rule of reason and excluding competitive exploitation of natural resources. Integration in American industry is a reality and not a myth. Public policy should be guided and formulated by taking full cognizance of the fact that nineteenth century *laissez-faire* theory no longer applies to twentieth century industrial realities.

Karl Schols.

University of Pennsylvania.

At the insistence of practicing attorneys and bar associations the law schools in recent years have instituted or emphasized so-called clinical courses—courses in legal bibliography, office, trial and appellate practice. Some of these courses are still in their experimental stage, but most schools have learned of their importance and are making a determined effort to graduate students who know how to find the law.

This tendency and these courses have no doubt led to the publication by Mr. Eldean of this work. The book in its first ten chapters covers in detail the legal material to which the law students and the lawyers usually have access. The frequent specimen pages from the different legal publications tend to illustrate and accentuate the subject-matter of the various chapters. In this way the author effectively emphasizes methods of using books.

Many law teachers, members of the bench and bar who constantly use books have a knowledge of one or two uses of a citator or perhaps of a digest system but it is doubtful if there are many who could not find valuable practical suggestions in the first ten chapters of Mr. Eldean's book. It is remarkable that lawyers know so little about "the tools of their trade," particularly when a comparison of legal literature with that of business, as pointed out in the eleventh chapter, shows that the materials for the lawyer are probably better annotated, digested and indexed than the materials used by business or any other profession.

The later chapters in Mr. Eldean's book with reference to the valuation of decisions, construction of statutes and preparation of briefs, are probably matters with which a practicing lawyer is more familiar and are matters on which a wide variety of opinion may be had. While the suggestions contained in these chapters are valuable, the law graduate will no doubt find that in his own practice he will evolve individual methods of preparing his trial and appellate work which are probably more suitable than the examples given in this publication.

The inclusion, however, of these chapters makes a complete volume, so that the law student has in compact form information as to how to find the law, how to value it, and how to use it in his active practice. The work is a material contribution to the law schools of the country. It is more than that—it is a readable text for the active practitioner and in itself a valuable reference book. All of those who take occasion to read it will profit thereby.

D. W. Robinson, Jr.
University of South Carolina Law School.


To the lawyer whose practice is confined to an eastern municipality the law relative to the cooperative marketing of farm products seems as remote a subject as that relating to water rights in the western mountain states. Yet not far from Philadelphia are located some of the most productive farming regions in the United States, and those who travel to the resorts of New Jersey via the Delsea Drive pass within calling distance of the poultry farm made famous in the case of New Jersey Poultry Producers Association v. Tradelius, which is located in the section around Vineland devoted to the raising of poultry.

It is not strange, therefore, that eastern universities have financed research work in the law applicable to cooperative marketing and Professor Hanna has made excellent use of the opportunity for such work which Columbia University afforded him.

The book would serve as a valuable handbook for anyone confronted by the task of advising a group which desired to form such an organization both prior
to incorporation and after the association had gotten under way. Professor Hanna points out in his introduction that where, due to space requirements, he was forced to choose between a discussion of a subject from the point of view of legal theory and of business practice, he chose business practice. This does not mean, however, that there is any failure to discuss legal theory adequately. Especially in those sections devoted to the discussion of the marketing contract and its enforcement one can perceive how thorough is the author's grasp of the equitable principles underlying the situation.

A proportionately large amount of space is devoted to a discussion of the "Standard" cooperative marketing act, and the various changes grafted upon it in the states where it has been enacted. There is also a complete summary of the statutes applicable to cooperatives in those states where the "Standard" law has not been enacted. This adds greatly to the worth of the book from the point of view of the student of such associations, and from it the organizer can determine the state of the statute law in the territory in which he proposes to operate.

The chapter on financing contains many practical suggestions as to methods and the use which can be made of the federal agencies created to assist the farmer and of which cooperatives are best suited to take advantage.

The appendix with its forms for Articles of Incorporation, By-Laws, Marketing Contracts and Financing Agreements and the text of several of the more important federal statutes will also be of great value to the person wishing to incorporate a cooperative marketing association.

Louise McCarthy.

BOOK NOTES


The necessity of an intelligent rapprochement between the respective fields of law and medicine is apparent to all save those with complete lack of discernment. The time having long since passed when one could "take all knowledge as his province", a relative concentration of one's energies into a more or less highly specialized field of endeavor becomes imperative. Yet this specialization has, in the law, as elsewhere, taken its inevitable toll. There is a tendency in the legal profession to regard medical knowledge or testimony merely as a transient instrument of proof in the particular case at hand without considering the broader influence of medical knowledge as affecting or even dictating the very theory of law upon which recovery in the case is sought. It is thus understandable perhaps, that among the members of the legal profession in general, homonymous hemianopsia is invoked as a ground for recovery under a workmen's compensation act with much the same spirit of awe and reverence and the same amount of understanding, as are the weird incantations made by a shaman as a means of wresting favors from the tribal deity—considered doubly effective because it is incomprehensible; and because it is incomprehensible and divorced from reality so is it more susceptible to misapplication. The frequently "heavy-handed" application of workmen's compensation laws to which this condition has given rise seems to point to the necessity of guides to the original sources of medical knowledge which will enable the busy lawyer, perforce unacquainted with medical lore, to readily locate authoritative articles on the precise medical question involved.

It is his clear recognition of this problem and the conscious effort made to solve it which makes this book by Mr. Kessler exceedingly valuable to the lawyer. His discussion of possible accidental injuries to various parts of the body, while thoroughly conventional in form is written with an admirable idea of perspective. After a few introductory chapters describing the history of compensation laws and the administrative problems incidental to such legislation, the author proceeds to discuss, in succeeding chapters, the various effects of accidental injuries classified according to the part of the body affected: Upper Extremity; Lower Extremity; Injuries to the Head; Hernia, etc. Other chapters deal with the relation between injury and disease, and with traumatic neuroses. Occupational diseases with their own peculiar medical and legal problems are given separate treatment in a chapter of a hundred pages.

In discussing each of these topics the author first states the usual nature of the injury; then, drawing upon the data personally gathered as medical advisor of the New Jersey Workmen's Compensation Bureau as well as from other sources, describes the factors to be considered in computing the percentage of total disability for each injury. Numerous cases are tabulated (usually with name and citation of the case) to illustrate each of the standards suggested. An extensive bibliography is inserted at the end of each chapter, referring the reader to articles in medical publications elaborating the principles expounded in the text.

In its careful discussion of the whole problem of accidental injury without the usual medical or legal bias the book may be said to be "medico-legal" in the best sense of that term. The tabulation of decided cases under each type of injury suggests interesting possibilities in the future development of legal bibliography. Lawyers, accustomed as they are to uniformity and accuracy in the citation of cases will be annoyed, however, by the author's uneven and at times almost slipshod efforts in this respect. "Bayner v. Riverside Storage Co.
(Michigan)"¹ is not a particularly helpful way of citing a case, and "Alchuff v. Reading Coal Co. (Pa. Decisions)"² can scarcely be termed an improvement. The Southwestern Reporter is variously cited as "S. W.", "S. W. R." and "S. W. B." This defect is a curious anomaly in a work otherwise so carefully done.

K. W. B.


This is the biography of one of those men, as outstanding in contemporary popularity as in ability and achievement, whose odd destiny it is to prematurely undergo historical oblivion. William J. Gaynor died in 1913. He was then Mayor of New York. He had been a leading contender for the Presidency; a crusader for human freedom from oppression of every kind; a thinker and scholar who quoted Cervantes at mass-meetings and Greek philosophers to the yellow press; a master of invective and author of piercing apothegms; a jurist and statesman who sought the ordered rule of law administered with honest efficiency. Quixotic and pragmatic at the same moment he had dreamed of creating, first in Brooklyn, then in greater New York, the Utopia of scientific municipal government freed from the shackles of the grafters. Audacious, he informed the assembled braves of Tammany who had just nominated him for the mayoralty that, if elected, he would probably swallow the Tammany tiger. However, after election, he contented himself with starving the beast. Relentless egoism, aided by over-caution, irritability, and a flood of vituperation capable of submerging Billingsgate, eventually alienated those who envisioned a goal similar to Gaynor's along different, yet not divergent, paths, and thereby deprived his administration of the fullest measure of achievement. Yet his individualism enabled Gaynor, after years of combating franchise-grabbers and campaigning for municipal ownership of utilities, to grant the greatest of all subway franchises to the Wall Street interests when convinced that from this grant the people of New York would receive the best transportation facilities obtainable with their available funds. His last boast was "I have been Mayor", meaning "I have exercised my judgment for the good of the city independently of all, corruptionists or reformers, who sought to bias my measures for the satisfaction of greed, ambition or bigotry". This would have been not a bad epitaph for Gaynor, had he not left a more enduring one in the conception and prophecy of "a government of laws, not men", protecting the taxpayer and rentpayer from the oppression, graft, and stupidity of officialdom, an ideal unremittingly impressed on all within the reach of Gaynor's tongue, precept, ordinance, or writ.

H. J. S.


The author, who has come in contact with the jury in the varied capacities of judge, assistant county attorney and assistant attorney general, has written this book to prove the necessity and advantages of putting an end to jury trials in civil cases. His message is addressed avowedly to the layman, in whose hands the author seems to believe rests the future destiny of the civil jury, and as a result the subject is treated in a superficial manner.

¹ P. 456.
² P. 500.
Briefly, the author believes that the jury trial in civil cases should be abolished for the following reasons: it causes a great waste of time; it makes possible verdicts based upon passion and prejudice; it is the cause of useless and harmful rules of procedure; it places the result of a case in the hands of the stupid and the ignorant; it stimulates trickery and dramatics in lawyers; it causes a loss of respect for the courts; its original justification as a body knowing the facts and parties in the controversy no longer exists.

The author does not seem to be aware of, or else ignores, the fact that these faults may be due to lawyers, judges, and foolish statutes and rules of procedure rather than to any innate defect in the jury system. Indeed, his attack upon the jury is wholly in accord with the prevalent practice of placing the blame for defects in the judicial system upon that loose and inarticulate body of people, the jury.

The author's arguments to support his criticisms of the civil jury are not always happy ones. He blames the jury for the frequent reversals of decisions due to misconduct of counsel, for reaching a verdict without regarding the testimony of two conflicting expert witnesses, for being unable to understand and apply rules of law about which lawyers and judges disagree. Here again, he is making the jury the scapegoat of others, but aside from this, he fails to show that these conditions would disappear with the disappearance of the jury, or that a different system of trial would be free from them.

The highly important question of jury reform is dismissed with the curt statement that jury reforms have failed. But the real defects in the jury system which the author mentions do not appear incapable of reformation. Stupid and ignorant jurors are the result of the present method of choosing and excusing jurors, which may be easily changed. The partial and passion-inflamed jury may be guarded against so that its occurrence will be no more frequent than that of the partial and passion-inflamed judge in the system the author advocates in place of the jury trial.

It may be true, as the author points out, that the popular feeling for the jury is bound up almost wholly with the criminal jury. Yet it is equally true that the civil jury as well as the criminal jury, stands for a "government of the people, by the people, and for the people". In these days of greater and greater curtailment of personal liberty, an institution so democratic in nature as the jury should not be lightly discarded. The criminal jury has proved itself the "bulwark of liberty". It may well be that a realization of the value and importance of the civil jury will cause it to emerge as the people's protection against harsh, arbitrary and unjust rules of law.

B. F.