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Aron's Notes on Proof. The Probative Law

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This volume, in addition to the foreword by the author, an introduction by Hon. Frederick E. Crane, Judge of the Court of Appeals of New York, and a brief postword as a conclusion, comprises eleven chapters under the following titles: The Probative Law; Judicial Procedure; Classification and Attributes of Proof; The Declaration of Independence as Judicial Proof; Proof in Actions ex Delicto; Proof in Actions ex Contractu; Proof in Actions Affecting Real Property; Proof in Actions Against Decedents’ Estates; Proof in Suits in Equity; Crimes and Their Proof; Proof Where Police Power is Involved.

A subtitle describes the book as “A commentary on evidence, trial procedure and practice and judicial proof,” thus indicating that the discourse is not entirely confined to the subject of proof. However, the main title and the chapter titles warrant an expectation that matters of evidence and proof will furnish some sort of a homogeneous theme, if not for the whole volume, at least for most of the chapters. Such expectation is doomed to disillusionment, if not to disappointment. As a whole, the book deals little more with matters of evidence and proof than with numerous other topics of the law, and the reviewer would search in vain for a theme concerned with any topic of the law so treated as to furnish a thread for homogeneity. A much more divulging title would seem to be “Miscellaneous Criticisms of the Law,” or “Critical Notes on the Law,” for most of the commentaries are highly critical in nature and many of them are primarily concerned with purely substantive problems of the law, where they are concerned with the law at all. In fact, there seems to be a pervading strained and artificial effort to interpolate references to the probative law into topics which have little, or nothing, to do with that field of the law, in a conscious or subconscious attempt to make the text colorably conform to the chapter titles. And it would seem that the author would have difficulty in justifying lack of segregation on the assumption, which might be surmised from some of his generalizations, that the probative law is at the bottom of all the law in action, for he is continually dismissing many problems from discussion with the assertion that they are problems of the substantive law.

The author would abandon the present classification of the law into (1) Substantive and (2) Adjective, and would substitute
therefor a tripartite division into, (1) Substantive, (2) Adjective and (3) Probative. He seems to think that such a definitive liberation of the "Probative Law" would, in some way not clearly perceived by the reviewer, work the salvation of the whole field of jurisprudence. This is a proposition sufficiently interesting and important to call for precise analysis and extended exposition. It is something new — at least to most readers — and so the burden of proof, if there is such a thing (the author contra, p. 64), may be taken as resting upon the author to demonstrate its logic. Apparently, he would divide between the adjective law as classified by him and the probative law various matters which now are ordinarily dealt with under the law of evidence. In this connection, he says (p. 16) : "There are principles governing the introduction of evidence; there are no rules and there is no law of evidence." It would seem that much of the space taken up by digressions of various import could more profitably have been devoted to developing the logic of this interesting classification and the claimed efficacy of its operation. The reviewer is in no position to take issue with the author against it, because he has only a vague comprehension of the use which the author would make of it in its specific application.

In those chapters where the author undertakes to deal specifically with matters of proof, he largely directs his efforts to a mere enumeration of facts which it is necessary to prove. An inquiry as to what facts must be proved in a given case, as distinguished from the manner or method of proof, would seem to be a function of the substantive law rather than of the probative law. Possibly this attitude is an exemplification of the author's view that "there are no rules and there is no law of evidence". If such be true, then there is nothing to inquire about except merely the facts to be proved. When they are apprehended, then just prove them. But, one is constrained to inquire, can the whole thing be as simple as that? Is the author's "Probative Law" to be understood merely as comprehending the process of diagnosing the probative facts?

Although the author believes that there are no rules and there is no law of evidence, he warns us (p. 16) that he "will repeatedly use that phraseology because it is ingrained in the practice". He avails himself of this privilege on numerous occasions. Many of his criticisms of rules will be accepted by most readers as sound and wholesome, e. g., his condemnation of the
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vagaries of the parol evidence rule; his explanation of misconceptions attaching to the term "burden of proof"; and his objection to failure to distinguish between presumptions of law and inferences from facts. Much of his discussion of such matters will be recognized as of long familiarity and as wholly orthodox in the field of criticism. Not a few of his observations reflect a practical background which could only have come from a varied experience in the practice of the law. In this connection, may be mentioned his sympathy with the rule (a partial survival of the general common-law rule disqualifying parties in interest) excluding testimony of an interested person as to transactions between such person and a decedent; his recognition of the expediency of impounding documentary evidence preliminary to trial; and his recommendation of tentative decisions by courts for criticism by counsel before final decision.

Much energy of criticism is expended upon the definitive import, or lack of import, of specified words and phrases, a tendency which seems rather general among critics of the law in recent years — an insistence, as it were, that words shall have a strict quantitative value. A puristic attitude in this respect has always appealed to the reviewer as displaying a lack of comprehension of the true purpose and intent of a definitive word or phrase. All language is relative and qualitative in its aspects, at least in its juridical applications. There is no starting point for absolute definition. It is surmised that, in most instances, definitive terms are adopted by the law, not for a priori functions of inclusion and exclusion through operation of the terms per se, but rather as frames or skeletons into which the animated substance is to be built by experience. Thus viewed, the meaning of a definitive term as such depends upon what the law has brought to it, rather than upon what it dictates to the law, and for this reason it can never be taken as dogmatic or unbending and it is crotious and unfair to expect it to perform such an impossible function. Few definitions have ever been very helpful to the reviewer until he has followed the law through some such process of accretion. This is not a wholesale condemnation of the author's efforts in this respect. Many of the words and phrases which he criticizes have been maimed after birth by misconceptions which the courts have brought to them — by the very process of accretion to which they have been subjected.

No attempt can be made to follow the author in his various
and abrupt digressions into topics only remotely related to his subjects — in many instances, wholly unrelated. These departures are not confined to unrelated phases of the law, but frequently involve dissertations, usually of a more or less homiletic tinge, upon pure ethics, politics, economics and the general range of human experience. While these digressions, when they are not too dilute in theme or prolix in material, are entertaining and add spice to the sauce, as a whole they lay the author open to the charge of garrulity.

In general, many of the author’s observations must be recognized as sane, practical and logical; while others, as he himself freely admits, will likely be accepted as radical. The reviewer would by no means classify the author himself as a radical. Some of his assumptions involve what many will recognize as obvious fallacies. For instance, his assumption (pp. 27, 220, 258), in accord with many court decisions but historically fallacious, that a seal imports or proves a consideration; and his assumption, seemingly, that the phrase *quare clausum fregit* characterizes trespasses generally, whether concerned with person, personality or realty, in the following quotation (p. 303): “The formula *quare clausum fregit* suggests the underlying idea of trespass; the law, as it were, builds an imaginary wall about the person, things and lands of a free citizen, which, to break through without his permission or legal justification constitutes trespass.” In mitigation of any historical errors that the author may have committed, it may be suggested that he has braved the hazards of a historical approach which might well test the courage of the most meticulous scholarship.

The author’s style is forceful, frequently pungent with epigramatic flavor and generally clear. The punctuation, however, is frequently poor and tends to confuse the diction, which itself is not always free from criticism. At page 63, he says, “Prima facie means sufficient, not good enough.” It would seem somewhat difficult for the ordinary mind to distinguish between a thing which is “sufficient” and a thing which is “good enough.” At page 173, is the statement, “One-most able advocate never appeared before the same jury in the same suit of clothes.” At page 194, it is said, “Testimony is elicited by examination of court and counsel.” (No doubt litigants have often wished it were so; but alas—!) At page 404, anent construction of a will, reference is made to “proving what a dead mind meant.”
The plan of eliminating all footnotes from the text and de-
ferring them to a supplement which does not accompany the book
will be subject to disapproval. A division of the chapters into
sections, or at least the use of topic headings, would have helped.

To sum up, the book is too lacking in homogeneity; the text
is largely foreign to the titles; the interpolated materials are fre-
quently too prolix and not sufficiently relevant to the context;
many of the digressions, though entertaining, are not justifiable;
but as a whole, the volume is thought-stimulating and reflects a
sincere desire to accomplish improvements in the administration
of the law.

—Leo Carlin.

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